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Introduction

The U.S. Environmental Protection Agency (EPA) has finally released its long-awaited "revised guidance" for implementing Title VI of the 1964 Civil Rights Act in so-called "environmental justice" cases.[1] The revised guidance largely mirrors EPA's controversial "interim guidance,"[2] which was released in 1998. Industry leaders claimed the 1998 guidance erected regulatory barriers that were too high,[3] while environmental and civil rights advocates insisted the interim guidance was not stringent enough.[4] Congress responded to this criticism by including in EPA's fiscal year 1999 funding bill a provision prohibiting the agency from following the interim guidance until the guidance was finalized.[5]

This paper addresses a fundamental legal question that has been ignored in the debates over EPA's guidance documents: Are the regulations EPA is seeking to implement legally valid? Like the widely disparaged interim guidance, the recently released revised guidance details the steps the agency will take to enforce its "disparate impact" regulations—the rules that forbid environmental permitting decisions that have the effect, even if unintentional, of impacting members of different races differently.[6] So far, all sides have simply assumed that EPA's disparate impact regulations are valid. But, as discussed below, EPA cannot derive the authority to ban disparate impact from Title VI itself.

The Supreme Court has squarely held that Title VI prohibits only *intentional* discrimination and does not reach unintentional disparate impact. Granted, EPA's regulations banning disparate impact as well as intentional discrimination have been on the books for a number of years, but are

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those regulations legally valid? If not, the agency's guidance for implementing Title VI, with its focus on steps the agency will take to prevent unintentional disparate impact, amounts to "sound and fury signifying nothing."

EPA's disparate impact regulations are legally invalid. If, as the Supreme Court has held, Title VI forbids only intentional discrimination, then that statute never provided EPA with legal authority to ban unintentional disparate impact.

This paper contends that EPA's disparate impact regulations are legally invalid. If, as the Supreme Court has held, Title VI forbids only intentional discrimination, then that statute never provided EPA with legal authority to ban unintentional disparate impact. Statements of various Supreme Court justices affirming the validity of the disparate impact regulations are merely off-hand remarks that lack the force of law; to put it in legal jargon, they are "dicta." As EPA's disparate impact regulations—the rules the new environmental justice guidelines seek to implement—are legally invalid, the agency's revised guidance is legally pointless.

EPA's Title VI Regulations: The Tool of Choice of Environmental Justice Advocates

Advocates for "environmental justice" contend, on the basis of somewhat sparse hard data, that members of minority communities have been burdened with hosting a disproportionate share of the nation's waste sites and polluting facilities.[7] Several studies suggest that racist siting of facilities may not be to blame for any observed disparity, but that non-white individuals, who tend to be poorer than average, may have voluntarily moved into polluted areas in order to take advantage of lower property prices.[8] Nonetheless, environmental justice advocates, ignoring the dire economic consequences their policy proposals could have for the neighborhoods they aim to help,[9] have focused their efforts on finding ways to prevent the siting of industrial and waste facilities in predominately minority neighborhoods. Their legal tool of choice has been Title VI of the 1964 Civil Rights Act.[10]

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Title VI prohibits racial discrimination by entities receiving federal funding. Section 601 of the statute contains the primary prohibition, providing that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.[11]

Section 602 authorizes federal agencies to adopt regulations to effectuate the provisions of § 601. It states, in relevant part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of § 601 of this title . . . by issuing rules, regulations, or orders of general applicability.[12]

Title VI thus includes a direct prohibition on racial discrimination by federally funded entities (§ 601) and an enabling provision (§ 602) empowering federal agencies to promulgate regulations to effectuate that prohibition.

Pursuant to § 602, in 1984[13] EPA adopted a regulation banning any federally funded environmental permitting entity from "us[ing] criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex."[14] Under this "disparate impact" prohibition, state environmental agencies, which generally receive federal funds, may not make permitting decisions that have the *effect* of treating various racial groups differently, even if those decisions were not intentionally discriminatory. Even if a polluting or waste facility completely complies with all substantive environmental laws and was sited where it was for wholly benign reasons, a decision to permit the facility technically violates the disparate impact rule if the facility will be located in a disproportionately minority community. For example, if a permitting agency sites a landfill in a particular area solely because of topographical factors (e.g., a particularly impermeable type of soil), that permitting decision is in violation of the EPA regulation if the community surrounding the site—conceivably the only available site—has a disproportionately high concentration of minority residents.[15]

This discussion of Title VI and EPA's implementing regulations makes clear why environmental justice advocates view Title VI and the rules thereunder as the best way to combat environmental disparity: The disparate impact regulations enable a plaintiff to prove unlawful discrimination, and thereby obtain an injunction preventing a permit from going forward, without establishing

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that anyone *intended* to discriminate on the basis of race. All that a plaintiff must establish is that a permitting decision had (or will have) *the effect* of subjecting a disproportionate number of minority individuals to increased exposure to environmental risks. As it is much easier to prove a racially disparate effect than it is to prove discriminatory intent, disparate impact suits are much more desirable to environmental justice plaintiffs than are lawsuits brought under legal provisions prohibiting intentional discrimination by the government, such as the U.S. Constitution's Equal Protection Clause.[16]

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But there are problems with EPA's ban on environmental permitting decisions that create a disparate impact. First of all, an absolute disparate impact ban, which is what the disparate impact regulations establish, is bad policy. Such a ban is undoubtedly over-inclusive, for there are many permitting decisions that create a disparate impact but are nonetheless good decisions on the whole. Indeed, in numerous cases residents of minority communities have actively campaigned to get industrial facilities permitted in their communities but have been thwarted in their efforts because permitting the facilities would create disparate impacts.[17]

Consider, for example, the experience of St. James Parish, Louisiana, a predominantly African-American community that in 1998 attempted to obtain a permit for a polyvinyl chlorine manufacturing plant that Shintech Corporation wanted to build in the community. St. James Parish, which is 67 percent African-American, is poor. In 1998, unemployment stood at 12 percent parish-wide and hovered near 60 percent in Convent, a small town located within the parish.[18] Given these dire circumstances, local residents were justifiably excited when a local group convinced Shintech Corporation to build a $700 million plant in Convent. Shintech promised to provide 165 full-time jobs, 90 contract positions, and 1,800 temporary construction jobs, plus $500,000 in local job train-

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ing programs that would ensure that local residents would be qualified for the jobs the facility would provide.[19] In light of these economic benefits, the local and state chapters of the NAACP[20]—and, according to polls, 70 percent of the parish's residents[21]—supported the Shintech plant.

EPA's absolute disparate impact ban thwarts "win-win" situations in minority communities where residents are attempting to attract industry to the area. It also seems to work against government "brownfield" initiatives.

But support for the facility was not unanimous. Indeed, students from Tulane University's Environmental Law Clinic found some local African-American residents who were opposed to the facility and threatened to file a disparate impact suit on their behalf.[22] By threatening a private lawsuit to enforce the disparate impact regulations, facility opponents, though outnumbered by proponents, were in effect able to veto the Shintech plant. Shintech finally gave up and decided to build its plant in a white community.[23]

EPA's absolute disparate impact ban thwarts "win-win" situations in minority communities like St. James Parish, where residents are attempting to attract industry to the area. It also seems to work against government "brownfield" initiatives, which attempt to attract new industry to abandoned industrial facilities, most of which are in inner cities and are surrounded by minority communities.[24] If permitting decisions that create a disparate impact are prohibited, it is difficult to see how EPA could allow the majority of brownfield projects to go forward, for most such projects require the issuance of industrial permits in minority areas. Indeed, the National Black Chamber of Commerce, in an amicus brief filed in the U.S. Supreme Court, has argued forcefully that private disparate impact suits should not be allowed because they would thwart brownfield projects and thereby harm urban minorities.[25]

Why EPA's Disparate Impact Regulations are Invalid

In addition to the policy problem resulting from the over-inclusiveness of the disparate impact

ban, EPA's disparate impact regulations confront an even more damaging legal problem: They are legally invalid because they are more prohibitory than the statute under whose authority they were promulgated. This section discusses this legal problem. It also analyzes statements Supreme Court justices have made suggesting that the regulations are valid and explains why those statements are not definitive.

Statutory Constraints on Agencies' Rulemaking Authority: EPA Can't Ban Behavior That Does Not Fall within a Statutory Prohibition

EPA, part of the executive branch, is an administrative agency of the federal government. It is *not* a legislature.[26] The U.S. Constitution vests legislative power—that is, the power to make law that binds members of the general public—in Congress alone.[27] This is not to say that a federal agency may not make rules that bind parties outside the agency. Indeed, courts have long recognized that agencies may have power to make such "legislative rules," and Congress, wisely recognizing that administrative agencies often possess expertise that enables them to make better rules than Congress could craft, frequently delegates to agencies the authority to adopt specific rules to achieve a statutory mandate. An agency's rulemaking power, however, may not extend beyond the sphere of power Congress delegated to the agency through a statute.[28] Otherwise, the agency would not merely be Congress' agent, adopting a rule to assist Congress in "fleshing out" its legislative goal, but would instead be acting as a legislature itself. Under Article I of the U.S. Constitution, it cannot so act. Agencies, then, may make specific rules to flesh out the details of a statutory prohibition, but they may not make rules that reach beyond the scope of the statutory prohibition.[29]

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An example helps clarify this basic principle of administrative law. Suppose Congress adopted a statute prohibiting individuals from painting their homes with lead-based paint and enabling EPA to adopt regulations to effectuate that statutory prohibition. The term "lead-based" is somewhat

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vague—does it include paints that contain only a trace amount of lead, or must lead comprise a substantial percentage of the paint's chemical makeup? The term "paint" is also vague—would it include a clear sealant used on a roof? EPA could certainly resolve these ambiguities by enacting rules stating exactly what types of lead-containing paint are considered "lead-based" and what coatings constitute paint.

EPA could not, however, adopt a "prophylactic" rule prohibiting homeowners from using *any* exterior building material containing lead. Though such a rule would certainly help Congress achieve its goal of eliminating lead-based paint, the rule would reach too far; it would ban, for example, use of a shingle containing lead. *Congress* might be able to ban such shingles, but EPA, although fully empowered to flesh out Congress' prohibition on lead-based paint, could not extend the ban to include non-paint building materials.

EPA also could not adopt a rule forbidding homeowners from using any paint manufactured before 1985. Most lead-based home paint was made before that year, and such a rule would undoubtedly aid Congress in curtailing the use of lead-based paint, but the rule would be over-inclusive. Because some pre-1985 paint is not lead-based, the proposed rule would result in a regulatory prohibition that reaches further than the statutory prohibition and would convert EPA into a legislature.

Title VI's Prohibition (Intentional Discrimination) Versus EPA's Ban (All Disparate Impact, Whether Intentional or Not)

Keeping in mind these examples and the basic administrative law principle that an agency's rules may not reach beyond the statutory prohibition the rules aim to effectuate, let us consider why EPA's regulations banning decisions that create a disparate impact must be legally unsound. In short, the regulations are invalid because they forbid behavior that could not possibly be prohibited by the statute enabling the regulations. EPA, then, is not just fleshing out Title VI's statutory prohibition but is instead acting as a legislature by enlarging the prohibition to cover unintentional disparate impacts.

EPA's regulations banning disparate impact purport to effectuate Title VI of the 1964 Civil Rights Act.[30] But the prohibition in EPA's disparate impact rules extends far beyond that which

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Congress adopted in Title VI. Whereas EPA's regulations ban wholly unintentional disparate impact, the Supreme Court has squarely held that Title VI's prohibition itself (§ 601 of the statute) forbids only *intentional* discrimination—that is, discrimination that is motivated by some sort of racial animus. The Supreme Court issued this holding in *Regents of the University of California v. Bakke*,[31] in which the Court concluded that Title VI's prohibition on racial discrimination is co-extensive with that of the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment.[32] As the Court had held, only two terms earlier, that the Equal Protection Clause prohibits only intentional discrimination—not disparate impact[33]—*Bakke* must be read as establishing that Title VI itself does not ban unintentional disparate impact. The Supreme Court has subsequently confirmed this understanding of Title VI's discrimination prohibition.[34]

EPA's regulations banning disparate impact purport to effectuate Title VI of the 1964 Civil Rights Act. ... But the Supreme Court has squarely held that Title VI's prohibition itself (§ 601 of the statute) forbids only intentional *discrimination—that is, discrimination that is motivated by some sort of racial animus.*

To the extent that EPA's Title VI regulations ban behavior (i.e., actions and decisions that unintentionally lead to disparate impact) that is not proscribed by Title VI itself, which bans only intentional discrimination, the regulations are invalid. Just as EPA lacked authority to ban all lead-containing building materials or all paint manufactured before 1985 in our example above, EPA does not have legal authority to prohibit federal fund recipients from making decisions and taking actions that have incidental (unintentional) disparate impacts. EPA's prophylactic rule would certainly aid in achieving the goal of eliminating intentional discrimination, but the rule is over-inclusive, amounts to legislation by an agency, and is thus invalid. And as EPA's recently released revised guidance implements the agency's disparate impact rules, the guidance rests on an unsteady legal foundation.

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What About Supreme Court Statements That the Rules Are Valid? Such Statements Are Non-Binding "Dicta."

But if it is a basic principle of administrative law that agencies may not adopt regulations more prohibitory than their enabling statutes, and if the Supreme Court has clearly held that Title VI prohibits only intentional discrimination, why have EPA's disparate impact regulations, adopted in 1984,[35] persisted for so long? The rules probably owe their long persistence to statements by Supreme Court justices that the regulations are valid. Lower courts have misinterpreted these statements as a "holding" of the Supreme Court—that is, as a Court pronouncement that carries the force of law.[36] A close reading of the statements approving the disparate impact rules reveals, however, that the statements are "dicta"—that is, surplus assertions that were not necessary to decide an issue before the Court and are therefore not legally binding.[37]

Before analyzing the specific statements at issue, let us consider the legal distinction between "holding" and "dicta." Contrary to the understanding of many laypersons, not every statement by a Supreme Court justice—or even a majority of justices—is legally binding. Indeed, judicial opinions, which have grown in length in recent years, frequently contain all sorts of ancillary ramblings and observations that will not be taken to be the "law of the land." The portion of a judicial opinion that *is* binding on a subsequent court—the "holding" of the opinion—is the narrowest legal conclusion that is necessary to resolve the precise controversy before the court.[38] All other statements constitute "dicta," which may be persuasive, but are not binding.[39]

By way of example, suppose a district court (the lowest court in the federal court system) rules that a tax statute Congress passed is unconstitutional because it originated in the Senate, not the House of Representatives. (The Constitution's "Originations Clause" requires "bills for raising revenue" to originate in the House of Representatives.[40]) Then suppose that the government appeals the ruling, and the appeals court issues an opinion that (1) affirms the trial court because the tax statute at issue did violate the Constitution's Originations Clause and (2) further notes that the statute violates the Constitution's ban on *ex post facto* (i.e., retroactive) laws.[41] In this hypothetical, only the first part of the appeals court's opinion is necessary to sustain the judgment of the trial court, and the rest of the opinion—unnecessary to the court's judgment—would amount to non-

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binding dicta. The distinction, then, turns on necessity: A legal conclusion that is essential to a court's ultimate judgment in a case is holding; all other statements are dicta.

EPA's rules probably owe their long persistence to mistaken statements by Supreme Court justices that the regulations are valid. Lower courts have misinterpreted these statements as a "holding" of the Supreme Court—that is, as a Court pronouncement that carries the force of law.

With this distinction in mind, let us consider the instances in which Supreme Court justices have stated that federal agencies' disparate impact regulations are valid exercises of the agencies' rulemaking power under Title VI. Close examination of the cases in which justices made such statements indicates that the statements are dicta, for they were not necessary to resolve the narrow issue before the Court.

The original source of the lower courts' mistaken belief that the Supreme Court has upheld agencies' disparate impact regulations under Title VI is the justices' opinions in *Guardians Association v. Civil Service Commission of the City of New York.*[42] A careful reading of those opinions, however, reveals that the Court did not *hold* that the disparate impact regulations are valid, though five of the justices did opine that such regulations are acceptable.

The issue in *Guardians* was narrow: Did Title VI entitle plaintiffs—black and Hispanic police officers—to a compensatory remedy (back seniority) for "discrimination" they suffered?[43] The plaintiffs admitted that the alleged discrimination was not intentional; they based their claim of discrimination on the police department's adoption of a "last hired, first fired" policy. The policy had a disparate adverse impact on black and Hispanic employees because officers were hired in order of their examination scores, and the examinations tended to favor white test-takers.[44] The United States Court of Appeals for the Second Circuit (the court just below the Supreme Court) had denied the compensatory relief awarded by the district court.[45]

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In a decision that generated five opinions, the Supreme Court affirmed the Second Circuit's denial of compensatory damages. Four justices—Chief Justice Burger and Justices Powell and Rehnquist (in an opinion authored by Justice Powell)[46] and Justice O'Connor (in her own opinion)[47]—concluded that affirmance was proper because Title VI prohibits only intentional discrimination. Justice O'Connor further asserted that, as Title VI forbids only intentional discrimination, federal agencies have no power to adopt implementing regulations that prohibit only disparate impact.[48] Chief Justice Burger and Justices Powell and Rehnquist expressly approved this portion of Justice O'Connor's opinion.[49] Hence, four justices expressly agreed that agencies' disparate impact regulations are invalid.

The original source of the mistaken belief that the Supreme Court has upheld agencies' disparate impact regulations under Title VI is the justices' opinions in Guardians Association v. Civil Service Commission of the City of New York. *A careful reading of those opinions, however, reveals that the Court did not* hold *that the disparate impact regulations are valid.*

Four other justices—Justices Blackmun, Brennan, and Stevens (in a dissenting opinion by Justice Stevens)[50] and Justice Marshall (in his own dissenting opinion)[51]—would have reversed the Second Circuit's denial of compensatory damages. Justice Marshall would have done so on the ground that Title VI prohibits disparate impact as well as intentional discrimination.[52] Justices Blackmun, Brennan, and Stevens would have done so because, while Title VI itself reaches only intentional discrimination,[53] the agency regulations under Title VI, which forbid disparate impact, are valid exercises of agency discretion and are authorized by the statute.[54]

This split put Justice White, the remaining justice, in the position of tie-breaker on the question of whether to affirm the Second Circuit's denial of compensatory relief for disparate impact suffered as a result of the police department's policies. Justice White voted to affirm the Second Circuit's denial of compensatory damages on the ground that compensatory remedies under Title VI

are available only if intentional discrimination is established.[56] But Justice White did not limit his opinion to this assertion, which was the only legal conclusion necessary to decide the case in favor of affirmance. He further opined that Title VI's prohibition reaches disparate impact as well as intentional discrimination.[57]

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

Table 1

A Tally of Votes in *Guardians Association v. Civil Service Commission*

A. Compensatory relief is available under Title VI only when discrimination is intentional (the narrowest issue before the court).

B. Title VI bars only intentional discrimination.

C. The regulations under Title VI may prohibit unintentional disparate impact.

Justice	A	B	C
Burger	Y (m)	Y (m)	
Blackmun		Y	Y
Brennan		Y	Y
Marshall			Y
O'Connor	Y (m)	Y (m)	
Powell	Y (m)	Y (m)	
Rehnquist	Y (m)	Y (m)	
Stevens		Y	Y
White	Y (m)		Y (m)
Total	5 Justices	7 Justices	5 Justices
Total in Majority	5 Justices	4 Justices	1 Justice

("Y" indicates a yes vote; "m" indicates that the justice was part of the majority.)

A mere tallying of positions announced in the opinions, however, fails to account for the fact that Justice White, the tiebreaker, voted *to affirm* the Second Circuit's denial of compensatory damages on the ground that compensatory relief is not available absent intentional discrimination.

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He also stated that Title VI forbids disparate impact, *but that portion of his opinion was not necessary to his decision to affirm and is therefore dicta.* The Supreme Court has explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds....' "[57] Accordingly, Justice White's statements concerning Title VI's intent requirement are not part of the "holding of the Court." The *Guardians* Court therefore never held that agency regulations under Title VI may forbid unintentional disparate impact. And, as discussed above, the basic administrative law principle that an agency's regulations may not be more prohibitory than the statute they implement, coupled with the fact that the Supreme Court has clearly held that Title VI forbids only intentional discrimination, compels the conclusion that agencies' regulations forbidding unintentional disparate impacts are legally invalid. Table 1 tallies the justices' votes on the various issues raised in *Guardians*.

Despite the fact that Justice White's approval of disparate impact regulations was dictum, the lower courts have read *Guardians* as *holding* that such regulations are authorized by Title VI.[58] This is probably because the Supreme Court, in dicta in another case, mistakenly stated that *Guardians* held that agency regulations implementing Title VI may prohibit disparate impact as well as intentional discrimination. In *Alexander v. Choate*,[59] the Court held that the State of Tennessee's reduction in annual inpatient hospital coverage did not constitute actionable discrimination under § 504 of the Rehabilitation Act of 1973.[60] In addressing a threshold issue—whether proof of discriminatory intent is always required to prove a violation of the Rehabilitation Act and its implementing regulations—Justice Marshall, writing for a unanimous Court, discussed the *Guardians* holding. He explained:

> In *Guardians*, we confronted the question whether Title VI of the Civil Rights Act of 1964 . . . which prohibits discrimination against racial and ethnic minorities in programs receiving federal aid, reaches both intentional and disparate-impact discrimination. No opinion commanded a majority in *Guardians*, and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reached only instances of intentional discrimination. *Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI.*[61] [Emphasis added.]

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In a wonderful example of dictum becoming "holding," a number of lower courts have cited *Alexander*'s dictum as establishing that the Supreme Court has held (in *Guardians*) that disparate impact regulations under Title VI are valid.[62] *But the* Guardians *Court did not so hold.*

Conclusion

EPA's Revised Guidance for Assessing Disparate Impact Complaints Lacks a Legal Foundation

EPA's recently released revised guidance for processing environmental justice complaints will undoubtedly continue to generate controversy. But beyond the question of the guidelines' merits lies a more fundamental legal question that most commentators and policymakers have ignored: Has EPA ever had the legal authority to ban environmental permitting decisions that have a disparate racial effect but are not intentionally discriminatory? EPA's disparate impact regulations, after all, provide the foundation for the agency's revised guidance. It is time for policymakers and courts to question the firmness of that foundation.

Because EPA's disparate impact rules are legally invalid, the agency's controversial guidelines for enforcing those rules will ultimately be legally meaningless.

Basic principles of administrative law indicate that EPA does not have legal power to ban mere disparate impact. The statute EPA cites as authorizing such a ban (Title VI) forbids only intentional discrimination, and EPA—an administrative agency, not a legislative body—cannot enlarge the statute's scope by adopting implementing regulations that are more prohibitory than the statute itself. Statements by Supreme Court justices that appear to indicate that EPA has authority to ban disparate impact are dicta; they are not legally binding and are, in light of well-established principles of administrative law, unpersuasive. Because EPA's disparate impact rules are legally invalid, the agency's controversial guidelines for enforcing those rules are, in the end, legally meaningless.

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Notes

1. A copy of the revised guidance is available on the web site of EPA's Office of Civil Rights, *http://www.epa.gov/ocr.html* (visited June 22, 2000).
2. See *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, available at http://www.epa.gov/oeca/oej/titlevi.html (visited Jan. 10, 1999).
3. See, *e.g.*, Patrick W. Merkel, *Civil Rights and the Environment: EPA, States Creating Another Regulatory Burden*, METROPOLITAN CORP. COUNSEL, March 1999, at 30 (*available in* ALLNEWSPLUS library of Westlaw) (summarizing complaints of local officials and business interests that the interim guidance erected overly stringent regulatory barriers).
4. See, *e.g.*, Vicki Ferstel, *EPA May Target State for Test Case*, BATON ROUGE ADVOCATE, Aug. 23, 1999, at 1B (noting environmental justice advocates' criticisms that the interim guidance "put too many hurdles for the environmental justice complainant").
5. See Merkel, *supra* note 2.
6. EPA's revised guidance purports to "provide a framework for the United States Environmental Protection Agency's Office of Civil Rights to process complaints filed under Title VI of the Civil Rights Act of 1964, as amended (Title VI), and EPA's Title VI implementing regulations alleging discriminatory *effects* resulting from the issuance of pollution control permits by recipients of EPA financial assistance." *See Revised Guidance*, cited *supra* in note 1, at 3 (emphasis added).
7. A handful of national studies document the existence of racial disparity in the siting of industrial and waste facilities, but those studies are plagued by methodological difficulties. See *generally*, Thomas Lambert and Christopher Boerner, *Environmental Inequity: Economic Causes, Economic Solutions*, 14 YALE J. ON REG. 195, 198-203 (1997) (summarizing the primary environmental justice studies and criticizing the methodologies they employ); Christopher Boerner and Thomas Lambert, *Environmental Injustice*, 118 PUB. INTEREST 61 (1995) (same).
8. See, *e.g.*, Vicki Been and Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOL. L. Q. 1 (1997); Lambert and Boerner, *supra* note 7; Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L. J. 1383 (1994).
9. Efforts to prevent industrial facilities from siting in minority communities may have the perverse result of causing economic harm to those communities. See, *e.g.*, Lambert and Boerner, *supra* note 7, at 217-21.
10. See, *e.g.*, Gilbert Paul Carrasco, *Public Wrongs, Private Rights: Private Attorneys General for Civil Rights*, 9 VILL. ENVTL. L. J. 321 (1998); Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L. J. 523, 531-34 (1994); Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. & LITIG. 309 (1994); Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285 (1985); Barry E. Hill, *Chester, Pennsylvania—Was It a Classic Example of Environmental Injustice?*, 479 VT. L. REV. 479, 482 (1999); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 834-39 (1993); Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TULANE L. REV. 787 (1999); Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1 (1999); Omar Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions*, 19 COLUM. J. ENVTL. L. 211, 228 (1994); 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, 152-71 (1994); Amanda C.L. Vig, Note, *Using Title VI to Salvage Civil Rights from Waste: Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997)*, 67 U. CIN. L. REV. 907 (1999). Cf. Leslie Ann Coleman, Comment, *It's the Thought that Counts: The Intent Requirement in Environmental Racism Claims*, 25 ST. MARY'S L. J. 447, 481 (1993) (arguing that discrimination should be determined on the basis of an effects test rather than an intent test).
11. 42 U.S.C. § 2000d.
12. *Id.* § 2000d-1.
13. See 49 Fed. Reg. 1656 (Jan. 12, 1984)(noting EPA's adoption of a final disparate impact rule). In actuality, EPA's disparate impact regulation even predates this rule. The 1984 rule, which is still on the books, amended a similar regulation adopted on July 5, 1973. *See id.*
14. 40 C.F.R. § 7.35(b)(1999).

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15. The example of the Emelle landfill in Sumter County, Alabama is instructive. The Emelle landfill, a hazardous waste disposal facility, was sited in Sumter County because of topographical factors: The landfill sits atop 700 feet of dense, natural chalk. *See* Lynn Blaise, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75, 109 (1996). Indeed, at the time the landfill was permitted, EPA could identify only a handful of areas with appropriate topography. *See id.* The landfill complies with all substantive environmental standards and has, in fact, been an economic boon to Sumter County, dramatically increasing the area's tax base and enabling the county to adopt very successful public health programs. *See* Charles McDermott, *Balancing the Scales of Environmental Justice*, 21 FORDHAM URB. L. J. 689, 697 (1994). Siting the Emelle landfill in Sumter County did, however, create a disparate impact, for Sumter County's residents are predominately African-American. Thus, EPA's decision to permit the landfill probably did violate the agency's disparate impact rules, even though there is no evidence that any environmental official *intended* to discriminate on the basis of race.
16. The Equal Protection Clause of the Fourteenth Amendment forbids only intentional discrimination by state actors. See Washington v. Davis, 426 U.S. 229 (1976).
17. See generally Lambert and Boerner, *supra* note 7, at 217-22 (citing examples of minority communities that have sought to have polluting facilities permitted in the area).
18. See Sara Shipley, *Race, Jobs, Pollution in Bayou Test Case*, CHRISTIAN SCI. MONITOR, Jan. 1, 1998, at 1.
19. See *id.*; Henry Payne, *Planting Prosperity or Sowing Racism? EPA Policy that Bars Polluting Plants from Minority Communities Comes Under Attack*, PITTSBURGH POST-GAZETTE, June 15, 1998, at A9.
20. See *State NAACP Takes Pro-Shintech Stance*, ASSOCIATED PRESS POL. SERV., Sept. 22, 1997, *available in Westlaw at* 1997 WL 2551041.
21. See Shipley, *supra* note 18, at 1 (noting results of poll conducted by local NAACP). *But see* Chris Gray, *Shintech Foes Live Closest to Site, Poll Says*, NEW ORLEANS TIMES-PICAYUNE, Jan. 18, 1998, at A1 (reporting results of another poll showing that, while a majority of parish residents supported construction of the Shintech facility, 52 percent of residents living closest to the site opposed construction of the facility).
22. See *Shintech Reaffirms Plan to Locate $700M Plant in Louisiana*, CAPITAL MKTS. REPORT, Jan. 16, 1998, *available in* ALLNEWSPLUS library of Westlaw.
23. See *Activism on the Bayou: Shintech Case Redefines Outreach*, CHEMICAL WEEK, May 26, 1999, *available in Westlaw at* 1999 WL 9309888.
24. See BRIEF OF AMICI CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL BLACK CHAMBER OF COMMERCE, INC., AND PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY IN SUPPORT OF PETITIONERS, *Seif v. Chester Residents Concerned for Quality Living*, No. 97-1620, 1998 WL 457676 (U.S. Amicus Brief)(discussing various brownfield initiatives and how private actions to enforce the disparate impact regulations would thwart brownfield redevelopment).
25. See *id.*
26. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213 (1976).
27. See U.S. CONST. Art. I, § 1.
28. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").
29. In *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), the Supreme Court rejected the view that administrative agencies may adopt rules that forbid behavior falling outside the sphere of activity proscribed by the enabling statute. In that case, the Securities and Exchange Commission (SEC) argued that its Rule 10b-5, promulgated pursuant to § 10(b) of the Securities Exchange Act of 1934, could forbid negligent conduct in connection with the sale or purchase of a security. The Court rejected this argument on the ground that the enabling statute itself, § 10(b), forbade only intentional acts—"any manipulative or deceptive device or contrivance." As the statute itself banned only intentional acts, a regulation promulgated thereunder could not forbid mere negligence, a less culpable behavior. *See id.* at 213-14.

    In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the Supreme Court reiterated its general rule that agency regulations cannot be more proscriptive than the enabling statutes under which they are promulgated. The *Central Bank* Court held that a private plaintiff may not bring suit under Rule 10b-5 against a defendant who aids or abets a securities law violation, because § 10(b) of the Securities Exchange Act, the statute authorizing Rule 10b-5, does not prohibit a class of behavior broad enough to encompass aiding and abetting. *Id.* at 173. In so holding, the Court emphasized that the scope of conduct forbidden by securities regulations may not exceed that prohibited by the securities statutes.

    Ernst & Ernst and *Central Bank* illustrate a basic principle of administrative law: Agencies charged with *administering* laws are not legislators and have no power to adopt rules that reach further than the statutes the agencies are charged with administering. This is not to say that agencies may not adopt rules that

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forbid conduct not expressly forbidden by an enabling statute; indeed, a primary function of administrative agencies is "gap-filling"—*i.e.*, spelling out in detail the prohibitions that are implicit in a statute's text. The prohibition in the regulation, however, must be capable of fitting within the statutory prohibition. Otherwise, it is a nullity.

30. The rules acknowledge that "[t]his part implements: Title VI of the Civil Rights Act of 1964." 40 C.F.R. § 7.10 (1999).
31. 438 U.S. 265 (1978).
32. *Id.* at 287 (Powell, J., concurring); *Id.* at 325 (Brennan, J., concurring) (joined by Blackmun, Brennan, Marshall, and White).
33. See *Washington v. Davis*, 426 U.S. 229 (1976).
34. The Court squarely acknowledged that Title VI forbids only intentional discrimination in *Fordice v. United States*, 505 U.S. 717 (1992). In that case, petitioners complained that a recipient of federal funds had violated an agency's Title VI regulation that required the recipient to "take affirmative action to overcome the effects of prior discrimination." *Id.* at 732 n. 7. The Court found it unnecessary to consider the alleged regulatory violation in addition to the Equal Protection claim asserted. It reiterated that "[o]ur cases make clear, and the parties do not disagree, that the reach of Title VI's protection extends no further than the Fourteenth Amendment. We thus treat the issues in this case as they are implicated under the Constitution." *Id.* The Court thus suggested that if the Fourteenth Amendment did not require "affirmative action to overcome the effects of prior discrimination," neither could the agency regulations implementing Title VI.
35. See *supra* note 13.
36. A "holding" is "a court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision." BLACK'S LAW DICTIONARY 737 (7th ed. 1999).
37. A "dictum" is "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case *and therefore not precedential* (though it may be considered persuasive)." *Id.* at 1100 (defining "obiter dictum") (emphasis added).
38. See *supra* note 36.
39. See *supra* note 37.
40. See U.S. CONST. Art. I, § 7, Cl. 1.
41. See U.S. CONST. Art. I, § 9, Cl. 3.
42. 463 U.S. 582 (1983).
43. In general, courts may provide plaintiffs with two types of relief: compensatory and injunctive. Compensatory remedies aim to return the plaintiff to the position he would have held but for the defendant's actions. The paradigm example is money damages; the defendant has to pay the plaintiff for the damage caused by the defendant's actions. Back seniority, the relief the plaintiffs requested in *Guardians*, is a type of compensatory relief. Injunctive relief, on the other hand, amounts to an order from the court directing the defendant to take or cease some action. Injunctive relief, unlike compensatory relief, does not aim at making the plaintiff whole. The narrow issue before the Court in *Guardians* was whether compensatory relief (in that case, back seniority) was available for Title VI plaintiffs who do not allege intentional discrimination.
44. See *Guardians*, 463 U.S. at 586.
45. *Id.* at 588.
46. *Id.* at 607.
47. *Id.* at 612.
48. *Id.*
49. *Id.* at 611 n. 5.
50. *Id.* at 635.
51. *Id.* at 615.
52. *Id.* at 623.
53. *Id.* at 642 ("Today, proof of invidious purpose is a necessary component of a valid Title VI claim.").
54. *Id.* at 644-45 (asserting that "an 'effects' regulation is an...appropriate means for an administrative agency to implement" Title VI's prohibition on discrimination").
55. *Id.* at 593 ("[T]he compensatory relief denied petitioners...is unavailable to them under Title VI, at least where no intentional discrimination has been proved, as is the case here.").
56. *Id.* ("[I]t must be concluded that Title VI reaches unintentional, disparate-impact discrimination as well

as deliberate racial discrimination.").

57. *Marks v. United States*, 430 U.S. 188, 193 (1977)(citation omitted).
58. *See, e.g., New York Urban League, Inc., v. State of New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) ("[T]he [*Guardians*] Court concluded that Title VI delegated to federal agencies the authority to promulgate regulations incorporating a disparate impact standard."); *Roberts v. Colorado St. Bd. of Agriculture*, 998 F.2d 824, 832 (10th Cir. 1993) (referring to "the additional holding of *Guardians*, that 'although Title VI itself requires proof of discriminatory intent, the administrative regulations [under Title VI] incorporating a disparate-impact standard are valid'") (quoting *Guardians*, 463 U.S. at 584 [opinion of White, J.]).
59. 469 U.S. 287 (1985).
60. *Id.* at 309.
61. *Id.* at 292-93.
62. *See, e.g., Powell v. Ridge*, 189 F.3d 387, 399 (3d Cir. 1999); *Ferguson v. City of Charleston*, 186 F.3d 469, 479 n.10 (4th Cir. 1999); *City of Chicago v. Lindley*, 66 F.3d 819, 827 (7th Cir. 1995); *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993); *Craft v. Board of Trustees*, 793 F.2d 140, 142 (7th Cir. 1986).

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