Michigan Law Review

Volume 80 | Issue 5

1982

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In enacting Title VI of the Civil Rights Act of 1964,[1] Congress declared that it would no longer tolerate discrimination in federally-funded programs.[2] Title VI provides, in part, that "[n]o person in the United States shall, on the grounds 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] Given the broad range of programs and activities that receive federal financial assistance,[4] it is not surprising that title VI has become an important weapon in the fight against discrimination.[5]

Despite its sweeping language, the scope of title VI's prohibition has been hotly debated. "One of the great unsettled questions of civil rights law"[6] is whether plaintiffs must prove discriminatory intent[7] to establish a violation of title VI.[8] Plaintiffs have argued that proof of the discriminatory impact of a federally funded program

1. Pub. L. No. 88-352, §§ 601-05, 78 Stat. 252 (1964) (codified at 42 U.S.C. §§ 2000d-2000d-6 (1976)).

2. *See, e.g.*, 110 CONG. REC. 1520-21 (1964) (remarks of Rep. Celler); *id.* at 6543-47 (remarks of Senator Humphrey); H.R. REP. NO. 914, 88th Cong., lst Sess. 25-26, *reprinted in* [1963] U.S. CODE CONG. & AD. NEWS 2391, 2400-01 [hereinafter cited as HOUSE JUDICIARY REPORT].

3. 42 U.S.C. § 2000d (1976). Section 2000d-1 provides that § 2000d's prohibition extends to any program or activity receiving federal assistance by way of grant, loan, or contract other than a contract of insurance or guaranty.

4. *See* U.S. COMMISSION ON CIVIL RIGHTS CLEARINGHOUSE PUBLICATION NO. 22, HEW AND TITLE VI 1-4 (1970).

5. The Supreme Court has never explicitly decided whether there is a private cause of action under title VI, but most courts that have considered the issue, including the Supreme Court, have either assumed or concluded that title VI confers a private cause of action. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978); 438 U.S. at 419 (Stevens, J., concurring in part); NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981) (en banc); Montgomery Improvement Assn. v. United States Dept. of HUD, 645 F.2d 291, 295 (5th Cir. 1981); Bossier Parish School Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir.), *cert. denied,* 388 U.S. 911 (1967).

6. Bryan v. Koch, 492 F. Supp. 212, 299 (S.D.N.Y.), *affd.*, 627 F.2d 612 (2d Cir. 1980).

7. A discriminatory intent standard requires the plaintiff to show that the defendant acted out of racial animus. *See* Washington v. Davis, 426 U.S. 229, 240 (1976).

8. This issue has been the subject of considerable scholarly commentary. *See, e.g.*, Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 GEO. L.J. 1 (1981); Benjes, Heubert & O'Brian, *The Legality of Minimum Competency Test Programs Under Title VI of the Civil Rights Act of 1964,* 15 HARV. C.R.-C.L. L. REV. 537 (1980); Note, *The Prima Facie Case and Remedies in Title VI Hospital Relocation Cases*, 65 CORNELL L. REV. 689 (1980); Note, *Maintaining Health Care in the Inner City: Title VI and Hospital Relocations*, 55 N.Y.U. L. REV. 271 (1980); Note, *Title VI: The Impact/Intent Debate Enters the Municipal Services Arena,* 55 ST. JOHN'S L. REV. 124 (1980); Note, *NAACP v. Medical Center, Inc.: The Evidentiary Hearing Under Title VI*, 24 ST. LOUIS U. L.J. 579 (1980).

should suffice to establish a prima facie violation.[9] Since an impact standard avoids the formidable problem of proving the defendant's subjective motivations, it is far more appealing to plaintiffs than an intent standard.[10] The Supreme Court upheld a finding of discrimination based on administrative regulations that incorporated an impact standard in *Lau v. Nichols,*[11] but language in *Regents of the University of California v. Bakke*[12] suggested that title VI prohibits only intentional discrimination. Confronted with ambiguous guidance from the Supreme Court, some courts have adopted an intent standard,[13] while others have opted for an impact test.[14]

This Note analyzes the controversy and concludes that courts must apply an impact standard in title VI cases. After reviewing the relevant Supreme Court decisions, Part I contends that *Bakke* did not overrule *Lau's* approval of an impact standard. Part II examines the regulations on which the *Lau* court relied. It first characterizes them as legislative; they derive the force of law from an explicit congressional delegation of substantive power. Part II then tests the regulations' impact standard against the language, legislative history, and policy of title VI and finds it valid. Since courts may not disregard valid legislative regulations, this Note concludes that an impact standard governs title VI litigation.

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9. *See, e.g.*, NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981) (en banc). A disparate impact standard is satisfied by a showing that the challenged action, even if facially neutral, falls more harshly on a protected group. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

10. The Supreme Court has indicated that discriminatory purpose may often be inferred from the impact of a challenged action. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."); 426 U.S. at 253 (Stevens, J., concurring) ("Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation."). This, of course, narrows the practical difference between the intent and impact standards.

11. 414 U.S. 563 (1974).

12. 438 U.S. 265 (1978).

13. *See, e.g.*, Cannon v. University of Chicago, 648 F.2d 1104, 1109 (7th Cir.), *cert. denied,* 102 S. Ct. 981 (1981) (court's holding that plaintiff must establish discriminatory intent in suit brought under title IX based on analysis of title VI); Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981); Guardians Assn. v. Civil Serv. Commn., 633 F.2d 232 (2d Cir. 1980), *cert. granted,* 50 U.S.L.W. 3528 (U.S. Jan. 12, 1982) (no. 81-431); Lora v. Board of Educ., 623 F.2d 248 (2d Cir. 1980); Parent Assn. of Andrew Jackson High School v. Ambach, 598 F.2d 705 (2d Cir. 1979); Harris v. White, 479 F. Supp. 996 (D. Mass. 1979).

14. *See, e.g.*, NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981) (en banc); Guadalupe Org., Inc. v. Tempe Elementary School Dist. No. 3, 587 F.2d 1022 (9th Cir. 1978); Jackson v. Conway, 476 F. Supp. 896 (E.D. Mo. 1979), *aff'd. on other grounds,* 620 F.2d 680 (8th Cir. 1980); Johnson v. City of Arcadia, 450 F. Supp. 1363 (M.D. Fla. 1978). Only the *NAACP* opinion fully confronts the *Bakke* decision.

I. The Supreme Court's Ambiguous Guidance

In *Lau v. Nichols*,[15] the Supreme Court ruled unanimously that the San Francisco school system's failure to provide supplemental education to Chinese-speaking children constituted discrimination in violation of title VI. In reaching its decision, the Court relied on regulations issued by the Department of Health, Education, and Welfare (HEW) pursuant to title VI.[16] Writing for the majority, Justice Douglas emphasized that HEW's regulations "barred [discrimination] which has that *effect* even though no purposeful design is present."[17] Those regulations, moreover, required that school systems take "affirmative steps" to rectify language deficiencies that "exclude national origin-minority group children from effective participation in the educational program."[18] Noting that "[t]he Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed"[19] and that the San Francisco school system was contractually obligated to comply with both title VI and HEW's regulations, Justice Douglas concluded that the school system had to comply with the regulations and provide supplemental education or face a cutoff of federal funds.

Justice Stewart's concurring opinion also stressed the importance of HEW's title VI enforcement regulations. After asserting that title VI alone might not require the termination of federal funding absent a showing that the school system had discriminated intentionally,[20] Justice Stewart stated that the "critical question" was whether HEW's regulations, which clearly adopted an impact standard and which required the provision of supplemental education,[21] exceeded the authority granted by title VI.[22] Justice Stewart applied the standard established by previous decisions[23] — agency regulations will be sustained if they are "reasonably related to the purposes of the enabling legislation"[24] — and concluded that HEW's regulations were valid.[25]

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15. 414 U.S. 563 (1974).

16. 45 C.F.R. § 80.3(b) (1973).

17. 414 U.S. at 568 (emphasis in original).

18. 414 U.S. at 568 (quoting 35 Fed. Reg. 11,595 (1970)).

19. 414 U.S. at 569. The Supreme Court has repeatedly acknowledged that Congress can condition the receipt of federal funds on the observance of federal statutory and administrative directives. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 474 (1980); Oklahoma v. Civil Serv. Commn., 330 U.S. 127, 143 (1947).

20. 414 U.S. at 569-70 (Stewart, J., concurring).

21. 45 C.F.R. pt. 80 (1973).

22. 414 U.S. at 571.

23. Mourning v. Family Publications Serv., Inc., 411 U.S. 356 (1973); Thorpe v. Housing Auth., 393 U.S. 268 (1969).

24. 414 U.S. at 571 (Stewart, J., concurring) (quoting Thorpe v. Housing Auth., 393 U.S. 268, 280-81 (1969)).

25. 414 U.S. at 571 (Stewart, J., concurring).

The *Lau* Court's reliance on HEW's impact standard to establish a statutory violation coupled with the absence of any constitutional analysis[26] suggested that title VI and the equal protection clause[27] were independent prohibitions against discrimination. Four years later, however, the validity of this conclusion was cast into doubt by the Court's opinion in *Regents of the University of California v. Bakke*,[28] a case that involved both constitutional and statutory challenges to a medical school's affirmative action admissions program.[29] In *Bakke*, Justice Powell, writing separately, and Justice Brennan, joined by three other Justices, held that certain kinds of admissions programs favoring minorities would pass constitutional muster.[30] Finding evidence in title VI's massive legislative history[31] indicating that Congress meant to prohibit discrimination no more broadly than does the Constitution itself, these Justices agreed in dicta that such programs were also permissible under title VI.[32] Since the Court had previously held that the Constitution prohibits only intentional discrimination,[33] some courts have interpreted *Bakke* as overruling *Lau* and have required a showing of discriminatory intent in all title VI litigation.[34]

This argument is plausible, but three elements of *Bakke* indicate that *Lau* remains viable. First, neither Justice Powell nor Justice

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26. The decision's statutory basis obviated the need for any consideration of the plaintiffs' equal protection claim. *See* 414 U.S. at 566.

27. U.S. CONST. amend. XIV, § 1.

28. 438 U.S. 265 (1978).

29. Plaintiff Alan Bakke alleged that the special admissions program of the University of California at Davis Medical School violated the equal protection clause of the fourteenth amendment and § 601 of title VI. 438 U.S. at 276-78. Justices Powell, Brennan, White, Marshall, and Blackmun upheld the constitutionality of certain types of affirmative action plans, while a separate majority composed of Justices Powell, the Chief Justice, and Justices Stevens, Stewart, and Rehnquist held that Bakke's constitutional rights had been violated and ordered his admission to medical school.

30. 438 U.S. at 320 (opinion of Powell, J.); 438 U.S. at 325 (Brennan, White, Marshall, and Blackmun, JJ.).

31. Title VI was enacted as one part of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 101-1106, 78 Stat. 241 (current version at 42 U.S.C. §§ 2000a-20000h-6 (1976, Supp. II 1978 & Supp. IV 1980). References to title VI are scattered throughout the legislative history of the Civil Rights Act, which occupies hundreds of pages of the *Congressional Record*, *see* 110 CONG. REC. Index (1964), and includes more than three thousand pages of congressional hearings. *See, e.g., Civil Rights — The President's Program, 1963: Hearings Before the Senate Comm. on the Judiciary,* 88th Cong., 1st. Sess. (1963); *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 88th Cong., 1st Sess. (1963).

32. 438 U.S. at 287 (opinion of Powell, J.) ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."); 438 U.S. at 328 (Brennan, White, Marshall, and Blackmun, JJ.) ("Title VI prohibits only the uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies . . . .").

33. *See* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 238-48 (1976).

34. *See* authorities cited in note 13 *supra*.

Brennan expressed any desire to overrule *Lau*.[35] Although Justice Brennan acknowledged that the thrust of his argument — that title VI prohibits discrimination no more broadly than the Constitution — appeared to contradict the premise of *Lau*,[36] he later cited *Lau* for the proposition that HEW's regulations "are entitled to considerable deference in construing title VI."[37] It was "most significant," Justice Brennan believed, that these regulations authorized and in some cases required institutions to adopt affirmative action programs.[38] The target of the remedial regulations in *Lau* was the discriminatory *impact* of the school system's conduct; there was no evidence of discriminatory intent. In noting the *Lau* remedy with approval, Justice Brennan confirmed that discriminatory impact can suffice to establish a title VI violation. Justice Powell also confronted *Lau* expressly but he chose to distinguish rather than overrule it, emphasizing the absence in *Bakke* of any "determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts."[39]

Second, the Court focused on entirely different issues in *Lau* and *Bakke*. The issue in *Lau* was whether proof of disparate impact was sufficient to state a claim under title VI.[40] In *Bakke*, however, the Court had no occasion to consider whether impact alone was actionable under title VI since the medical school had intentionally excluded the plaintiff in favor of minority applicants.[41] The *Bakke* Court only needed to analyze different kinds of intentional discrimination. Any consideration of de facto discrimination would have been superfluous.

The Court's attention to the remedial purpose of title VI is a final element of *Bakke* that supports *Lau*'s continuing viability. Both Justice Powell and Justice Brennan expressly noted Congress' interest in remedying past discrimination against minorities.[42] The Justices'

35. *See* 438 U.S. at 303-05 (Powell, J.); 438 U.S. at 328 (Brennan, White, Marshall, and Blackmun, JJ.).

36. 438 U.S. at 352.

37. 438 U.S. at 343.

38. 438 U.S. at 343. It may seem anomalous to argue that title VI's enforcement regulations can properly forbid disparate impact and yet permit affirmative action plans. Yet the same concept has been embraced by the Supreme Court in interpreting title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1976). Title VII, a companion provision to title VI that prohibits employment discrimination in similar terms, forbids facially neutral employment practices that have a disparate impact unjustified by business necessity, *see* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), but allows private voluntary affirmative action plans, *see* United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979).

39. 438 U.S. at 304-05.

40. *See* notes 16-27 *supra* and accompanying text.

41. *See* 438 U.S. at 289 n.27.

42. *See* 438 U.S. at 285 (Powell, J.); 438 U.S. at 328 (Brennan, White, Marshall and Blackmun, JJ.).

dicta limiting title VI's prohibition to the constitutional standard was motivated by their concern that title VI might otherwise be read to prohibit affirmative action programs. Such a reading of title VI, the petitioner had warned, "would turn a charter of liberty into an instrument of exclusion from opportunities central to American life."[43]

In expressly declining to consider the issue in *Board of Education v. Harris*,[44] the Supreme Court implicitly acknowledged that *Bakke* did not settle the question whether a showing of disparate impact alone establishes a valid title VI claim.[45] The *Harris* majority observed in dicta that Congress might have intended to establish an intent standard in title VI, because "[a] violation of title VI may result in a cutoff of all federal funds, and it is likely that Congress would wish this drastic result only when the discrimination is intentional."[46] But title VI incorporates procedural mechanisms designed to ensure that federal funds are not withdrawn drastically. While a title VI violation may lead to the cutoff of all federal funding, the statute provides that the relevant agency must first attempt to secure voluntary compliance.[47] Failing that, the agency must file reports with the appropriate House and Senate Committees providing thirty days' notice of its intention to terminate funding.[48] Given these statutory safeguards, it is not clear that narrowing the range of conduct that title VI proscribes by imposing an intent standard is necessary to prevent "drastic" funding cutoffs. The *Harris* Court, moreover, ignored the fact that title VI plaintiffs normally seek to enjoin future discrimination or reductions in services rather than to force the termination of federal funding.[49]

In sum, *Lau* established that title VI regulations incorporating an impact standard are consistent with the statute. While language in

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43. Supplemental Brief for Petitioner at 6, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), *reprinted in* 100 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 683 (1978).

44. 444 U.S. 130 (1979).

45. 440 U.S at 149. Harris involved a challenge to HEW's authority to employ a disparate impact standard of discrimination under the Emergency School Aid Act (ESAA), 20 U.S.C. §§ 3193-3207 (Supp. II 1978). The Court upheld the validity of a disparate impact standard under the ESAA and concluded that there was no need to consider whether a showing of disparate impact would also establish a violation of title VI.

In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Court discussed with approval its holding in *Lau* that HEW regulations adopting a disparate impact standard are a constitutional exercise of Congress' power under the spending clause. 448 U.S. at 479. *Fullilove* indicates that the Court still considers *Lau* to be good law. It is significant that Justices White and Powell joined the opinion of the Court, since they were among the five Justices who indicated in *Bakke* that title VI requires a showing of discriminatory intent.

46. 444 U.S. at 150.

47. 45 U.S.C. § 2000d-1 (1976).

48. 45 U.S.C. § 2000d-1 (1976).

49. *See, e.g.*, NAACP v. Medical Center, Inc., 657 F.2d 1322, 1339 (3d Cir. 1981) (en banc) (Adams, J., concurring).

Bakke may have created doubt, courts should not interpret that decision as an obstacle to enforcing these regulations. Part II more closely examines the regulations in light of the language, legislative history, and policy of title VI. It concludes that agency regulations issued under title VI, as valid legislative rules having the force of law, bind courts to an impact standard.

II. An Administrative Approach

Administrative agencies issue two types of rules and regulations. Interpretative regulations "advise the public of the agency's construction of the statutes and rules which it administers."[50] Legislative regulations "are issued pursuant to statutory authority and implement the statute; they create law just as the statute itself does, by changing existing rights and obligations."[51] The difference between these two types of regulations has significant implications for courts reviewing agency actions. Valid legislative regulations are binding on courts,[52] but interpretative regulations are merely entitled to deference in varying degrees depending on the facts of the particular case.[53]

In deciding whether a particular agency regulation is legislative or interpretative, it is important to recall that "[t]he legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress."[54] When Congress delegates its legislative power, the administrative regulations promulgated by the responsible agency are legislative rather than interpretative and have "the force and effect of law."[55] Congress delegates substantive law-making authority to administra-

50. Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979) (quoting Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947)). The Court noted that "[i]n prior cases, we have given some weight to the Attorney General's Manual . . . since the Justice Department was heavily involved in the legislative process that resulted in the Act's enactment in 1946." 441 U.S. at 302 n.31.

51. B. Schwartz, Administrative Law 154 (1976) (footnotes omitted). *See, e.g.*, Herweg v. Ray, 50 U.S.L.W. 4205, 4207 (U.S. Feb. 23, 1982); Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979); Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977).

52. *See* authorities cited in note 56 *infra*.

53. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."). *See generally* 2 K. Davis, Administrative Law Treatise § 7.14 (2d ed. 1979).

54. Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979).

55. Chrysler Corp. v. Brown, 441 U.S. 281, 302-03 (1979) (quoting Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977)). *See, e.g.*, Herweg v. Ray, 50 U.S.L.W. 4205, 4207 (Feb. 23, 1982); Schweiker v. Gray Panthers, 101 S. Ct. 2633, 2640 (1981); General Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976); Joseph v. United States Civil Serv. Commn., 554 F.2d 1140, 1153-54 & nn.24-26 (D.C. Cir. 1977); 2 K. Davis, *supra* note 53, at § 7.8; B. Schwartz, *supra* note 51,

tive agencies via statute.[56] Thus courts must scrutinize pertinent statutory language before characterizing regulations as legislative or interpretative.

When one applies these principles to title VI, the clarity of Congress' delegation of legislative authority is striking. Section 602 of title VI provides that "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions . . . of this title . . . by issuing rules, regulations, or orders of general applicability . . . ."[57] Shortly after the Civil Rights Act of 1964 was enacted, a presidential task force[58] produced model title VI enforcement regulations specifying, in part, that recipients of federal funds may not use "criteria or methods of administration which have the *effect* of subjecting individuals to discrimination" or "the *effect* of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin."[59] These regulations were soon adopted by seven agencies[60] and have now been promulgated by at least fifty-two federal agencies,[61] including every Cabinet department.[62] Since section 602 not only authorizes but commands federal agencies to issue regulations enforcing title VI's policy of nondiscrimination, the enforcement regulations are legislative.

The Supreme Court has generally been content to state, without further explanation, that legislative regulations are those issued pursuant to explicit statutory authority,[63] but language in *General Elec-*

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at 148-49; Koch, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047, 1047-49 & nn.4-10 (1976).

56. *See* 2 K. DAVIS, *supra* note 53, at § 7.8; authorities cited in note 55 *supra*; *cf.* General Elec. Co. v. Gilbert, 429 U.S 125, 140-42 (1976) (distinguishing Congress' failure in title VII to confer rulemaking authority on administrative agency from "regulations which under the enabling statute may themselves supply the basis for imposition of liability").

57. 42 U.S.C. § 2000d-1 (1976).

58. *See* Comment, *Title VI of the Civil Rights Act of 1964 — Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 845-46 (1968).

59. 45 C.F.R. § 80.3(b)(2) (1964) (emphasis added).

60. 29 Fed. Reg. 16,273-309 (1964) (Dept. of Interior; Dept. of Agriculture; Dept. of Labor; Dept. of Health, Education, and Welfare; General Services Administration; Housing and Home Finance Agency; and the National Science Foundation).

61. *See* C.F.R. Index (July 1, 1981) at 84-86.

62. Dept. of Agriculture, 7 C.F.R. § 15.3(b)(2) (1981); Dept. of Energy, 10 C.F.R. § 1040.13(c), (d) (1981); Dept. of the Interior, 43 C.F.R. § 17.3(b)(2), (3) (1981); Dept. of State, 22 C.F.R. § 141.3(b)(2) (1981); Dept. of Housing and Urban Development, 24 C.F.R. § 1.4(2)(i), (3) (1981); Dept. of Justice, 28 C.F.R. § 42.104(b)(2), (3) (1980); Dept. of Labor, 29 C.F.R. § 31.3(b)(2), (3) (1981); Dept. of Treasury, 31 C.F.R. § 51.52(b)(4) (1981); Dept. of Defense, 32 C.F.R. § 300.4(b)(2) (1981); Dept. of Education, 34 C.F.R. § 100.3(b)(2) (1980); Dept. of Commerce, 15 C.F.R. § 8.4(b)(2) (1981); Dept. of Health and Human Services, 45 C.F.R. § 80.3(b)(2), (3) (1980); Dept. of Transportation, 49 C.F.R. § 21.5(b)(2), (3) (1981).

63. 2 K. DAVIS, *supra* note 53, at 54. *See* authorities cited in note 55 *supra*.

The relationship between the nature of legislative regulations and their statutory origin

tric Co. v. Gilbert[64] supports the proposition that title VI regulations are legislative. In *Gilbert*, the Court held that title VII did *not* confer law-making power on the Equal Employment Opportunity Commission (EEOC).[65] Accordingly, the EEOC's employment discrimination guidelines were interpretative and entitled only to "consideration."[66] The Court cited Section 23(a) of the Securities Exchange Act of 1934[67] as an example of a provision that authorizes the promulgation of legislative regulations. Section 23(a) provides that "[t]he [Securities and Exchange] Commission shall . . . have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter."[68] Section 602, under which federal agencies are "authorized and directed to effectuate" title VI's provisions,[69] is a similar, if not more forceful, delegation of legislative power. The Court's illustrative reference in *Gilbert*, then, provides further support for characterizing title VI regulations as legislative.

The debates on title VI supply even more compelling evidence that Congress intended to delegate legislative authority to the executive branch. Although Justices Powell's and Brennan's opinions in *Bakke* found support for the proposition that Congress intended to limit title VI's definition of discrimination to the constitutional standard,[70] contrary language can also be found.[71] A review of the mas-

seems self-evident. If the law is to regulate conduct effectively, it must often be composed of complex and specific rules. Since Congress is not always capable of enacting sufficiently detailed statutory language, the Supreme Court has recognized that Congress may delegate its law making authority to the executive branch so long as the separation of powers is preserved. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 423-26 (1944); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940); 1 K. DAVIS, *supra* note 53, at § 3.1; note 95 *infra*.

64. 429 U.S. 125 (1976).

65. 429 U.S. at 141.

66. 429 U.S. at 141-42.

67. 15 U.S.C. § 78w(a) (1976). *See* 429 U.S. at 141.

68. 15 U.S.C. § 78w(a) (1976).

69. 42 U.S.C. § 2000d-1 (1976).

70. *See* notes 31-32 *supra* and accompanying text.

71. Some statements suggest that title VI and the Constitution were not intended to be coextensive. *See, e.g.*, 110 CONG. REC. 2467-68 (1964) (remarks of Rep. Celler) ("I believe there is a case in one of the courts of appeal [sic] which has held that 'separate but equal' as applicable to these hospital grants unconstitutional [sic]. That case has not yet been decided by the Supreme Court. By the enactment of title VI you override all such 'separate but equal' provisions for the future, *regardless of the ultimate outcome of the pending litigation*." (emphasis added)); *id.* at 6544 (remarks of Senator Humphrey) ("The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. In *many* instances the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. . . . In *all* cases, such discrimination is contrary to national policy, and to the moral sense of the Nation." (emphasis added)).

Other remarks by legislators suggest that they thought title VI would incorporate a disparate impact standard. *See, e.g.*, 110 CONG. REC. 6543 (1964) (remarks of Senator Humphrey) (quoting Presidential message to Congress of June 23, 1963, proposing the Civil Rights Act) ("Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or *results* in racial discrimi-

sive legislative record[72] reveals a pervasive theme flatly inconsistent with the Justices' proposition: Congress chose to leave the task of defining and enforcing title VI's prohibition of discrimination to the executive branch.[73] Both proponents and opponents of title VI understood that the statute allowed the executive branch to exercise broad discretion in defining what would constitute discrimination.[74] Representative Celler, Chairman of the House Judiciary Committee, for example, recognized that the bill assigned "[g]reat powers" to agency administrators.[75] The extent of these powers was illustrated most clearly in a colloquy between Senator Ervin and Attorney General Kennedy before the Senate Judiciary Committee:

> Senator Ervin: So the *rules which would have the force and effect of law* are to be developed first in the minds of the administrators of the various programs and then written in regulations and orders issued by them?
>
> Attorney General Kennedy: That is correct, Senator.[76]

The House Judiciary Committee heard similar testimony.[77] The wide latitude afforded the executive branch was bitterly criticized by the Act's foes,[78] but since Congress knowingly conferred such lati-

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nation." (emphasis added)); *id.* at 1703 (remarks of Rep. Winstead) ("Title VI would authorize Federal agencies to withhold Federal financial support in connection with any program where there is racial discrimination in its *application*." (emphasis added)).

72. *See* note 31 *supra*.

73. *See* Abernathy, *supra* note 8, at 20-39.

74. As Justice Brennan noted in *Bakke*, "[T]here was a strong emphasis throughout Congress' consideration of title VI on providing the Executive Branch with considerable flexibility in interpreting and applying the prohibition against racial discrimination." 438 U.S. at 338-39 (Brennan, White, Marshall and Blackmun, JJ.).

75. *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess., 1520-21 (1963) [hereinafter *House Subcomm. Hearings*].

76. *Civil Rights — The President's Program, 1963: Hearings Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 400 (1963) (emphasis added).

77. *See House Subcomm. Hearings*, *supra* note 75, at 2765-66 (colloquy between Rep. Mathias and Attorney General Kennedy).

78. *See, e.g.*, 110 CONG. REC. 2498 (1964) (remarks of Rep. Selden) ("[T]itle VI . . . gives Federal departments and agencies extending Federal financial assistance practically unlimited powers to dictate the implementation of any and all Federal programs within the States."); *id.* at 1588 (remarks of Rep. Tuck) ("No one would know the law. It would be what these various agencies say it is, and the law would vary from agency to agency and from mouth to mouth."); HOUSE JUDICIARY REPORT, *supra* note 2, at 2436 (report of the Minority) ("It will be noted that the word "discrimination" is nowhere defined in the bill."); *id.* at 2453 *("Of all the harsh and unprecedented proposals contained in the bill, this title is the most radical departure from proper governmental policy*." (emphasis in original)); 110 CONG REC. 13,068 (1964) (remarks of Sen. Russell) ("Never has there been a bill before the Senate during my time here that has been so sweeping in its application or result. The bill leaves the definition of offenses against the law in the hands of the same officers who would prosecute for alleged violations. . . ."); *id.* at 5612 (remarks of Sen. Ervin) ("What constitutes unequal or unfair treatment? Section 601 and Section 602 of title VI do not say. They leave the determination of that question to the executive department or agencies administering each program, without any guideline whatever to point out what is the congressional intent."); *id.* at 12,320 (remarks of Sen. Byrd) ("The casual reader of title VI may fail to grasp the full portent of its provisions. While the stated objective of title VI is meritorious, the depth of this title is almost beyond description. It

tude the agency regulations must be characterized as legislative and given the force and effect of law.[79]

This characterization of the regulations issued under title VI as legislative was implicitly accepted by the Supreme Court in *Lau v. Nichols*.[80] Justice Douglas, who wrote the Court's opinion, assumed without discussion that title VI authorizes federal agencies to issue binding regulations.[81] Similarly, Justice Stewart's concurring opinion implied that HEW's enforcement regulations are legislative when it judged them against the lenient standard developed to test the validity of legislative regulations.[82]

The express delegation of authority in title VI, Congress' recognition that the executive branch would exercise substantive authority under the provision, and the Court's opinion in *Lau*, therefore, all confirm that the enforcement regulations are legislative. The impact standard that they impose is thus binding on courts so long as the agencies involved validly exercised their delegated power.[83]

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cannot be clearly delineated. It cannot be said that it goes so far and no farther. It has open-ended provisions that virtually give it whatever depth and intensity a Federal bureaucrat may read into it.").

79. *See* authorities cited in note 55 *supra*.

Two factors help explain Congress' decision to leave the task of defining discrimination to administrative officials. First, agencies would not be subject to static rules applicable to every executive department; instead, each agency could, over time, adopt regulations appropriate to its particular program. *See, e.g.*, *House Subcomm. Hearings*, *supra* note 75, at 2765-66 (testimony of Atty. Gen. Kennedy). Second, Congress was concerned with the "dilly-dallying" of federal judges in the fight against discrimination and consequently assigned primary enforcement responsibility to agency administrators. *See, e.g.*, *id.* at 1523 (remarks of Rep. Celler).

80. 414 U.S. 563 (1974).

81. 414 U.S. at 566.

82. 414 U.S. at 571 (Stewart, J., concurring).

83. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 295, 308 (1979) (quoting National Broadcasting Co. v. United States, 319 U.S. 190, 224 (1943)); Batterton v. Francis, 432 U.S. 416, 425-26 (1976); 2 K. DAVIS, *supra* note 53, at § 7.8; B. SCHWARTZ, *supra* note 51, at § 59.

Even if a court should erroneously conclude that the title VI enforcement regulations are interpretative rather than legislative, the agencies' choice of a disparate impact standard would still be entitled to a very high degree of judicial deference. "Courts give extra authoritative weight to interpretative rules . . . which are made contemporaneously with the enactment of the statute, which have been followed consistently over a long period, or which were outstanding at the time of statutory reenactment." 2 K. DAVIS, *supra* note 53, at 64; *see, e.g.*, Saxbe v. Bustos, 419 U.S. 65, 74 (1974); NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974); NLRB v. Boeing Co., 412 U.S. 67, 74-75 (1973). The title VI enforcement regulations satisfy each of these conditions. The regulations have not been modified since they were first promulgated in December, 1964. *See* 29 Fed. Reg. 16,273-309 (1964). Nor has Congress ever criticized or questioned these regulations, even though it has amended the statute since its original enactment. *See, e.g.*, 42 U.S.C. § 2000d-6 (1976). In addition, the model regulations on which all of the agency regulations are based were drafted under the aegis of the Justice Department just a few months after title VI was enacted. The Justice Department's involvement is significant because it helped draft the language of title VI as well. *See House Subcomm. Hearings*, *supra* note 75, at 2703 (testimony of Atty. Gen. Kennedy). An interpretation of a statute by administrators who participated in drafting it is entitled to particularly great weight. *See* Zuber v. Allen, 396 U.S. 168, 192 (1969).

On the other hand, if these regulations are withdrawn, new regulations adopting an intent standard would be entitled to very little respect since they would contradict a previous, consis-

The Supreme Court has recognized several related formulations for testing the validity of legislative regulations. "A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner."[84] Legislative regulations are invalid only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if the issuing agency exceeded its statutory authority.[85] They will be upheld so long as they are "reasonably related to the purposes of the enabling legislation."[86] But regulations that conflict with their statutory scheme will not be sustained even if they advance the legislation's goals.[87] To assess the validity of the impact regulations promulgated under title VI, therefore, it is necessary to analyze the language, legislative history, and policies of title VI.[88]

Title VI prohibits discrimination in federally funded programs, but it neither defines "discrimination" nor includes any criteria or standards that would narrow or withhold administrative discretion to identify the conduct subject to its proscription.[89] The statute merely commands federal agencies to issue rules and regulations ef-

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tent, contemporaneous, and long-standing interpretation. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141-45 (1976).

84. Batterton v. Francis, 432 U.S. 416, 425 (1976).

85. Batterton v. Francis, 432 U.S. 416, 425-26 (1976) (quoting Administrative Procedure Act § 10(e), 5 U.S.C. §§ 706(2)(A), (C) (1976)).

86. *E.g.*, Lau v. Nichols, 414 U.S. 563, 571 (1974) (Stewart, J., concurring); Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1973); Thorpe v. Housing Auth., 393 U.S. 268, 280-81 (1969).

87. *See* FCC v. Midwest Video Corp., 440 U.S. 689, 708 (1979); Note, *SEC Disciplinary Proceedings Against Attorneys Under Rule 2(e)*, 79 MICH. L. REV. 1270, 1281-82 (1981).

88. Legislative regulations must also be properly promulgated. *See* 2 K. DAVIS, *supra* note 53, at 36. The Administrative Procedure Act (1976) (APA), 5 U.S.C. §§ 551-559 (1976), normally requires legislative rules to be published for notice and comment before final adoption. The title VI regulations are valid, even though many agencies did not publish them prior to adoption, because the APA exempts from its publication requirement rules and regulations "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2) (1976). These title VI regulations apply only to the recipients of federal funds and thus come within this exception. *See, e.g.*, Good Samaritan Hosp., Corvallis v. Mathews, 609 F.2d 949, 953 (9th Cir. 1979); Housing Auth. v. United States Housing Auth., 468 F.2d 1, 9 (8th Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); Opelika Nursing Home, Inc. v. Richardson, 356 F. Supp. 1338, 1342 (M.D. Ala. 1973); Rodriguez v. Swank, 318 F. Supp. 289, 295 (N.D. Ill. 1970), *aff'd. mem.*, 403 U.S. 901 (1971); B. SCHWARTZ, *supra* note 51, at 169-70.

There is also no question as to the regulations' constitutionality. The Supreme Court has held repeatedly that Congress and the agencies to which it has delegated authority may under the spending clause, U.S. CONST. art. I, § 8, cl. 1, require recipients of federal funds to observe stricter standards of nondiscrimination than are required by the Constitution. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 474 (1980); Board of Educ. v. Harris, 444 U.S. 130, 137-38 (1979); Lau v. Nichols, 414 U.S. 563, 569 (1974). The only inquiry, therefore, is statutory.

89. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978) (Powell, J.) ("The concept of 'discrimination' . . . is susceptible of varying interpretations. . . ."); 438 U.S. at 337 (Brennan, White, Marshall, and Blackmun, JJ.) ("[T]he legislative history [of title VI] shows that Congress specifically eschewed any static definition of discrimination. . . .").

fectuating its policy of nondiscrimination.[90]

One provision suggests, however, that Congress did not mean to impose a rigid constitutional definition of discrimination on the agencies. Congress adopted an amendment, proposed by Representative Lindsay, that required all rules and regulations issued under title VI to be approved and signed by the President.[91] Lindsay, a leading proponent of the Civil Rights Act,[92] explained that agency rulemaking would be so critical in defining title VI's reach that "the Chief Executive should be required to put his stamp of approval on such rules and regulations."[93] As a procedural requirement imposed on agencies whose discretion is otherwise unconstrained by statutory limits, the Lindsay amendment indicates that Congress meant to allow the executive wide latitude in enforcing title VI. It seems doubtful, moreover, that Representative Lindsay would have believed his amendment necessary had he understood the forthcoming regulations to be restricted to a constitutional standard of discrimination.

Notwithstanding Congress' intent to delegate the difficult task of defining discrimination to the executive branch,[94] there was extensive discussion concerning the uncertain object of title VI's proscription. The meaning of "discrimination" was a controversial issue. Opponents of the legislation expressed particular antipathy toward the possibility that it would be used to attack de facto as well as de jure discrimination.[95] The legislative history reveals that Congress

90. 42 U.S.C. 2000d-1 (1976).

91. 42 U.S.C. 2000d-1 (1976).

92. Rep. Lindsay, a member of the Judiciary Committee, was an active participant in the House debate on title VI. *See* 110 CONG. REC. 2797 (1964) (remarks of Rep. Conte).

93. 110 CONG. REC. 2499 (1964).

94. Congress was within its constitutional authority when it delegated the task of defining "discrimination" to the executive branch. The Supreme Court has invalidated Congress' delegation of authority to the executive in only two cases, both decided in 1935. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). Since then the Court has upheld every challenged delegation, including several broader than that contained in section 602. *See, e.g.*, American Trucking Assn. v. United States, 344 U.S. 298 (1953); Fahey v. Mallonee, 332 U.S. 245 (1947). A delegation of authority will be sustained so long as Congress expresses a guiding principle against which administrative action can be measured. *See, e.g.*, Yakus v. United States, 321 U.S. 414, 425 (1944). Title VI and its legislative history explicitly identify the problem which concerned Congress: unequal treatment of blacks and other minorities in government-funded programs. Moreover, courts have recently confirmed Congress' power to mandate that agencies define statutory terms. *See, e.g.*, Schweiker v. Gray Panthers, 101 S. Ct. 2633, 2640 (1981); Batterton v. Francis, 432 U.S. 416, 425-26 (1977); United States Postal Serv. v. Brennan, 574 F.2d 712, 717 (2d Cir. 1978); United States v. Pray, 452 F. Supp. 788, 797 (M.D. Pa. 1978). Thus, whatever the current limit, if any, on Congress' power to delegate legislative-type authority to the executive branch, *see generally* 1 K. DAVIS, *supra* note 53, at § 3.1; McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977); Wright, Book Review, 81 YALE L.J. 575 (1972), Congress was within its constitutional authority when it delegated the responsibility for defining "discrimination."

95. *See, e.g.*, HOUSE JUDICIARY REPORT, *supra* note 2, at 2436 (report of the minority); Abernathy, *supra* note 8, at 26-30.

was aware of the likelihood that the Johnson administration would use title VI in exactly that way.[96] The Minority Report of the House Judiciary Committee, for example, bitterly predicted that the administration would act to *"remove the effects of previous practices"* in its quest to attain "racial balance."[97] Yet neither the statute nor the legislative history suggests that Congress meant to preclude this possibility. Indeed, the political controversy over the question may further explain Congress' willingness to charge another branch of government with responsibility for resolving the issue. Regulations that include an impact standard for defining discrimination cannot, therefore, be considered contrary to congressional intent.

Agency adoption of a disparate impact standard is also consistent with the goals of title VI. As one Congressman observed, "Title VI enunciates what always should have been the policy of the United States — that no person should be denied equal benefits under any federal financial assistance program because of his race, color, religion or national origin."[98] While the proof problems that attend the application of an intent standard may prevent the full realization of this goal, the disparate impact standard prohibits both intentional discrimination and facially neutral practices that have a discriminatory effect. Accordingly, it advances the policy of title VI by ensuring that administrators of federally funded programs are sensitive to the discriminatory impact of their actions.

In explicitly conferring on the executive branch the authority and responsibility to issue enforcement rules and regulations under title VI, Congress gave administrative agencies the power to promulgate rules with legislative effect. These regulations, which adopt a disparate impact standard of discrimination, are consistent with the text, legislative history, and policy of the statute.[99] Since consistency with

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96. *See, e.g., House Subcomm. Hearings*, *supra* note 75, at 1512, 1519 (testimony of HEW Secretary Celebrezze).

97. HOUSE JUDICIARY REPORT, *supra* note 2, at 2436 (report of the minority) (emphasis added).

98. 110 CONG. REC. 1594 (1964) (remarks of Rep. Farbstein).

99. Congress' adoption in the 1970's of statutes prohibiting discrimination on account of sex, Education Amendment of 1972, Pub. L. No. 92-318, tit. IX, § 901, 86 Stat. 373 (codified at 20 U.S.C. § 1681 (1976)) (prohibiting sex discrimination in certain educational programs), handicap, Rehabilitation Act of 1973, Pub. L. No. 93-112, tit. V, § 504, 87 Stat. 393 (codified at 29 U.S.C. § 794 (Supp. III 1979)), or age, Age Discrimination Act of 1975, Pub. L. No. 94-135, tit. III, § 303, 89 Stat. 728 (codified at 42 U.S.C. § 6102 (1976)), also supports the view that title VI was not intended to incorporate a constitutional prohibition of discrimination. The language of these measures was clearly patterned after that used in title VI, yet it is very unlikely that Congress intended thereby to incorporate only a constitutional standard of discrimination since the Constitution has been interpreted to afford only minimal protection against these forms of discrimination. The better view is that in modeling these statutes after title VI, Congress "understood the phraseology and pattern already employed in title VI to allow agencies to attack discriminatory actions that do not violate judicial conceptions of constitutional equal protection." Abernathy, *supra* note 8, at 38.

the enabling statute renders legislative regulations valid, courts must enforce an impact standard in title VI litigation.

Adoption of a disparate impact standard in title VI suits might pose practical problems. Minorities could more easily challenge the decisions of governmental officials since any program with a disparate effect on a protected class would be vulnerable under title VI. Consequently, courts may be placed in the uncomfortable position of having to review the day-to-day decisions of administrative and political entities.[100]

Nevertheless, an appropriate allocation of evidentiary burdens would ameliorate this problem. Initially, a plaintiff's proof of disparate impact should establish a prima facie title VI violation.[101] The defendant then should have an opportunity to rebut the plaintiff's showing. The defendant's rebuttal should include a showing that a rational procedure, including consideration of available alternatives, led to the challenged decision.[102] Two recent title VI cases in the courts of appeals suggest that any further requirement need not be onerous. In *NAACP v. Medical Center, Inc.*, [103] the Third Circuit indicated that a defendant's rebuttal burden was one of production rather than persuasion.[104] Under this test, producing evidence that the disparate impact results from the pursuit of a legitimate governmental interest should enable the defendant to rebut the plaintiff's prima facie case.

In *Bryan v. Koch*,[105] the Second Circuit did not clearly enunciate the nature of the defendant's task once the plaintiffs had established their prima facie case, though an earlier decision in the circuit had imposed a burden of persuasion in analogous civil rights litigation.[106] The *Bryan* majority did indicate that title VI defendants need not account for their failure to choose an alternative to the challenged decision.[107] Judge Newman's majority opinion expressed extreme reluctance to intrude on administrative and legislative functions by independently assessing other options.[108] Yet as Judge Kearse pointed out in a separate opinion, courts may provide mean-

100. *See generally,* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1339 (3d Cir. 1981) (en banc) (Adams, J., concurring); Bryan v. Koch, 627 F.2d 612, 619 (2d Cir. 1980).

101. *See* NAACP v. Medical Center, Inc., 657 F.2d 1322, 1334-35 (3d Cir. 1981) (en banc); Bryan v. Koch, 627 F.2d 612, 623 (2d Cir. 1980) (Kearse, J., concurring); *cf.* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) (disparate impact establishes prima facie title VII case).

102. *See* Bryan v. Koch, 627 F.2d 612, 623 (2d Cir. 1980) (Kearse, J., concurring).

103. 657 F.2d 1322, 1339 (3d Cir. 1981) (en banc).

104. 657 F.2d at 1334-36.

105. 627 F.2d 612 (2d Cir. 1980).

106. *See* Vulcan Socy. of New York City Fire Dept. v. Civil Serv. Commn., 490 F.2d 387, 393 (2d Cir. 1973).

107. *See* 627 F.2d at 618-19.

108. *See* 627 F.2d at 619.

ingful review without risking "judicial usurpation of executive prerogatives inherent in any review of the substance of the decision" by requiring that decisions result from processes that demonstrably include consideration of alternatives.[109] An impact standard, therefore, need not hamstring policy makers or present insurmountable problems of judicial administration.

CONCLUSION

Courts considering suits brought under title VI must use the standard of nondiscrimination specified in the enforcement regulations issued by the funding agency. In enacting title VI, Congress delegated to the executive branch broad authority to define and enforce title VI's prohibition of discrimination. The executive branch has responded by promulgating regulations that prohibit disparate impact in federally funded programs. These regulations are legislative in nature and within the scope of the enabling statute. Hence, they carry the force of law and are binding upon the courts.

109. *See* 627 F.2d at 623-28 (Kearse, J., dissenting in part).