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The Agency Roots of Disparate Impact

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INTRODUCTION

The disparate impact strand of antidiscrimination law provides the possibility of challenging harmful employment, education, housing, and other public and private policies and practices without the often-difficult burden of proving intentional discrimination. And yet the disparate impact standard seems to be facing its own burdens. Rulings by the Supreme Court in recent years have shaken the disparate impact standard's footing. In *Ricci v. DeStefano*,[1] the Court rejected a frontal assault to the disparate impact standard under Title VII of the Civil Rights Act of 1964,[2] but cast the standard as at odds with Title VII's true core — its prohibition of intentional discrimination.[3] In its 2001 decision in *Alexander v. Sandoval*,[4] the Court refused to allow private enforcement of the disparate impact regulations issued pursuant to Title VI of the Civil Rights Act of 1964,[5] and though it assumed the validity of these regulations, the Court noted their "considerable tension" with the dictates of the statute.[6] Then, in May 2013, the Court granted certi-

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[1] 557 U.S. 557 (2009).
[2] 42 U.S.C. §§ 2000e–2000e-17 (2006).
[3] 557 U.S. at 580–81.
[4] 532 U.S. 275 (2001).
[5] 42 U.S.C. §§ 2000d–2000d-7 (2006).
[6] 532 U.S. at 282 (assuming the validity of the disparate impact regulations under Title VI).

orari on the validity of the federal courts' longstanding interpretation of the Fair Housing Act ("FHA") to prohibit unjustified disparate impacts in *Township of Mount Holly, New Jersey v. Mt. Holly Gardens Citizens in Action, Inc.*[7] The Supreme Court appeared poised to decide the question, but the case was settled by the parties shortly before oral argument.[8] The Supreme Court has had past waves of skepticism about the doctrine. The Court's 1989 opinion in *Wards Cove Packing Co. v. Atonio*[9] made it harder for plaintiffs to establish disparate impact claims;[10] congressional rejection of this decision spurred the 1991 Civil Rights Act's codification of a burden-shifting standard for Title VII.[11] Indeed, even commentators supportive of disparate impact's inclusionary goals question the efficacy of the disparate impact standard[12] and ask whether the standard detracts from the assumed more important goal of addressing intentional discrimination.[13]

This Article argues that casting disparate impact as a disfavored, illegitimate, judicially created branch of antidiscrimination law fails to grapple adequately with disparate impact's longstanding roots as a tool employed by agencies to implement statutory antidiscrimination precepts. Nor does this view fully appreciate the continuing role that federal administrative agencies play in shaping the meaning of disparate impact today. Investigating the role of agencies in shaping disparate impact has new urgency: the Department of Housing and Urban Development ("HUD") recently promulgated regulations formalizing the FHA's disparate impact standard.[14] The rule's legality as well as its broader legitimacy crucially depend on one's view of agencies' formal powers, expertise, and capacity to define and shape dispa-

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[7] *See* Petition for Writ of Certiorari at 15–18, Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., No. 11-1507 (U.S. June 11, 2012), 2012 WL 2151511; Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 133 S. Ct. 2824 (2013) (granting cert.).

[8] Adam Liptak, *Fair-Housing Case Is Settled Before It Reaches Supreme Court*, N.Y. TIMES (Nov. 13, 2013), http://www.nytimes.com/2013/11/14/us/fair-housing-case-is-settled-before-it-reaches-supreme-court.html, *archived at* http://perma.cc/09Dhz2wn6E1; *see also* Order Dismissing Writ of Certiorari, *Mount Holly*, No. 11-1507 (U.S. Nov. 15, 2013), 2013 WL 6050174.

[9] 490 U.S. 642 (1989).

[10] *See id.* at 659–60 (holding that the employer bears only the burden of production on the question of business necessity, not the burden of persuasion); *id.* at 659 (replacing the business necessity prong with the requirement that the practice "serve, in a significant way, the *legitimate* goals of the employer" (emphasis added)).

[11] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

[12] *See* Michael Selmi, *Was the Disparate Impact Theory A Mistake?*, 53 UCLA L. REV. 701, 705 (2006) (arguing that "the disparate impact theory has produced no substantial social change" outside of "written employment tests"); *see generally* Charles F. Abernathy, *Legal Realism and the Failure of the "Effects" Test*, 94 GEO. L.J. 267 (2006) (arguing that the effects test the Supreme Court developed under Title VI proved judicially unmanageable).

[13] *See* Selmi, *supra* note 12, at 781 (arguing "that the presence of the disparate impact theory may have stunted the evolution of a more robust definition of intentional discrimination").

[14] *See* Implementation of the Fair Housing Act's Discriminatory Effect Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. §§ 100.5, 100.70, 100.120, 100.130, 100.500).

rate impact. This rulemaking brings to the fore the role of civil rights and federal agencies in shaping and interpreting disparate impact.

The new FHA regulations, I suggest, provide an occasion to examine afresh the disparate impact standard's origins in agency lawmaking and practice. Understanding the role of agencies in developing and shaping disparate impact standards has the potential to shore up the disparate impact standard's seemingly shaky normative foundations in a number of key ways. For one, including agencies in our account allows us to understand disparate impact not as a separate offshoot of antidiscrimination law invented by courts, but as a reasonable agency implementation choice given the potentially broad and conflicting meanings of the antidiscrimination directive of civil rights law. Agencies, not courts, first developed disparate impact under the Civil Rights Act of 1964, and, under standard administrative deference principles, agencies have authority to define the capacious term "discrimination" to include disparate impact.[15] In addition, agencies' implementation of disparate impact draws on their distinctive set of competencies relative to courts. For instance, in the context of fair housing, HUD's promulgation of disparate impact rules has the capacity to stabilize disparate impact law and to provide clarity to regulated entities subject to different judicial standards. Disparate impact's fate is intimately connected with civil rights' hybrid enforcement regime — one that lodges implementation power not just in courts, but also in agencies.

This Article's examination proceeds in three Parts. Part I considers the contested nature of disparate impact in recent Supreme Court jurisprudence, with attention to Title VI and Title VII. Part II recounts the longstanding agency role in developing and implementing disparate impact standards in the context of Title VI and Title VII. Though the implementing agencies at issue differ in their strength and capacity — the Equal Employment Opportunity Commission ("EEOC") has limited regulatory authority to enforce Title VII[16] — this Part reframes disparate impact as an implementation choice of long vintage and one that both the statutory and regulatory structure of civil rights statutes allow. Part III introduces Title VIII's disparate impact regulations. This Part argues that HUD's promulgation of a disparate impact rule requires us to take seriously the notion that agencies have the capacity to determine whether civil rights statutes reach disparate impact and to develop the standards for implementing disparate impact rules. Next, this Part considers the formal regulatory context that supports HUD's action — specifically, its rulemaking power, and its adjudicatory power born of the 1988 Amendments that fundamentally reshaped HUD's authority under the

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[15] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984). As discussed below, deference will be strongest for those agencies with authority to issue regulations with the force of law. *See* United States v. Mead Corp., 533 U.S. 218, 230 (2001).

[16] *See infra* notes 107–13 and accompanying text.

FHA. This Part considers, finally, HUD's function and competence to define disparate impact, showing how a disparate impact rule has the potential to provide clarity and predictability to regulated actors.

I. EROSION

After the Supreme Court's recent decisions in *Ricci v. DeStefano*[17] and *Alexander v. Sandoval*,[18] disparate impact's grounding seems shaky. In this Part, I consider the effect of those rulings, which address disparate impact under Title VII and Title VI of the 1964 Civil Rights Act (prohibiting certain forms of discrimination in employment and federally funded activities, respectively). While I believe that the Court is unlikely to eviscerate the disparate impact standard in the near future, its recent rulings have cast a shadow over the standard. As this Part shows, these decisions reflect a broader skepticism about the normative value and the provenance of disparate impact law.

In *Ricci v. De Stefano*, which arose out of a challenge to the promotion practices of the New Haven, Connecticut Fire Department,[19] the Court confronted an apparent conflict between the disparate treatment and disparate impact prohibitions of Title VII.[20] Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[21] The Supreme Court in *Griggs v. Duke Power*[22] interpreted the statute to allow claims of discrimination based on certain discriminatory effects.[23] As a result of the Civil Rights Act of 1991,[24] Title VII also includes a provision codifying the standard of proof in disparate impact cases.[25] As codified, the disparate impact provisions provide that a plaintiff establishes a prima facie case of disparate impact by showing that an employer uses "a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex or national origin."[26] In *Ricci*, the city claimed that it could not certify the

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[17] 557 U.S. 557 (2009).

[18] 532 U.S. 275 (2001).

[19] 557 U.S. at 561–62 (providing account of the examination process).

[20] *See* 42 U.S.C. § 2000e-2(a) (delineating employment prohibitions); *id.* § 2000e-2(k)(1)(A) (specifying burden of proof in disparate impact cases).

[21] *Id.* § 2000e-2(a)(1). The Act also makes it an unlawful employment practice for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." *See id.* § 2000e-2(a)(2).

[22] 401 U.S. 424 (1971).

[23] *Id.* at 429–36.

[24] The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

[25] 42 U.S.C. § 2000e-2(k).

[26] *Id.* § 2000e-2(k)(1)(A)(i).

results of a promotion examination because to do so would have a disparate impact on African American applicants.[27] By contrast, the plaintiffs in the case — one Hispanic and several white firefighters — challenged this refusal as violating Title VII's disparate treatment provisions.[28]

In its ruling, the Court concluded that the city's failure to certify the test violated Title VII's prohibition on disparate treatment. In arriving at its holding, the majority sought to "give effect" to both the disparate impact and disparate treatment dimensions of the statute, rejecting the plaintiffs' argument that an employer's actions to avoid disparate impact could never justify disparate treatment.[29] The Court then announced a new standard for resolving the asserted statutory conflict between the disparate impact and disparate treatment provisions of the Act.[30] Borrowing from prior constitutional decisions specifying when government actors may make race-conscious decisions to remedy past racial discrimination,[31] the Court required employers first to establish "a strong basis in evidence" of disparate impact liability.[32] This "strong basis in evidence" standard requires that the employers make more than a prima facie showing of disparate impact.[33]

The effect of *Ricci*, then, was to preserve statutory disparate impact, but to do so under a heightened standard ("strong basis in evidence") that may be difficult for employers to establish in particular cases. In addition, members of the Court majority called into question the stability of this compromise in separate opinions. In particular, Justice Scalia, while joining the majority opinion, argued that the decision "merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution's guarantee of equal protection?"[34] In Justice Scalia's view, *Ricci* resolved the conflict between disparate impact and disparate treatment, but a larger war — between Equal Protection and disparate impact — loomed.[35]

In examining *Ricci*, I do not propose to answer whether *Ricci* was correctly decided on statutory grounds or to take on Justice Scalia's challenge to

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[27] *See* Ricci v. DeStefano, 557 U.S. 557, 562 (2009).

[28] *Id.* at 575.

[29] *Id.* at 580.

[30] *See id.* at 582–83.

[31] *See id.* at 582 ("The Court has held that certain government actions to remedy past racial discrimination — actions that are themselves based on race — are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary." (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989))).

[32] *Id.*

[33] *See id.* at 587 (concluding that "a prima facie case of disparate-impact liability — essentially, a threshold showing of a significant statistical disparity, and nothing more — is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the results" (citation omitted)).

[34] *Id.* at 594 (Scalia, J., concurring).

[35] *See id.* at 595–96 ("But the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how — and on what terms — to make peace between them.").

justify the disparate impact standard's constitutionality. The constitutional arguments for disparate impact are well articulated in post-*Ricci* commentary.[36] Justice Ginsburg's dissent argued that the majority's "strong basis in evidence" standard was vague and lacked a basis in the statutory language, and she articulated some of the primary statutory interpretation arguments against the majority's holding.[37] For those interested in preserving Title VII's disparate impact standard, the decision certainly could have been worse. The Court explicitly affirmed the language and goals of Title VII's codified disparate impact standard and made clear that employers could take "affirmative efforts to ensure that all groups have a fair opportunity" and could design a test or practice to ensure a "fair opportunity for all individuals, regardless of their race."[38] In addition, a subsequent Court opinion unanimously endorsed a plaintiff's claim in a Title VII disparate impact case.[39] Instead, I offer *Ricci* as evidence of the incrementally more fragile state of disparate impact law, a standard clouded by suggestions that it may run afoul of core norms of equal treatment and antidiscrimination that are embodied in the statute.

A 2001 Supreme Court decision similarly cast a shadow over disparate impact — that time in the context of Title VI of the Civil Rights Act of 1964. Section 601 of Title VI provides that no person shall "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity" receiving federal funds.[40] Section 602 of the Title requires federal agencies "to effectuate the provisions" of the statute "by issuing rules, regulations, or orders of general applicability."[41] In compliance, federal agencies promulgated rules forbidding intentional discrimination as well as actions with a disparate impact. Specifically as to disparate impact, federal agency rules provide that funding recipients cannot "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin."[42] Unlike Title VII, Title VI contains no explicit private right of action. The Court in the 1979 case

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[36] *See, e.g.*, Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010).

[37] *See Ricci*, 557 U.S. at 627 (Ginsburg, J., dissenting) (arguing that the Court's test, "drawn from inapposite equal protection precedents, is not elaborated"). Justice Ginsburg argued that the Court had "stack[ed] the deck further by denying respondents any chance to satisfy the newly announced strong-basis-in-evidence standard." *Id.* at 631 ("When this court formulates a new legal rule, the ordinary course is to remand and allow the lower courts to apply the rule in the first instance.").

[38] *Id.* at 585 (majority opinion).

[39] *See* Lewis v. City of Chicago, 560 U.S. 205 (2010) (holding that a plaintiff who fails to file a timely charge when a disparate impact practice is adopted may challenge the later application of that practice in a disparate impact suit).

[40] 42 U.S.C. § 2000d (2006).

[41] *Id.* § 2000d-1.

[42] *E.g.*, DOJ Discrimination Prohibited, 28 C.F.R. § 42.104(b)(2) (2013); DOT Discrimination Prohibited, 49 C.F.R. § 21.5(b)(2) (2012).

Cannon v. University of Chicago[43] found Title IX of the Education Amendments of 1972 privately enforceable.[44] This decision explicitly encompassed Title VI, which had served as the model for Title IX.[45]

In *Alexander v. Sandoval*,[46] however, in an opinion authored by Justice Scalia, the Court held that though private suits were permissible to enforce section 601 of Title VI, the disparate impact regulations promulgated by the agencies were not privately enforceable. First, the Court relied on its past decisions holding that section 601 of Title VI prohibited only intentional discrimination.[47] As I discuss in greater detail in Part II, there is ample reason to be skeptical of these past decisions — they sealed a narrower definition of discrimination in the statute than that promulgated in agency regulations by the Executive Branch, which had participated in the drafting of the statute, shortly after passage.[48]

The Court's second move was to hold that the implied private right of action extended only to section 601 and not to its regulations. According to the Court, because the disparate impact regulations prohibited conduct that section 601 allowed, *Cannon*'s implied private right of action for section 601 could not carry over to the impact regulations.[49] Additionally, the Court found no intent to create a private right or remedy (no "rights creating language"[50]) in the text or structure of section 602.[51]

The Court's decision in *Sandoval* thus destabilized Title VI. Quite simply, it made the disparate impact provisions less useful for private parties — confining plaintiffs to administrative complaints rather than courts.[52] The decision also brought into sharp relief Title VI's own version of a *Ricci* problem: a seeming collision between section 601's coverage of intentional discrimination and the disparate impact regulations allowed by section 602. Justice Scalia's opinion for the Court assumed the validity of the regulations, noting that the State had not "challenged the regulations here."[53] Still, Justice Scalia's opinion highlighted the "considerable tension" between the dis-

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[43] 441 U.S. 677 (1979).

[44] *See id.* at 694.

[45] *See id.* at 694, 699. Further, after *Cannon*, Congress abrogated states' Eleventh Amendment sovereign immunity in Title VI suits. *See* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1807; *see also* Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 72 (1992) (reading these amendments as a "validation of *Cannon*'s holding").

[46] 532 U.S. 275 (2001).

[47] *Id.* at 280.

[48] *See infra* notes 90–96 and accompanying text.

[49] *See Sandoval*, 532 U.S. at 286 (relying on prior holding that a "private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute]" (alterations in original) (citation omitted)).

[50] *Id.* at 291.

[51] *Id.* at 289 ("Far from displaying congressional intent to create new rights, § 602 limits agencies to 'effecutat[ing]' rights already created by § 601." (alteration in original)).

[52] *See* Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1352 (2012) (noting effect of *Sandoval* on civil rights litigants).

[53] *Sandoval*, 532 U.S. at 282.

parate impact regulations and the Court's prior holdings that section 601 extended only to intentional discrimination.[54]

In general this skepticism about disparate impact reflects ideas echoed in other judicial decisions as well as academic commentary about the normative place of disparate impact in antidiscrimination law. This skepticism often stems from the idea that disparate impact originated from an exercise in judicial overreach — that the disparate impact standard instantiated a reading of the Civil Rights Act at odds with congressional understandings centered on intentional discrimination.[55] Other commentary has noted judicial reluctance to enforce robustly disparate impact standards in lower court litigation[56] — which I have elsewhere argued reflects judicial skepticism about judicial competence to administer the remedies seemingly required by disparate impact law and the standard's potential to destabilize a range of institutional actions.[57]

This skeptical reading casts disparate treatment firmly at the core of the antidiscrimination regime, with disparate impact teetering as antidiscrimination law's questionable spin off. In the next Part, I suggest that a harder look at the roots of disparate impact in agency actions has the potential to mitigate some of the concerns and skepticism that commentators and courts have about disparate impact law. On a formal level, administrative law precepts provide a basis for shoring up disparate impact: disparate impact — particularly for those agencies with interpretive authority — is a reasonable construction and implementation of the ambiguity of the meaning of "discrimination" that exists in all civil rights statutes. But beyond this formal justification of disparate impact, the next Part also argues that the agency role reminds us that disparate impact has always been a part of antidiscrimination law. Disparate impact standards were not invented by courts; agencies have played a role in developing and implementing those standards in ways that reflect their specific competence. I offer these arguments with an eye towards the upcoming battle over disparate impact stan-

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[54] *Id.*

[55] *See, e.g.*, Michael Evan Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 491–500 (1985); *see also* PAUL D. MORENO, FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA 1933–1972, at 1–2 (1997) (introducing "disparate impact" as outside of the "unequal treatment" colorblindness understanding that served as the foundation of civil rights laws); JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE AND JUSTICE IN AMERICA 120–21, 127–31 (1996) (describing developments such as disparate impact as moving away from the "color-blind" approach of Title VII, which focused on the intent of the discriminator).

[56] *See* Abernathy, *supra* note 12, at 294–312 (reviewing Title VI appellate court opinions); Selmi, *supra* note 12, at 734–42 (reviewing reported appellate and trial court Title VII decisions).

[57] *See* Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 399 (2007) (arguing, in the context of Title VI, that "concerns about judicial competence and the broad reach of disparate impact rules" have made some courts reluctant to adequately implement disparate impact rules).

dards in the FHA, where whether the Court provides deference to the agency depends crucially on abandoning the notion that disparate impact is solely for the courts to define.

II. Understanding the Agency Role

Disparate impact doctrine is not merely the invention of courts, but part of the implementation of antidiscrimination law by relevant agencies. This aspect of disparate impact has been intermittently recognized by commentators and in court opinions, but it bears emphasizing because the Court's 1971 *Griggs v. Duke Power Co.* decision is typically offered as the shorthand for disparate impact's creation. In this vein, the *Ricci* decision locates the Supreme Court's decision in *Griggs* that Title VII prohibited facially neutral practices that were "discriminatory in operation" as disparate impact's starting point.[58] The story, according to the *Ricci* Court, is that Title VII as enacted in 1964 provided "only for disparate treatment," but "in *Griggs v. Duke Power Co.*, the Court interpreted the Act to prohibit, in some cases, employers' facially neutral practices that in fact are 'discriminatory in operation.'"[59] Similarly, in the years before the 1991 Civil Rights Act codified the disparate impact proof framework, key commentators discussed (and defended) the Court's interpretation of disparate impact in *Griggs* as a product of common law judging — a judicial interpretation of a broadly worded statute.[60] Yet, as I show in this Part, agencies were the first movers in developing disparate impact standards in both Title VI and Title VII of the Civil Rights Act. This understanding of the agency role, I argue, should undermine any claim that the Civil Rights Act provided for "only" disparate treatment, and instead reveals disparate impact as a reasonable interpretive choice given the implementation problems that necessarily attend antidiscrimination law.

A. *Foregrounding Agencies*

In Title VII, the EEOC, and not courts, first elaborated what we now know as the disparate impact or "effects" standard. Prior to *Griggs*, the EEOC interpreted the 1964 Act to reach certain practices with a disparate impact. The 1964 Act explicitly authorized the use of "professionally developed ability test[s]" that are "not designed, intended or used to discriminate because of race."[61] In August 1966, the EEOC issued guidance interpreting "'professionally developed ability test' to mean a test which fairly measures

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[58] Ricci v. DeStefano, 557 U.S. 557, 577–78 (2009).

[59] *Id.*

[60] *See* George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 Va. L. Rev. 1297, 1306–07 (1987) (describing disparate impact as appropriate common law gap filling).

[61] 42 U.S.C. § 2000e-2(h) (2006).

the knowledge or skills required by the particular job or class of job."[62] The EEOC subsequently issued additional guidelines in 1970 requiring that employers using tests have available "data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[63] The EEOC's interpretive actions stemmed from early recognition that interpreting the Act as limited to intentional discrimination would make it ineffectual against a range of southern practices that had been adopted in the wake of the 1964 Civil Rights Act.[64]

Further, in the context of Title VI, federal agencies had interpreted that provision to include claims of disparate impact even before *Griggs* and the EEOC action. Within a year after the passage of Title VI, the federal agencies charged with implementing Title VI's prohibition of discrimination in federally funded programs promulgated regulations prohibiting not just intentional discrimination, but practices that have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."[65]

This account of the development of disparate impact law under Title VI and Title VII makes plain the longstanding place of disparate impact in antidiscrimination law. As I discuss below, these early interpretations of the Civil Rights Act by agencies to reach disparate impact suggest the absence of a time in which the meaning of discrimination was not contested — where the meaning of "discrimination" was solely limited to disparate treatment. The meaning of "discrimination" in fact emerges as agencies (as well as private litigants and courts) grapple with the problem of implementing civil rights statutes.

B. Implications

Agencies have played a key role in shaping the contours of the disparate impact standard. First, as I discuss below, agencies' interpretation of "discrimination" to include disparate impact occurred shortly after passage of the 1964 Civil Rights Act and thus speaks to the ambiguity in "discrimination" recognized by early interpreters. Second, in key respects, agencies define and implement disparate impact in light of their ability to identify

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[62] EEOC, GUIDELINES ON EMPLOYMENT TESTING PROCEDURES 2 (1966); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 433 n.9 (1971) (quoting EEOC, *supra*, at 2).

[63] Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(c) (1970); *Griggs*, 401 U.S. at 433 n.9 (relying on 29 C.F.R. § 1607.4(c)).

[64] ALFRED W. BLUMROSEN, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY 69–75 (1993).

[65] *See* 45 C.F.R. § 80.3(b)(2) (1965) (regulations of the Department of Health, Education, and Welfare).

evolving problems and challenges in implementing civil rights statutes' antidiscrimination directives.[66]

1. Shaping "Discrimination."

Discrimination is undefined in the 1964 Civil Rights Act, and in key decisions the Court has subtly charged itself with defining the contours of discrimination. In *Ricci*, for instance, the Court borrows the "strong basis in evidence" standard from its constitutional cases.[67] Given the potential breadth of the meaning of discrimination, the lack of an explicit definition, and the centrality of litigation as a method of implementing the 1964 Act,[68] the Court's common law judging approach to defining the contours of "discrimination" has a certain appeal.[69] It is the approach the Court adopted in cases like *Connecticut v. Teal*[70] and *Wards Cove v. Atonio*,[71] in which it developed rules for guiding disparate impact cases, filling the statutory gaps before the 1991 Civil Rights Act. Yet, an exclusively common law approach risks ignoring definitions of discrimination that may be at odds with judicial conceptions of discrimination. It also shields the way that the institutional context in which courts must implement antidiscrimination norms shapes judicial conceptions of discrimination. This context may be quite different for other institutional actors such as administrative agencies.[72] As I discuss in what follows, Congress did not settle on the contours of "discrimination" in the Civil Rights Act, and it gave agencies a role in shaping the meaning of discrimination.

In the case of Title VII, the original text of the 1964 Act cannot answer the question of whether "discrimination" includes disparate impact. It is no doubt true that language in section 703(h) of the 1964 Civil Rights Act, added on the floor during Senate debates, states that it is not unlawful "for an employer to give and to act upon the results of any professionally devel-

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[66] *See* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES 7 (2010).

[67] *See* Ricci v. DeStefano, 557 U.S. 557, 582–84 (2009).

[68] *See* Johnson, *supra* note 52, at 1346 (describing the private attorney general model as "an important mechanism for advancing antidiscrimination goals" while addressing its limitations).

[69] *See* Margaret H. Lemos, *Interpretive Methodology and Delegations to Courts: Are "Common Law Statutes" Different?*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 89, 96 (Shyamkrishna Balganesh ed., 2013) (arguing that because the EEOC "does not have the authority to create binding substantive regulations interpreting and implementing Title VII, as a practical matter courts are responsible for elaborating the meaning of the statute"); Rutherglen, *supra* note 60, at 1299–1307.

[70] 457 U.S. 440, 451 (1982) (holding that the plaintiffs established a prima facie case of disparate impact by showing that one component of a selection procedure had a discriminatory disparate impact even if the "bottom line" final pool included an appropriate representation of minorities).

[71] 490 U.S. 642, 658–60 (1989) (adopting a test that made it easier for defendants to satisfy disparate impact's burden shifting test).

[72] *See* Johnson, *supra* note 57, at 389–90, 399–400 (discussing limitations of disparate impact as deriving in part from concerns about institutional competence).

oped ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."[73] Yet this begs the question of what "discriminate" means. Congress left "discrimination" undefined in the Act. The legislative history, well pored over as we near the fiftieth anniversary of the Act, contains conflicting history on whether "discrimination" was meant to be limited to intentional discrimination, with arguments supporting both sides.[74] All told, neither the text nor the legislative history can settle the question of what "discriminate" means.

Additionally, as several commentators have noted, prevailing ideas of "discrimination" at the time of the 1964 Civil Rights Act advanced in administrative and other implementation contexts include the disparate impact standard ultimately adopted by the EEOC.[75] Paul Moreno has shown that the disparate impact approach was rooted in notions advanced by federal agencies in the New Deal era and by executive orders advanced in the early years of the Kennedy Administration.[76] More recently, Professor Susan Carle has revealed that the EEOC implementation of disparate impact grew in part out of work by civil rights groups and the New York State Commission Against Discrimination before passage of the Civil Rights Act. According to Carle, the Commission advanced early versions of the disparate impact idea to address the difficulties in proving intentional discrimination.[77]

Moreover, adding Title VI to the analytic mix casts further doubt on a claim that Congress had in mind a fixed notion of "intentional discrimination" and should buttress the legitimacy of agencies' role in shaping the meaning of discrimination. Title VI is where the Court has been most forceful in limiting the meaning of the statute — defining the statute as confined to intentional discrimination and thus creating the awkward collision dis-

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[73] Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h) (2006).

[74] The key prohibitions of the Act, including the meaning of "discrimination," were undefined. In the absence of a definition, commentators have drawn opposing conclusions about whether Congress intended to encompass claims of disparate impact. *Compare* Gold, *supra* note 55, at 491–500 (contending that Congress intended Title VII to prohibit only intentional discrimination), *with* Rutherglen, *supra* note 60, at 1302–07 (disputing claims that Congress meant to limit Title VII to intentional discrimination). Senator Hubert Humphrey, a key sponsor, stated that "[t]he meaning of racial or religious discrimination is perfectly clear. . . . it means a distinction in treatment given to different individuals because of their race, religion, or national origin." 110 CONG. REC. 5423 (1964). Humphrey's remarks may be read as supporting a disparate treatment account. But Professor Alfred Blumrosen, a former counsel at the EEOC who played a role in developing the effects test, has noted ambiguity in even this statement as to whether the "differential treatment" could be based on policies that might be race-neutral but have a racial effect. *See* BLUMROSEN, *supra* note 64, at 50–51 ("Does Senator Humphrey's statement help decide whether the 'difference in treatment' has to be intentional? Does the phrase 'because of' race or sex require a conscious intent or a result which affects people differently depending on their race?").

[75] *E.g.*, Neal E. Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1738–39 (1991).

[76] PAUL D. MORENO, FROM DIRECT ACTION TO AFFIRMATIVE ACTION: FAIR EMPLOYMENT LAW AND POLICY IN AMERICA 1933–1972, 1–2 (1997).

[77] Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 294–96 (2011).

cussed in *Sandoval* in which a disparate treatment statute seems at odds with disparate impact regulations.[78] But this reading of the statute, which separates the asserted true meaning of the statute from its implementing regulations, results from a set of disjointed decisions of the Supreme Court. Specifically, in *Regents of the University of California v. Bakke*[79] — best known for its ruling on the constitutionality of higher education affirmative action — five Justices of the Court contended that section 601 of Title VI prohibits only intentional discrimination.[80] These five justices held that Title VI could extend no further than the Constitution, and thus, pursuant to the Supreme Court's decision in *Washington v. Davis*,[81] required a showing of intent.[82] This portion of the opinion is arguably dicta as neither the plaintiff's claim nor the Court's decision turned on whether the statute prohibited intentional or disparate impact discrimination. Yet, in subsequent decisions, the Court has relied on *Bakke* to conclude that the Title VI statute by its terms — Title VI "itself" — is limited to intentional discrimination.[83]

At the outset, even apart from the role of the agency, there are strong reasons to doubt this reading of Title VI. Discrimination is undefined in Title VI (as in Title VII) and the legislative record advances no clear account of the meaning of discrimination. To be sure, there is language in Title VI's legislative history to support Justice Powell's conclusion in *Bakke* that Congress intended through Title VI to remedy violations of the Constitution.[84] But the legislative record supports an expansive reading of those constitutional norms and of Title VI's goals. President Kennedy, in introducing Title VI, announced its broad goals, stating that "[s]imple 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 discrimination."[85] A key Senate sponsor of Title VI contended that Title VI targeted practices of segregation and discrimination, even those that might not be firmly unconstitutional, instituting a mandate that federal funds be "spent in accordance with the Constitution and the moral sense of the Na-

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[78] *See* Alexander v. Sandoval, 532 U.S. 275, 280 (2001) ("It is beyond dispute . . . that § 601 prohibits only intentional discrimination."); *id.* at 285 ("It is clear . . . that the disparate-impact regulations do not simply apply § 601 — since they indeed forbid conduct that § 601 permits — and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.").

[79] 438 U.S. 265 (1978).

[80] *Id.* at 282 ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.").

[81] 426 U.S. 229 (1976).

[82] *Bakke*, 438 U.S. at 287 (Powell, J., announcing the judgment of the Court); *id.* at 328 (opinion of Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part).

[83] Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 610 (1983) (Powell, J., concurring); *id.* at 612 (O'Connor, J., concurring); *id.* at 642 (Stevens, J., dissenting).

[84] Justice Powell's review of the "voluminous legislative history of Title VI" led him to conclude that Congress intended to "halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution." *Bakke*, 438 U.S. at 284.

[85] 109 CONG. REC. 11,174, 11,178 (1963).

tion."[86] Congressional members referred to constitutional norms in ways that encompassed disparate impact.[87]

It is thus far from clear that participants in the legislative process equated the constitutional standard with intentional discrimination or disparate treatment. What does seem clear, however, is that the Court has read Title VI in line with its own constitutional rulings, rulings that came subsequent to Title VI. Two terms prior to deciding *Bakke* — but twelve years after passage of Title VI — the Court held in *Washington v. Davis* that the Equal Protection Clause only extended to claims of disparate treatment.[88] The distinction, however, between impact and intent was not firmly established in constitutional analysis at the time of the 1964 Civil Rights Act, as evidenced by equal protection decisions prior to *Washington v. Davis* in which lower courts applied impact analysis in constitutional law.[89]

This account may also have implications for Title VII. While Title VII developed on a separate track from Title VI, it was part of the same Act and it would seem unlikely that "discrimination" should acquire a different meaning in the fair employment context than in the context of programs receiving federal funding. At minimum, any such distinction would likely have prompted some explanation in the legislative record.

To bring the agencies' enforcement role into the account raises further questions about the extant doctrinal understanding of Title VI as limited to intentional discrimination. While Congress gave the EEOC limited power in enforcing Title VII, Title VI sought to unleash administrative power. In enacting Title VI, Congress explicitly gave agencies power to determine whether federal fund recipients were engaging in discrimination or exclusion, and to adopt appropriate remedies including the termination of federal

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[86] 110 CONG. REC. 6490, 6544 (1964) (statement of Sen. Humphrey); *see also id.* ("In many instances the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. This is clearly so wherever Federal funds go to a State agency which engages in racial discrimination. It may also be so where Federal funds go to support private, segregated institutions . . . . In all cases, such racial discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation.").

[87] For instance, one of the House sponsors suggested an understanding of the constitutional requirements as going beyond invidiousness, contending that "the Constitution may impose on the United States an affirmative duty to preclude racial segregation or discrimination by the recipient of Federal aid." 110 CONG. REC. 1514, 1528 (1964) (statement of Rep. Celler); *see also* Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination,"* 70 GEO. L.J. 1, 29–30 (1981) (detailing lack of agreement among members of the legislative and executive branch on the meaning of discrimination).

[88] 426 U.S. 229 (1976) (rejecting the contention that an official act is unconstitutional solely because it has a racially disproportionate impact); *see also* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977) (holding that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact").

[89] *See, e.g.*, Hawkins v. Town of Shaw, 437 F.2d 1286, 1290 (5th Cir. 1971); Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

funding.[90] The statute required executive agencies and departments to promulgate regulations to enforce the substantive provisions of the statute.[91] The statute also required that the President explicitly approve these regulations.[92] These first regulations promulgated under Title VI in 1964 contained language specifying an "effects" standard[93] and resulted from an extraordinary coordinated drafting effort of all federal agencies and the White House.[94] Each agency drafted a rule and submitted it to the Department of Justice, which then worked with a task force consisting of the White House, the Bureau of Budget, and the Civil Rights Commission to draft the final rules.[95] The task force first developed regulations for the Department of Health, Education, and Welfare, which then became the model for all other federal agencies.[96]

The relevance of Congress' grant of significant power through Title VI is twofold. First, considerable evidence in the legislative record suggests that Congress did not settle on a meaning of discrimination in the statute, and instead delegated to agencies the power to develop a context-specific understanding of discrimination.[97] Second, and more fundamentally, as I discuss in the next section, Title VI created an explicit regime that allowed the agency authority in shaping disparate impact — a regime in which Title VI "itself" and its regulations are intimately connected.

Read as a whole, the Civil Rights Act of 1964 leaves open the meaning of "discrimination" and, especially in the case of Title VI, provides an explicit role for agencies in shaping its meaning.

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[90] *See* 42 U.S.C. § 2000d-1 (2006) (empowering agencies to enforce their regulations by terminating funding or "by any other means authorized by law").

[91] *See id.*

[92] *See id.* ("No [enforcement] rule, regulation, or order shall become effective unless and until approved by the President.").

[93] *See* HEW Discrimination Prohibited, 45 C.F.R. § 80.3(b)(2) (1965) ("A recipient . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.").

[94] Comment, *Title VI of the Civil Rights Act of 1964 — Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 846 n.19 (1967–1968).

[95] *Id.* at 845–46.

[96] *Id.* at 846.

[97] Abernathy, *supra* note 87, at 29–30 (providing evidence that provision of regulatory authority to define discrimination emerged as a compromise). Attorney General Robert Kennedy, testifying in support of the bill, contended that while section 601 would provide "a general criterion to follow," agencies "will establish the rules that will be followed in the administration of the program — so that the recipients of the program will understand what they can or cannot do." *Civil Rights: Hearings on H.R. 7152 Before the H. Comm. on the Judiciary*, 88th Cong. 2740 (1963) (statement of Robert Kennedy, Att'y Gen. of the United States).

2. *Disparate Impact Implementation and Agency Competence.*

The implementation of disparate impact also stems from a set of agency competences that differ from those of courts. While judicial resistance to disparate impact may stem in part from concerns about court capacity to determine what impacts should be actionable and to develop appropriate remedies,[98] agencies develop disparate impact within a particular regulatory and programmatic context in response to their knowledge of problems in a particular area.[99] Disparate impact must be understood within the contours of civil rights' hybrid enforcement regime — one which gives agencies the power to promulgate regulations and guidance, and to review and resolve complaints. Looking first at Title VII and then at Title VI, this section shows how this hybrid enforcement regime contributes to our understanding of disparate impact.

Disparate impact in Title VII emerged from the EEOC's recognition of employers' potentially easy evasion of the statute's goal through the adoption of formally race-neutral but exclusionary methods. The 1964 Civil Rights Act authorized the use of "professionally developed ability tests" that are not "designed, intended or used to discriminate because of race,"[100] and the EEOC issued guidance in August 1966 interpreting "'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs."[101] The EEOC subsequently issued additional guidelines in 1970 requiring that employers using tests have "empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[102] This guidance constituted the EEOC's response to practices by southern employers that restricted employment opportunities for blacks, but that were facially race neutral.[103] In the absence of clear evidence that

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[98] *See supra* note 57 and accompanying text.

[99] This functional argument about agency expertise is linked of course to the underlying justifications for deference in administrative law. As the Court noted in *Skidmore v. Swift & Co.*, deference to agencies is warranted because agencies' interpretations "constitute a body of experience and informed judgment." 323 U.S. 134, 140 (1944) (outlining the factors that bear on an agency's "power to persuade" even in the case of nonbinding interpretations that lack formal "power to control").

[100] 42 U.S.C. § 2000e-2(h) (2006).

[101] EEOC, *supra* note 62, at 2; *accord* Griggs v. Duke Power Co., 401 U.S. 424, 433 n.9 (1971) (quoting EEOC, *supra* note 62, at 2).

[102] Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(c) (1970); *accord Griggs*, 401 U.S. at 433 n.9 (relying on 29 C.F.R. § 1607.4(c)).

[103] Historian Hugh Graham provides a skeptical account of the EEOC's move to disparate impact, but even so notes in his account that the "[EEOC] nevertheless enjoyed an abundance of targets throughout the South that fairly begged for a linkage between statistical disparities and certain highly suspect practices of the workplace. High on such a list were two formidable barriers to black advancement: employee tests and seniority systems." HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA: ORIGINS & DEVELOPMENT OF NATIONAL POLICY 1960–1972, at 247–48 (1990).

these practices were adopted to bar blacks intentionally, challenging those practices would be nearly impossible.[104] In addition, the EEOC's disparate impact regulations permitted a structural response to the problem of discrimination and exclusion — allowing group-based remedies rather than piecemeal individual litigation or complaints.[105] Under this account, disparate impact is the agency's pragmatic, problem-solving response to the challenges of implementing the statute.[106]

Some have no doubt viewed the EEOC's interpretive move skeptically given that Congress created the EEOC as a weak agency, and limited it to issuing "procedural" regulations to enforce Title VII.[107] And to be sure, the EEOC's regulatory limitations mean that its actions will not be afforded deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[108] but the more limited *Skidmore* deference.[109]

Yet if the EEOC lacks power to issue binding substantive regulations, the 1964 Civil Rights Act granted the EEOC a set of enforcement powers that proved important in developing the disparate impact standard. The

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[104] BLUMROSEN, *supra* note 64, at 73.

[105] *Id.* at 80. Sociologist John Skrentny has argued generally that the EEOC's development of group-based solutions like affirmative action and disparate impact represented a pragmatic way to deal with a flood of individual complaints. JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION 125–27 (1996) (in the context of affirmative action, providing an account of EEOC's "administrative pragmatism" — its realization that "responding to the complaints of properly abstract citizens was a blueprint for failure").

[106] Susan Carle has emphasized this point most recently. *See* Carle, *supra* note 77, at 297. Alfred Blumrosen, a key drafter of the EEOC's initial disparate impact guidance, has supported the *Griggs* decision on similar rationales. BLUMROSEN, *supra* note 64, at 73–75 (arguing that the effects test was not compelled by the statute but was a pragmatic regulatory choice; the "effect test was aimed at changing industrial relations systems with a minimum of governmental effort and at maximizing the influence of the law on industrial relations practices").

[107] A key compromise in the 1964 Civil Rights Act ensured that the EEOC would be a constrained, weak agency. Though civil rights advocates urged the creation of an agency with lawmaking and adjudicatory power over Title VII complaints, opponents advocated for an agency with less power. On this front, opponents won and the EEOC, as created, lacked adjudicatory power, and its regulatory power was limited to "procedural" rather than substantive regulations. For an account, see SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 106–09, 113–14 (2010) (detailing stances on the power of the proposed EEOC and congressional actions limiting EEOC enforcement power) and Robert C. Lieberman, *Weak State, Strong Policy: Paradoxes of Race Policy in the United States, Great Britain, and France*, 16 STUD. AM. POL'Y. DEV. 138, 138, 141 (2002).

[108] 467 U.S. 837, 844 (1984).

[109] *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944). Prior to *Chevron*, the Court in *Griggs* held that "administrative interpretation of the Act by the enforcing agency is entitled to great deference," Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971), but it has subsequently been unwilling to grant the EEOC *Chevron* deference, *see, e.g.*, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 n.6 (2002) (applying *Skidmore* deference to the EEOC's interpretation of what constitutes a continuing violation under Title VII). *See generally* Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1941–45 (2006). Indeed, as Melissa Hart has noted, even where the EEOC has formal rulemaking power (as for procedural regulations or for certain provisions in the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12116 (2006)), the Court has not consistently afforded the agency *Chevron* deference. *See* Hart, *supra*, at 1941–45 (detailing those decisions in which the Court declined to determine the appropriate standard of deference to the EEOC's interpretation or declined to give it *Chevron* deference).

EEOC was charged with investigating complaints from private litigants under the Act, but beyond that had the power to conduct investigations, hold hearings, and subpoena information from employers. This provided the EEOC with greater understanding of on-the-ground realities facing African American workers, and the practices engaged in by employers that undermined the goals of the Civil Rights Act.

The EEOC can also shape the enforcement of disparate impact in ways that emerge from its knowledge of the contexts in which the standard might be enforced. For instance, the EEOC developed disparate impact guidance, providing more specific rules for determining the extent of the impact necessary to create a cause of action. In 1978 the EEOC announced a guidance delineating that a selection rate for a protected group that is less than four-fifths of the applicant pool, or 80%, generally constitutes an adverse impact.[110] The agency also issued guidance on how to create valid selection devices.[111] The EEOC has also over the years developed rules on how to avoid practices with disparate impacts — most recently issuing guidance on how employers might avoid disparate impact discrimination in the consideration of arrest and conviction records in employment decisions.[112] This type of guidance, even if not binding on employers,[113] provides notice to employers of claims that might trigger enforcement attention[114] and serves the goal of promoting voluntary compliance with the Act — addressing discrimination without resort to court enforcement.[115] Agencies like the EEOC process administrative complaints, hold hearings, and conduct investigations[116] that provide them with knowledge of specific exclusionary practices, and that

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[110] *See* Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,290, 38,294 (Aug. 25, 1978); Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 40,223, 40,223 (Sept. 11, 1978).

[111] *See* Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, 44 Fed. Reg. 11,996, 11,997 (Mar. 2, 1979).

[112] *See* EEOC, ENFORCEMENT GUIDANCE NO. 915-02, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 8 (2012), *available at* http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf, *archived at* http://perma.cc/0PUfqddovdX.

[113] The Supreme Court grants the more limited *Skidmore* deference to EEOC guidelines. *See, e.g.*, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 n.6 (2002) (applying *Skidmore* deference to the EEOC's interpretation of what constitutes a continuing violation under Title VII).

[114] *See* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007) (noting that guidance documents serve to "interpret existing law through an interpretive rule or to clarify how they tentatively will treat or enforce a governing legal norm through a policy statement").

[115] *See* H.R. REP. NO. 88-914, pt. 1, at 18 (1963) (contending that the Act would "create an atmosphere conducive to voluntary or local resolution of other forms of discrimination"); EEOC, COMPLIANCE MANUAL SECTION 15: RACE & COLOR DISCRIMINATION 15-3 (2006), *available at* http://www.eeoc.gov/policy/docs/race-color.pdf, *archived at* http://perma.cc/05BWJRs2HY2 (issuing manual to further EEOC's "strong interest in proactive prevention and 'best practices'").

[116] *See* 42 U.S.C. §§ 2000e-4–2000e-5 (2006) (specifying duties and responsibilities of the EEOC).

also allow them to suggest remedies and best practices responsive to the requirements of various stakeholders. By contrast, courts are less well positioned to adopt this kind of tailored enforcement. Commentators like Professor Selmi have shown how courts are often reluctant to find violations of Title VII on a disparate impact theory, and often defer to the employer's claims of business necessity.[117] Similarly, I have suggested that this caution in applying disparate impact reflects courts' concern about their capacity to impose a broad remedy or their reluctance to interfere with institutional decisionmaking.[118]

The power agencies have to shape disparate impact standards is even more robust in the context of Title VI. In Title VI, the 1964 Civil Rights Act gives a strong role to federal agencies to adopt rules and regulations to implement antidiscrimination prohibitions, rules that are binding on federal agencies and grantees. The effects test in Title VI arose immediately after the Act, as agencies sought to have mutually consistent rules to give clarity to grantees and to allow themselves flexibility to develop rules for the programs they regulate.[119] Federal agencies have gone beyond this initial articulation of broad disparate impact rules to detail what disparate impact means in particular regulatory contexts. As I have noted in prior writing, agencies have detailed rules in the context of transportation and agriculture that require federal grantees to take affirmative steps to avoid disparate impacts.[120] These rules emerged from agencies' supervision of a specific set of programs and the expertise they acquired about the types of discrimination and exclusion that arose in those programs.

In the context of Title VI, the power of federal agencies to resolve civil rights complaints further shapes disparate impact. The factfinding and remedial powers provided in this administrative context differ from those of courts. When a complainant alleges disparate impact, federal agencies can investigate the claim with greater knowledge about the underlying program than a generalist court would have. In shaping the remedy, a federal agency has the power not only to withhold funds, but also to develop a remedial

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[117] *See* Selmi, *supra* note 12.

[118] *See* Johnson, *supra* note 57, at 399–401.

[119] A large part of the urgency in drafting Title VI rules was the fear of agency power with regard to terminating federal funds. Senator Pastore, in explaining section 602 on the Senate floor, made clear that agencies were given a "certain degree of latitude in the procedure by which [they] accomplish[ ] the mandate to eliminate discrimination" but that "[a]ction is mandatory." 110 CONG. REC. S2,7058 (daily ed. Apr. 7, 1964) (statement of Sen. Pastore); *see also id.* at 7059 ("The rule or regulation issued by the particular Federal agency would vary, depending on the nature and method of administration of the particular assistance program.").

[120] *See, e.g.*, 49 C.F.R. pt. 21 (2013); FED. TRANSIT ADMIN., U.S. DEP'T OF TRANSP., CIRCULAR FTA C 4702.1A, TITLE VI AND TITLE VI-DEPENDENT GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS II-1 (2007); OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF AGRIC., CIVIL RIGHTS IMPACT ANALYSIS 1 (2003), *available at* http://www.ocio.usda.gov/directives/doc/DR4300-4.pdf, *archived at* http://perma.cc/04sYB8Cjr41; *see also* Johnson, *supra* note 52, at 1364.

plan, working with federal grantees to adopt practices that may mitigate impacts found.[121] The Department of Education, which is charged with enforcing Title VI, has used this strategy. In recent years, plaintiffs have filed administrative complaints against school districts whose discipline policies allegedly adversely impacted minority school children.[122] Upon finding disparate impact, the Department of Education has worked with school districts as well as complainants to develop best practices in school discipline policies that avoid discriminatory effects, promote safety, improve data collection and record keeping, and allow input from affected families and students.[123] Agencies do not work within the binary structure that generally characterizes litigation, and thus can develop a set of tailored remedies or alternative practices that respond to various constituencies and stakeholders.

Any discussion about agencies' expertise and capacities must of course be careful to grapple with their limitations. Agencies are subject to political manipulation and capture by particular interests, and may be insufficiently aggressive in promoting civil rights goals.[124] When they do undertake vigorous enforcement activity, they are subject to criticism for overreaching.[125] The flexibility that agencies have to craft remedies may be subject to claims that the agencies' actions are arbitrary.

My claim, however, is not that agency enforcement is superior to that of courts or that agencies will always rise to their enforcement or regulatory capacity. Rather, it is to emphasize that the 1964 Civil Rights Act's antidiscrimination regime, in which disparate impact operates, is a hybrid regime with agencies as key players as well as courts. Understanding this hybridity provides a richer account of how disparate impact standards actually emerged and of how they are enforced by agencies charged with investigating, rulemaking, and complaint resolution. This hybridity responds to the

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[121] *See* Coordination of Enforcement of Non-discrimination in Federally Assisted Programs, 28 C.F.R. § 42.411 (2013) (detailing methods of resolving noncompliance).

[122] *See* U.S. DEP'T OF EDUC., OFFICE OF CIVIL RIGHTS, TITLE VI ENFORCEMENT HIGHLIGHTS 8 (2012), *available at* www2.ed.gov/documents/press-releases/title-vi-enforcement.pdf, *archived at* http://perma.cc/0Wz74knAGnE (stating that from fiscal year 2009 to fiscal year 2011, the Department of Education received 900 complaints about civil rights violations involving school discipline, and from fiscal year 2009 through early 2012 the Office of Civil Rights launched twenty investigations).

[123] *See id.* at 9–10 (detailing remedies developed with school districts including teacher training, providing support for struggling students, implementing school climate surveys, establishing district-wide discipline coordinator, creating systems for collecting and evaluating data on school discipline, and developing programs to share information with families and students).

[124] For instance, the NAACP Legal Defense Fund initiated litigation to force what was then the Department of Health, Education, and Welfare to enforce Title VI in higher education. *See* Adams v. Richardson, 356 F. Supp. 92, 94 (D.D.C. 1973), *modified*, 480 F.2d 1159 (D.C. Cir. 1973). The D.C. Circuit ultimately dismissed the case, holding that the private parties could not bring actions against federal officials for failing to enforce Title VI. *See* Women's Equity Action League v. Cavazos, 906 F.2d 742, 748 (D.C. Cir. 1990).

[125] *See, e.g.*, STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 52–57 (1995) (describing criticism of the Department of Health, Education, and Welfare's 1966 Guidelines promoting school integration).

limitations and concerns raised about the potentially broad reach of disparate impact standards when one focuses only on their enforcement by courts.[126]

III. Implications for Fair Housing

How we understand the role of agencies in shaping disparate impact has implications for the looming battle over disparate impact under the Fair Housing Act of 1968 ("FHA"). The lesson learned from an examination of Title VI and Title VII is that the civil rights regime did not settle on a meaning of discrimination, and that agencies have long had a role in shaping disparate impact. The agency actions that shaped disparate impact are consistent with agencies' formal roles in the civil rights regulatory regime as well as their functional reality. The story of disparate impact is not the same for each statute or each agency. Under Title VII, the EEOC cannot issue binding substantive rules to enforce the statute. But it has and can shape disparate impact through its formal powers and functions of investigation and problem solving, and by issuing guidance followed by employers.[127] Title VI contemplates a different role for agencies, giving them power to issue binding rules and regulations for their programs and grantees, and also power to investigate and resolve claims of discrimination.[128]

The FHA, which I turn to in this Part, has its own story. The FHA, though it uses the language of discrimination, is not part of the same 1964 statute that contains Title VI and Title VII. And the agency's disparate impact rule emerged for the first time in February 2013, years after initial passage of the statute. Indeed, much commentary locates the origins of the FHA's disparate impact theory not in administrative law or practice, but instead in a lower court opinion — *United States v. Black Jack*[129] — in which the Eighth Circuit read the FHA *in pari materia* with Title VII (after *Griggs*) to reach effects claims.[130] And yet, as I explore below, a focus on HUD's particular competence and capacities helps us understand its interpretive and regulatory role. I offer this not only as a basis for sustaining HUD's action as a reasonable reading of the statute under *Chevron*, but also to suggest more broadly that this deference makes sense given the expansive powers that the FHA as amended in 1988 gives to HUD in the fair housing regulatory regime.

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[126] *See supra* notes 56–57 and accompanying text (discussing judicial competence about broad reach of disparate impact standards and courts' ability to administer remedies).

[127] *See supra* notes 61–63 and accompanying text.

[128] *See supra* note 65 and accompanying text.

[129] 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

[130] *Id.* at 1184–85.

A. The Emergence of Disparate Impact in the FHA

The FHA makes it unlawful to "refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[131] The Act allows for private enforcement in court and in administrative adjudications by HUD, but like Title VII prior to the 1991 amendments, it does not explicitly delineate a disparate impact standard.

1. Interpretation by Courts.

In the 1974 case *United States v. Black Jack*, the Eighth Circuit read the Act to allow claims of disparate impact.[132] The litigation began when the United States brought a claim under the FHA against the City of Black Jack, Missouri — a town with few racial minorities — for adopting a zoning ordinance that prohibited the construction of any multiple-family dwellings.[133] The United States contended that this zoning exclusion operated to exclude low- and moderate-income residents who in the context of the racial composition of the surrounding county were overwhelmingly African American.[134] In holding that the FHA extended to disparate impact claims, the court found that the Act was designed to prohibit "'all forms of discrimination, sophisticated as well as simple-minded,'"[135] and analogized to Title VII (as interpreted by *Griggs*) which seeks "'the removal of artificial, arbitrary, and unnecessary barriers'" in employment.[136] "Effect," the *Black Jack* court emphasized, "and not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because '. . . [w]hatever our law was once, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.'"[137]

In the years after *Black Jack*, courts of appeals around the country went on to interpret the FHA to allow disparate impact claims.[138] Such seemed

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[131] 42 U.S.C. § 3604(a) (2006).

[132] *Black Jack*, 508 F.2d at 1184–85.

[133] *Id.* at 1181–82.

[134] *Id.* at 1183 (noting that "[t]he virtually all-white character of Black Jack was in marked contrast to the racial composition of other parts of the St. Louis area"). The United States had also pursued a claim of intentional discrimination, which the lower court dismissed and which was left undisturbed by the Court of Appeals. *Id.* at 1182.

[135] *Id.* at 1184 (quoting Williams v. Matthews Co., 499 F.2d 819, 826 (8th Cir. 1974)).

[136] *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

[137] *Id.* at 1185 (quoting Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc)).

[138] *See* Langlois v. Abington Hous. Auth., 207 F.3d 43, 49 (1st Cir. 2000); Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1251 (10th Cir. 1995); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935–36 (2d Cir. 1988), *aff'd in part*, 488 U.S. 15 (1988); Hanson v. Veteran's Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); Arthur v. City of Toledo, 782 F.2d 565, 574–75 (6th Cir. 1986); United States v. Marengo Cnty. Comm'n, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984), *cert. denied*, 469 U.S. 976

the state of the law, a unanimity even noted by a key sponsor of the 1988 Amendments to the FHA, which strengthened the Act's core enforcement provisions.[139] Yet, the Supreme Court has never ruled on the issue. In May 2013, the Court granted certiorari on the question of whether the FHA permits disparate impact claims in *Township of Mount Holly, New Jersey v. Mt. Holly Gardens Citizens in Action.*[140] In the case, residents affected by the township's proposed redevelopment plan, which sought to demolish a neighborhood and rebuild new homes on the site, claimed that the plan would have a disparate impact on minority residents whose homes were disproportionately affected by the plan, and who could not afford to purchase the redeveloped housing.[141] The court of appeals reversed the district court's holding that the plaintiffs had failed to establish a prima facie case of disparate impact[142] and the Supreme Court granted review.[143] The parties later settled the case,[144] postponing — at least for the 2013 term — Supreme Court review of this question.

2. HUD's Disparate Impact Rule.

As the *Mount Holly* case was winding its way through the courts, HUD, in February 2013 — after a period of notice and comment — issued a rule providing that: "[l]iability may be established under the Fair Housing Act based on a practice's discriminatory effect . . . even if that practice was not

(1984); Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1065 (4th Cir. 1982); Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977), *cert. denied sub nom.* City of Philadelphia v. Resident Advisory Bd., 435 U.S. 908 (1978); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

[139] *See* 134 CONG. REC. 23,711–12 (1988) (Sen. Kennedy, stating on the Senate floor prior to the vote on the FHA amendments that "Congress accepted th[e] consistent judicial interpretation" "of the [f]ederal courts of appeals that" the FHA "prohibit[s] acts that have discriminatory effects, and that there is no need to prove discriminatory intent"); *see also Fair Housing Amendments Act of 1988: Hearing on H.R. 558 Before the S. Committee on the Judiciary*, 100th Cong. 529 (1987) (testimony of Robert Schwemm, Professor of Law, noting unanimity among the circuits that had addressed the issue on the question of disparate impact discrimination).

[140] Petition for Writ of Certiorari at 15–18, Twp. of Mount Holly v. Mt. Holly Gardens Citizens in Action, Inc., No. 11-1507 (U.S. June 11, 2012), 2012 WL 2151511; Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 133 S. Ct. 2824 (2013) (granting cert.).

[141] *See* Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375, 379 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013), *cert. dismissed*, No. 11-1507, 2013 WL 6050174 (U.S. Nov. 15, 2013).

[142] *See id.* at 382–85 ("When viewed in the light most favorable to the Residents, the evidence submitted by the Residents was sufficient to establish a *prima facie* case.").

[143] Petition for Writ of Certiorari at 15–18, *Mount Holly*, No. 11-1507 (U.S. June 11, 2012), 2012 WL 2151511; Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 133 S. Ct. 2824 (2013) (granting cert.).

[144] *See* Liptak *supra* note 8; *see also* Order Dismissing Writ of Certiorari, *Mount Holly*, No. 11-1507 (U.S. Nov. 15, 2013), 2013 WL 6050174.

motivated by a discriminatory intent."[145] In addition, the rule defines discriminatory effect as involving an action that "actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns" on the basis of categories covered by the Act.[146]

Beyond broadly permitting impact claims, HUD's rule adopts a specific burden-shifting framework for proving disparate impact claims. As provided by the rule, a plaintiff has the initial burden of "proving that a challenged practice caused or predictably will cause a discriminatory effect."[147] If the plaintiff meets that burden, the burden shifts to the defendant to show "that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[148] If the defendant meets that burden, the plaintiff can still win by showing that "substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[149]

The question then is how one should view the legality and legitimacy of this rule. In what follows, I make the case that HUD has formal capacity under standard administrative law precepts to promulgate the rule, and further argue that HUD's promulgation of the rule is appropriate as a question of institutional design and function.

B. Formal Capacity

Fair housing's regulatory and statutory structure — shaped anew by the 1988 amendments to the FHA — endows HUD with the capacity to determine the contours of disparate impact. Specifically, the FHA by its terms makes it unlawful to "refuse to sell or rent . . . or otherwise to make unavailable or deny, a dwelling to any person because of" a prohibited characteristic, including race or gender.[150] With relation to disability, the FHA makes it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap."[151] The FHA grants HUD authority to promulgate rules implementing the statute.[152] Moreover, HUD has general rulemaking authority under its enabling act, giving it the power to make such rules and regulations as necessary to carry out its functions, powers, and duties.[153]

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[145] *See* Implementation of the Fair Housing Act's Discriminatory Effect Standard, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (codified at 24 C.F.R. §§ 100.5, 100.70, 100.120, 100.130, 100.500).

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *See* 42 U.S.C. § 3604(a) (2006).

[151] *See id.* § 3604(f)(1).

[152] *See id.* § 3614(a).

[153] *See id.* § 3635(d).

One might argue that the language of the statute making it unlawful to "otherwise make unavailable or deny a dwelling" establishes a results test.[154] And, as noted above, to the extent that one finds such canons of interpretation instructive, members of Congress in amending the Act in 1988 were aware that the courts of appeals were unanimous in interpreting the Act to reach disparate impact claims.[155] The Supreme Court, further, has relied on the "otherwise make unavailable or deny" language to support an effects standard under another civil rights statute, the Age Discrimination in Employment Act of 1964 ("ADEA").[156] Basic statutory interpretation principles of horizontal coherence would support reading the same language consistently across the United States Code.[157]

Yet even if one finds the statutory interpretation of the FHA less than conclusive — and the legislative history unavailing — basic principles of administrative deference would support a finding that HUD has authority to issue these disparate impact regulations. Courts will afford *Chevron* deference to an agency where it has power to make rules carrying the force of law, and has adopted rules pursuant to that authority.[158] The disparate impact rules here were promulgated pursuant to HUD's rulemaking authority.[159]

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[154] *See id.* § 3604(a).

[155] *See* 134 CONG. REC. 23,711–12 (1988) (statement of Sen. Kennedy). As a general matter, jurisprudence supports the notion that Congress is "presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *See* Lorillard v. Pons, 434 U.S. 575, 580 (1978). Further, Congress failed to adopt an amendment that would have specifically required proof of intentional discrimination in zoning cases. *See* H.R. REP. No. 100-711, at 89–91 (1988) (dissenting views of Rep. Swindall).

[156] *See* Smith v. City of Jackson, 544 U.S. 228, 240 (2005) (holding that this "otherwise make unavailable" language in the ADEA includes a disparate impact standard).

[157] The FHA also uses similar language in other provisions. *See, e.g.*, 42 U.S.C. § 3604(a) (making it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."); *id.* § 3604(f)(2) (making it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap"). As explained in the context of Title VI, "discriminate" need not be limited to intentional motivation, and along those lines the Court has found the term sufficiently ambiguous in other civil rights statutes to support disparate impact arguments. *See* Alexander v. Choate, 469 U.S. 287, 299 (1985) (assuming without deciding that language in section 504 of the Rehabilitation Act of 1973 making it unlawful to "subject to discrimination" otherwise qualified handicapped individuals "reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped"); Bd. of Educ. v. Harris, 444 U.S. 130, 140–41 (1979) (holding that in the context of the 1972 Emergency School Aid Act, the term "discrimination" was ambiguous and encompassed claims of disparate impact).

[158] *See* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001) (authorizing *Chevron* deference only where Congress delegated authority to the agency to make rules carrying the force of law, and where the agency adopted rules pursuant to that authority); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[159] *See* Implementation of the Fair Housing Act's Discriminatory Effect Standard, 78 Fed. Reg. 11,460, 11,482 (Feb. 15, 2013) (codified at 24 C.F.R. §§ 100.5, 100.70, 100.120, 100.130, 100.500) (citing rulemaking authority under FHA and enabling act as authority for the rule).

Thus, even if the FHA does not speak directly to the question of impact claims, the relevant statutory language is sufficiently ambiguous to support *Chevron* deference to HUD's interpretation that the statute encompasses disparate impact.

An argument for deference takes account of the extensive power that the FHA provides HUD. Notably, HUD has not just rulemaking authority, but also adjudicatory authority — combined powers that make fair housing's hybrid regulatory regime (with explicit private enforcement and expansive public enforcement) the strongest of any civil rights statute as a formal matter.[160] When the FHA was first enacted, HUD's enforcement powers were limited — HUD had only the power to investigate complaints and conciliate claims it found meritorious.[161] When Congress amended the FHA in 1988, it strengthened HUD's regulatory powers.[162] Specifically, the statute now allows individuals to file complaints with the Secretary of HUD, which are adjudicated by HUD administrative law judges.[163] After opportunity for all parties to petition the Secretary of HUD, these formal adjudications become final agency decisions.[164]

Since at least 1992 — four years after enactment of the 1988 Act — HUD has interpreted the Act to apply to disparate impact claims in these formal adjudications.[165] That HUD has propounded an interpretation of the rule in formal adjudications may provide an independent basis for *Chevron* deference,[166] and in any event, when combined with the rulemaking, provides a strong basis for deference.

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[160] *See* Olatunde Johnson, *The Last Plank: Rethinking Public and Private Power to Advance Fair Housing*, 13 U. PA. J. CONST. L. 1191, 1207 (2011) (describing the 1988 amendments to the Fair Housing Act which strengthened incentives for private enforcement and created a new administrative enforcement system to allow victims to pursue claims more easily than through court litigation).

[161] *See* Fair Housing Act, Pub. L. No. 90-284, § 810(a), 82 Stat. 73, 85 (1968) (requiring HUD to investigate, pursue, or dismiss complaints of housing discrimination within thirty days of filing; if it found a suit meritorious, HUD was required to engage in "conference. conciliation, and persuasion"). The FHA did not allow HUD to litigate claims; HUD had power only to refer pattern or practice cases or cases "of general public importance" to DOJ. *Id.*; *see generally* Johnson, *supra* note 160, at 1206–07 (detailing congressional compromises that limited HUD's powers).

[162] *See* Fair Housing Amendment Act of 1988 (FHAA), Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. § 3601).

[163] 42 U.S.C. § 3610 (2006); *id.* § 3612.

[164] *See* 42 U.S.C. § 3612(g), (h); *see also* 24 C.F.R. § 180.675 (2013).

[165] *See* HUD v. Carter, No. 03-90-0058-1, 1992 WL 406520, at *5 (HUD ALJ May 1, 1992); *see also* HUD v. Twinbrook Vill. Apartments, No. 02-00-0256-8, 2001 WL 1632533, at *17 (HUD ALJ Nov. 9, 2001); HUD v. Pfaff, No. 10-93-0084-8, 1994 WL 592199, at *7–9 (HUD ALJ Oct. 27, 1994), *rev'd on other grounds*, 88 F.3d 739 (9th Cir. 1996); HUD v. Ross, No. 01-92-0466-8, 1994 WL 326437, at *5, *7 (HUD ALJ July 7, 1994).

[166] *See* United States v. Mead Corp., 533 U.S. 218, 230 & n.12 (2001) (stating that *Chevron* deference is appropriate for "the fruits of notice-and-comment rulemaking or formal adjudication").

C. *HUD's Competence: Regulatory Stability and Uniformity*

Beyond HUD's formal capacity to issue rules, HUD's disparate impact rule, like the agency rules implemented in Title VI and Title VII, must also be understood with regard to HUD's distinctive duties and capacities in the FHA's hybrid enforcement regime. HUD's disparate impact rule has the virtue of establishing clarity and uniformity, goals salient to HUD's particular role in the FHA housing regime.

1. Stability.

HUD's promulgation of a disparate impact rule has the advantage of formalizing the disparate impact rule as a central part of the fair housing regime. In promulgating the new rule, HUD stated that it is not creating new law; the effects standard is longstanding in the circuit courts and consistent with HUD's interpretation for at least twenty years.[167] In addition, HUD noted that beyond its formal adjudications, it has engaged in administrative actions that support the impact theory. There is much to support HUD's characterization of its actions. For example, HUD has issued guidance to agency staff recognizing disparate impact liability, including a 1993 memorandum advising HUD investigators to "analyze complaints under the disparate impact theory of liability."[168] HUD also published "internal guidance" in 1998 making clear that "occupancy limits may violate the Act's prohibition of discrimination because of familial status, premised on the application of disparate impact liability."[169] The formal rule takes these informal actions one step further. It uses regulatory power to formalize these post-1988 actions to make clear that disparate impact is an explicit part of the fair housing regime.

2. Clarity.

HUD's statement on its final rule asserts that the rule will eliminate variation in court standards.[170] HUD emphasized the variation that has

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[167] Implementation of the Fair Housing Act's Discriminatory Effect Standard, 78 Fed. Reg. 11,460, 11,461 (Feb. 15, 2013) (codified at 24 C.F.R. §§ 100.5, 100.70, 100.120, 100.130, 100.500).

[168] *Id.* (citing Memorandum from the HUD Assistant Secretary for Fair Housing & Equal Opportunity on The Applicability of Disparate Impact Analysis to Fair Housing Cases (Dec. 17, 1993)). HUD also published similar instructions to fair housing staff in 1995 and 1998. *See id.* at 11,462 (citing HUD, TITLE VIII COMPLAINT INTAKE, INVESTIGATION & CONCILIATION HANDBOOK 7–12 (1995); HUD, TITLE VII COMPLAINT INTAKE, INVESTIGATION & CONCILIATION HANDBOOK 2–27 (1998)).

[169] Implementation of the Fair Housing Act's Discriminatory Effect Standard, 78 Fed. Reg. at 11,462 n.26 (citing Fair Housing Enforcement — Occupancy Standards of Notice of Statement of Policy, 63 Fed. Reg. 70,256 (Dec. 18, 1998)).

[170] *See id.* at 11,460 (arguing that inconsistency in the burden-shifting analysis "threatens to create uncertainty as to how parties' conduct will be evaluated").

arisen among the circuits in applying the disparate impact standard.[171] HUD and most federal courts of appeals use the three part burden-shifting approach.[172] But the Seventh Circuit has used a four-factor balancing test,[173] and the Fourth Circuit uses a four-factor balancing test for public defendants and a burden-shifting approach for private defendants.[174] Another difference among the circuits and HUD is who bears the burden of proof at the third stage of the burden-shifting analysis. Five circuits that use the burden-shifting approach place the burden on the plaintiff, but the Second Circuit places the burden on the defendant.[175] The advantage of the rule then is that it "establishes uniform clear standards for determining whether a practice that has a discriminatory effect is in violation of the Fair Housing Act."[176] This rule, assuming legality under *Chevron* and given the agency's use of notice-and-comment rulemaking, will now be controlling in every circuit.[177]

Uniformity is of special value given HUD's particular role in the FHA regime. HUD's adjudicatory function — singular among civil rights agencies — makes uniformity of central importance. Administrative law judges ("ALJs") need to apply a set of horizontally consistent rules within the agency. But, as ALJs function nationwide, horizontally consistent rules may be at odds with those operating in particular jurisdictions.

Uniformity is important in the context of the FHA regime for another reason as well. Beyond HUD's adjudicatory and interpretive role in relation to the FHA is HUD's broad regulatory relationship to a range of housing providers and housing-related entities that have found themselves as defendants in housing discrimination cases. HUD provides funding to states and localities for housing programs, administers loan programs, and provides mortgage insurance.[178] Potential defendants, even as they may balk at the prospect of disparate impact liability under the Act, may prefer a regime in which the rules are the same across circuits and between circuits and HUD adjudicators.

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[171] *Id.*

[172] *See, e.g.*, *id.* ("This rule formally establishes a three-part burden-shifting test currently used by HUD and most federal courts . . . ."); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 939 (2d Cir. 1988) (applying three-part burden-shifting test), *aff'd in part*, 488 U.S. 15 (1988).

[173] *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

[174] *See* Betsey v. Turtle Creek Assocs., 736 F.2d 983, 988 n.5 (4th Cir. 1984).

[175] *See Town of Huntington*, 844 F.2d at 939. HUD ALJs have also applied varying standards. *See* Implementation of the Fair Housing Act's Discriminatory Effect Standard, 78 Fed. Reg. at 11,463 n.37 (citing HUD adjudications).

[176] Implementation of the Fair Housing Act's Discriminatory Effect Standard, 78 Fed. Reg. at 11,480.

[177] *See* National Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

[178] *See Table of Contents*, PROGRAMS OF HUD, http://portal.hud.gov/hudportal/HUD?src=/hudprograms/toc (last visited Sept. 28, 2013), *archived at* http://perma.cc/0LqoiYN7KrP (listing programs under HUD's authority). See Johnson, *supra* note 52, for a discussion of HUD's role in this regard.

Certainly, HUD's relationship with public and private housing and mortgage providers has meant that HUD does not consistently advance the civil rights position.[179] Indeed, some civil rights groups in recent public commentary have argued that HUD's disparate impact rule was too weak in using the language of "legitimate, nondiscriminatory interests" in its burden-shifting framework rather than "business necessity."[180] Yet, HUD is charged with both advancing fair housing and working with public and private housing and mortgage providers. Creating a clear disparate impact rule (even if it provokes dissent in both camps) may be consistent with the agency's particular regulatory role.

CONCLUSION

This Article brings to the fore the role of civil rights agencies in developing and shaping disparate impact standards in civil rights law. Courts and commentators have portrayed disparate impact as a questionable offshoot of antidiscrimination law, which they contend should be focused on disparate treatment, and have wrung their hands over the difficulties of implementing this standard in courts. But any analysis of disparate impact should grapple with the longstanding role agencies have played and might continue to play in shaping disparate impact rules. While judicial decisions and commentary often fail to account consistently for agencies' role in developing disparate impact law, the FHA can now be the location for exploring disparate impact in light of agencies' formal roles and functional capacity. I have argued that any evaluation of HUD's capacity must be attentive to the FHA's own specific regime — one in which the agency has regulatory authority akin to agencies that administer Title VI, but where the agency has a set of adjudicatory powers singular among civil rights agencies.

Acknowledging the agency's role does not mean that one need evaluate the agency's role as uniformly positive, or declare its competence always superior to those of courts. Agencies are subject to a set of important constraints, including political constraints, and disparate impact is highly contested terrain. From a civil rights perspective, agencies might be viewed with suspicion given their power to weaken disparate impact rules. Indeed, agency inefficacy —particularly in the case of HUD and the EEOC — has

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[179] *See* CHRISTOPHER BONASTIA, KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS 144–45 (2006) (placing many of the failures of housing integration on HUD's "weak institutional home for civil rights"); *see also id.* at 13–14 (detailing conflicts that arise in an agency like HUD, which has multiple missions — stimulating housing production but also promoting civil rights goals).

[180] *See* Implementation of the Fair Housing Act's Discriminatory Effect Standard, 78 Fed. Reg. at 11,470. HUD responded that the "legitimate, nondiscriminatory interest" standard is equivalent to business necessity, and that HUD chose not to use the latter term "because the phrase may not be easily understood to cover the full scope of practices covered by the Fair Housing Act, which applies to individuals, businesses, nonprofit organizations, and public entities." *Id.*

historically prompted civil rights litigants to pin their hopes not on agencies, but on courts.[181] These, however, are always the constraints that attend the agency role. And these constraints should not blind us to the traditional benefits of agency involvement — the power to develop rules and guidance responsive to a set of specific problems and civil rights goals. In this instance, these powers provide the potential to clarify, formalize, and ultimately stabilize disparate impact law.

[181] *See generally* BONASTIA, *supra* note 179, at 128 (stating that in the face of HUD's ineffectiveness in the 1970s, "federal courts would be the primary instigators of change" in fair housing).