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ALEXANDER V. SANDOVAL: WHY A SUPREME COURT CASE ABOUT DRIVER'S LICENSES MATTERS TO ENVIRONMENTAL JUSTICE ADVOCATES

Lisa S. Core*

Abstract: Environmental justice litigants have used federal courts to challenge actions on the part of federal fund recipients that have a disparate impact, regardless of intent. In the environmental justice context, it is nearly impossible to provide evidence of discriminatory intent. Unfortunately, the federal courts have all but eliminated a private right of action to enforce violations of federal agency regulations enacted pursuant to Title VI of the Civil Rights Act of 1964 that prohibit such an impact. It is plain that the courts will not imply a private right of action to enforce these regulations. The question remains whether litigants may use an alternative enforcement mechanism, 42 U.S.C. § 1983, to sue for violations of their Title VI rights. The answer is not simple because the purported rights are regulatory, and the current Supreme Court has made clear that evidence of congressional intent is required.

Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination.1

INTRODUCTION

Minority communities bear a disproportionately high burden of environmental hazards and are disproportionately denied environmental benefits.2 Environmental justice aims to attack and eradicate

* Solicitations Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2002-03.


2 Poor people and people of color encounter environmental hazards in their workplace, homes, and communities. See Robert D. Bullard, Overview and Legacy of Early Struggles, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 19 (Robert D. Bullard ed., 1994). Exposure to these environmental burdens has a deleterious impact on health. See U.S. GEN. ACCOUNTING OFFICE, HAZARDOUS AND NON-HAZARDOUS
this disparity by injecting equity considerations into environmental enforcement, compliance, policy formation, and decision-making.\textsuperscript{3} The equitable allocation of resources is necessary "to insure that the uses people make of the environment are compatible with one another, and with the environment's continued habitability."\textsuperscript{4} Environmental justice focuses on the quality of life of present generations, as well as the condition of the environment for future generations.\textsuperscript{5}

Environmental justice plaintiffs first brought claims to federal court that alleged violation of the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{6} These claims met with little success—because plaintiffs could not prove discriminatory intent—and so plaintiffs searched for a new vehicle for their challenges.\textsuperscript{7} They found Title VI of the Civil Rights Act of 1964.\textsuperscript{8} Simply put, Title VI governs the conduct of recipients of federal funds.\textsuperscript{9} Federal agencies that administer these funds have promulgated regulations that proscribe conduct that has a discriminatory impact.\textsuperscript{10} Until recently, every federal court to consider the question has allowed individuals to sue for violations of Title VI and its regulations by \textit{implying} a private right of action, and

\begin{itemize}
  \item \textsuperscript{3} See Bullard, \textit{supra} note 2, at 11. The Environmental Protection Agency's Environmental Justice Program suggests that "environmental justice is achieved when everyone, regardless of race, culture, or income enjoys the same degree of protection from environmental and health hazards and equal access to the decision making process to have a healthy environment in which to live, work and learn." EPA Environmental Justice Program Website, \url{http://www.epa.gov/compliance/environmentaljustice/index.html} (Last visited Oct. 2, 2002).
  \item \textsuperscript{4} \textit{Peter S. Wenz, Environmental Justice} 19 (1988). Wenz suggests that as environmental problems increase, our social fabric will be compromised unless people can be assured that "they are receiving their fair share of benefits and are not being required unfairly to shoulder great burdens." \textit{Id} at 21.
  \item \textsuperscript{5} See id.
  \item \textsuperscript{6} See infra Part I.A.
  \item \textsuperscript{7} See infra Part I.A.
  \item \textsuperscript{8} See infra Part I.B.
  \item \textsuperscript{9} See infra Part II.B.
  \item \textsuperscript{10} See infra Part I.B.
\end{itemize}
had only required that plaintiffs prove a disparate impact. The Supreme Court recently foreclosed this avenue, however, when it held that there is no private right of action to enforce the Title VI's disparate-impact regulations in Alexander v. Sandoval.

Because plaintiffs no longer enjoy an implied private right of action to enforce the disparate-impact regulations of Title VI, the search is on for another enforcement mechanism. Relief may be provided by 42 U.S.C. § 1983. While the federal circuit courts, prior to Sandoval, uniformly implied a private right of action under Title VI, they have taken different approaches under § 1983 and have arrived at conflicting answers. Recently, the Supreme Court denied certiorari in a Third Circuit case that held the Title VI regulations could not be enforced through § 1983. This denial could be interpreted as an affirmation of the Third Circuit’s position. Alternatively, as the federal circuit courts remain split on the issue, it is possible that the Supreme Court is simply waiting for a better opportunity to answer the question. This Note will examine the viability of 42 U.S.C. § 1983 as an enforcement mechanism for violations of Title VI in the post-Sandoval era.

Part I of this Note will discuss the legal strategies that environmental justice litigants have used, including constitutional claims and actions based on Title VI claims. Part I will also review the mechanisms litigants have employed to bring their claims for discrimination under Title VI, specifically, the implied private right of action and 42 U.S.C. § 1983. Part II will focus on the Supreme Court decision in Sandoval and its impact on environmental justice plaintiffs. Part III will attempt to answer what remains for environmental justice litigants in Sandoval’s wake: May they still enforce Title VI through 42 U.S.C. § 1983?

I. THE LEGAL STRATEGIES OF ENVIRONMENTAL JUSTICE LITIGANTS

Prior to the Supreme Court’s landmark decision in Alexander v. Sandoval, environmental justice plaintiffs had a number of legal tools with which to wage their battles, including common law tort claims, federal and state environmental statutes, constitutional challenges, and civil rights statutes, such as Title VI of the Civil Rights Act of

11 See infra Part II.A.
12 See infra Part III.A.
13 See infra Part II.B.2.
14 See infra Part III.B.2.b.
1964.¹⁵ Largely dependent on the plaintiff’s burden at trial, some strategies have been more effective than others. The following sections will compare using the Constitution and Title VI of the Civil Rights Act of 1964 to combat environmental discrimination in court.

A. The Burden of Proving Intent Under the Equal Protection Doctrine

Most early environmental justice cases alleged a violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁶ The Equal Protection Clause provides that “no state shall make or enforce any law which shall ... deny to any person within its jurisdiction equal protection of the laws.”¹⁷ The historical failure of these constitutionally based actions stems from the requirement that plaintiffs prove that discriminatory intent motivated the challenged conduct.¹⁸ Even when disparate impact is evident, it is nearly impossible for plaintiffs


¹⁶ These complaints often challenge the decision to locate undesirable facilities in minority communities. See, e.g., R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991) (community group alleged local government’s decision to site a regional landfill in a predominantly black community violated their equal protection rights), aff’d, 977 F.2d 573 (4th Cir. 1992) (table decision); E. Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb County Planning & Zoning Comm’n, 706 F. Supp. 880 (M.D. Ga. 1989) (plaintiffs challenged decision of local planning and zoning commission to allow a private landfill in a predominantly minority community), aff’d, 888 F.2d 573 (11th Cir. 1989), op. amended & superseded on denial of reh’g by 896 F.2d 1264, 1266 (11th Cir. 1989) (agreeing with district court’s conclusion that the challenged decision was without racial animus); Bean v. Southwestern Waste Mgmt. Corp., 482 F. Supp. 673 (S.D. Tex. 1979) (plaintiffs challenged the Texas Department of Health’s decision to grant an operation permit for a solid waste facility in a predominantly minority community); see also Cole, supra note 15, at 538-39; James H. Colopy, The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964, 13 STAN. ENVTL. L.J. 125, 145 (1994).

¹⁷ U.S. CONST. amend. XIV, § 1.

¹⁸ See, e.g., Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582, 617 (1983) (asserting that the Equal Protection Clause has been held to only prohibit intentional discrimination); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976) (stating that disproportionate impact is not irrelevant, but it is not the sole touchstone of invidious racial discrimination); see also Colopy, supra note 16, at 151 (stating that the intent requirement has been a major stumbling block for environmental justice plaintiffs seeking relief under the Fourteenth Amendment); Richard J. Lazarus, Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection, 87 NW. U. L. REV. 787, 828 (1993) (suggesting that the equal protection doctrine has not been hospitable to environmental justice claims).
to prove discriminatory intent.¹⁹ The one exception to this rule has been municipal services cases, where plaintiffs have successfully demonstrated that their cities or towns provide services in a racially or ethnically discriminatory manner.²⁰

To determine whether discriminatory intent is present, the court must engage in a "sensitive inquiry into such circumstantial and direct evidence as may be available."²¹ Evidence may include: (1) the impact of the action; (2) the historical background of the decision; (3) the specific sequence of events leading to the challenged action; (4) any departure from normal decision-making processes; and (5) the legislative or administrative history of the decision.²² By requiring plaintiffs to prove intentional discrimination, the courts have created a nearly insurmountable obstacle because "[m]odern-day institutional racism in the United States is rarely so apparent that it will be seen in

¹⁹ See Cole, supra note 15, at 538; Latham Worsham, supra note 15, at 641. See generally Terry Props., Inc. v. Standard Oil Co., 799 F.2d 1523 (11th Cir. 1986); R.I.S.E., 768 F. Supp. 1144; E. Bibb Twiggs, 706 F. Supp. 880; Bean, 482 F. Supp. 673. The one exception to this rule has been municipal services cases, where plaintiffs have successfully demonstrated that their cities or towns provide services in a racially or ethnically discriminatory manner. See generally, e.g., Miller v. City of Dallas, NO. CIV.A.3:98-CV-2955-D, 2002 WL 230834 (N.D. Tex. Feb. 14, 2002).

²⁰ See generally Ammons v. Dade City, 783 F.2d 982 (11th Cir. 1986); Dowdell v. City of Apopka, 698 F.2d 1181, 1186 (11th Cir. 1983); Miller, 2002 WL 230834; Baker v. City of Kissimmee, 645 F. Supp. 571 (M.D. Fla. 1986). It is not easy to explain why the courts treat these two categories of cases differently. They share common threads of environmental discrimination, and the effects are substantially the same: minority communities are left in an inferior position either by being required to shoulder burdens or by being denied benefits. See Lazarus, supra note 18, at 833. One explanation might be that it is easier to establish a pattern of discrimination in municipal services cases because of the evidentiary record of municipal decision-making, or that courts may be more willing to require municipalities to provide additional services and be less willing to shift the burden to another community by rejecting a siting decision. See Colopy, supra note 16, at 150. In rare circumstances, a "stark" pattern of discriminatory impact—that is unexplainable on grounds other than race—may be determinative of discriminatory intent. See Arlington Heights, 429 U.S. at 266. See generally Gomillon v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that disparate impact itself sufficient to prove invidious discrimination); Ammons, 783 F.2d 982 (finding that based on the size of the disparity and the nature of the practices, the impact alone gives rise to an inference of discriminatory intent); Rachel D. Godsil, Remediing Environmental Racism, 90 MICH. L. REV. 394, 410 (1991) (noting that where the pattern of discrimination is particularly "invidious" the Supreme Court has found discriminatory purpose from pattern alone). Municipal services cases demonstrate how conspicuous official action must be before courts will infer discriminatory purpose.

²¹ Arlington Heights, 429 U.S. at 266.

²² See id. at 266–68. The Supreme Court noted that these factors are not exhaustive. Id. at 268.
the records of hearings and deliberations of a government body.\textsuperscript{23} When environmental discrimination is commonly "traceable to the self perpetuating vestiges of past discrimination, the equal protection test simply cannot be met."\textsuperscript{24} The intent requirement disregards the pattern and pervasiveness of institutional racism in this country.\textsuperscript{25}

The problem is particularly acute for environmental justice plaintiffs because of the nature of environmental discrimination and degradation.\textsuperscript{26} Environmental justice concerns commonly arise when a community suffers from adverse effects created by multiple pollution sources.\textsuperscript{27} The cumulative nature of these adverse environmental impacts makes it difficult to prove intent on the part of any single actor.\textsuperscript{28}

B. An Answer to the Intent Obstacle: Title VI of the Civil Rights Act of 1964

A litigation strategy that only requires proof of discriminatory impact rather than discriminatory intent reduces an environmental justice plaintiff's burden.\textsuperscript{29} Intent is not an element of the disparate impact test.\textsuperscript{30} To establish a prima facie case of adverse disparate im-

\textsuperscript{23}Colopy, \textit{supra} note 16, at 151. \textit{See Guardians}, 463 U.S. at 622 (Marshall, J., dissenting) (an effects-based test is more practical than a test that focuses on the intent of the Title VI fund recipient because motive is difficult to determine).

\textsuperscript{24}Lazarus, \textit{supra} note 18, at 830-31. Apparently neutral criteria, such as land cost and residential density, commonly serve to justify locating "environmental harms" in minority communities; this makes it difficult to prove intent and easy to defend a decision that has a discriminatory effect. \textit{See} Colopy, \textit{supra} note 16, at 150.

\textsuperscript{25}Colopy, \textit{supra} note 16, at 151. Colopy argues that requiring proof of discriminatory intent quietly suggests that conscious racism is blameworthy but unconscious racism is not, regardless of effect. \textit{Id}.

\textsuperscript{26}Cole, \textit{supra} note 15, at 538-39. In fact, civil rights lawyers have characterized environmental justice cases employing equal protection claims as "certain losers." \textit{Id}.

\textsuperscript{27}\textit{See} Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650, 39,653 (June 27, 2000) [hereinafter EPA Title VI Guidance].

\textsuperscript{28}Environmental degradation follows a self-fulfilling prophecy. The presence of undesirable facilities—landfills, heavy industry, and poorly maintained infrastructure—negatively affects property values. As property becomes less expensive, it becomes more attractive from a development perspective. The trend continues until communities are densely populated and overburdened by undesirable facilities. \textit{See} Lazarus, \textit{supra} note 18, at 831 (a community may become a minority community only after a hazardous waste facility is located there because of the decrease in property values caused by the siting).


\textsuperscript{30}\textit{See}, e.g., Llamas v. Butte Cnty. Coll. Dist., 238 F.3d 1123, 1127 (9th Cir. 2001); Equal Employment Opportunity Comm'n v. Joe's Stone Crab, Inc., 220 F.3d 1263, 1278 (11th Cir.
pact, a plaintiff must allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities. Once this showing has been made, the burden shifts to the defendant to demonstrate the existence of "a substantial legitimate justification" for the allegedly discriminatory practice. If the defendant meets this burden, the plaintiff may still prove her case by demonstrating that other less discriminatory means would serve the same objective, or that the defendant's explanation is pretext.

Title VI of the Civil Rights Act of 1964 (Title VI) was once thought to provide an answer to the discriminatory intent obstacle of the Constitution, and relieve the plaintiff of her burden of proving intent. Title VI forbids discrimination by programs receiving federal financial assistance, and it applies when federal funding is given to an intermediate, non-federal entity that distributes funding to beneficiaries. Section 601 of Title VI states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Under section 602, federal agencies


31 E.g., Powell v. Ridge, 189 F.3d 387, 393 (3d. Cir. 1999), cert. denied, 528 U.S. 1046 (1999); Urban League, 71 F.3d at 1036.

32 E.g., Guardians Ass'n v. Civil Servo Comm'n, 463 U.S. 582, 624 n.15 (1983); Urban League, 71 F.3d at 1036; Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985).

33 E.g., Guardians, 463 U.S. at 624 n.15; Urban League, 71 F.3d at 1036; Branches of NAACP, 775 F.2d at 1417; see Michael D. Mattheison, Applying the Disparate Impact Rule of Law to Environmental Permitting Under Title VI of the Civil Rights Act of 1964, 24 WM. & MARY ENVTL. L & POL'Y REV. 1, 12-13 (2000) (describing the elements of the disparate impact test).

34 See Lazarus, supra note 18, at 839 (by using Title VI as a vehicle for environmental justice suits "the bugaboo of proving discriminatory intent can be avoided"). In Griggs v. Duke Power Co., the Supreme Court emphasized that "Congress directed the thrust of the [Civil Rights] Act to the consequences of employment practices, not simply the motivation." 401 U.S. 424, 432 (1971). Although Griggs addressed discrimination in the Title VII employment context, courts deciding Title VI disparate impact cases have looked to Title VII cases for guidance. See, e.g., Urban League, 71 F.3d at 1036; Branches of NAACP, 775 F.2d at 1417; Larry P. v. Riles, 793 F.2d 969, 982 nn.9 & 10 (9th Cir. 1984).

35 Colopy, supra note 16, at 154. A typical intermediary grant recipient is a state agency that provides funding to a wide range of beneficiaries, including individuals, local or state governments, nonprofit organizations, and private industry. See Cole, supra note 15, at 531. Most Title VI environmental justice suits are brought against a state agency; in 1986 Congress prohibited states from invoking Eleventh Amendment immunity to escape Title VI liability. See Colopy, supra note 16, at 156 (citing 42 U.S.C. § 2000d-7 (1988)).

that make grants may promulgate regulations that prohibit recipients from engaging in activities that cause discriminatory effects.\textsuperscript{37} Section 602 provides:

Each federal department and agency which is empowered to extend Federal financial assistance to programs or activity . . . is authorized and directed to effectuate the provisions of [section 601] . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute.\textsuperscript{38}

Approximately forty federal agencies have created regulations pursuant to section 602's directive.\textsuperscript{39} The Environmental Protection Agency (EPA) is one such agency.\textsuperscript{40} EPA awards grants on an annual basis to many state and local agencies that administer environmental programs under EPA's authority. As directed by Title VI, EPA's section 602 regulations prohibit recipients—including state agencies granting environmental permits—from engaging in practices that create discriminatory effects.\textsuperscript{41} This Note will focus on EPA's section 602 regulations because of its broad oversight of environmental programs, permitting activities, and public commitment to environmental justice.\textsuperscript{42}

\textsuperscript{38} Id.
\textsuperscript{39} Guardians Ass'n v. Civil Servo Comm'n, 463 U.S. 582, 619 (1983) (Marshall, J., dissenting); Powell v. Ridge, 189 F.3d 387, 393 (3d Cir. 1999), cert. denied, 528 U.S. 1046 (1999). The Department of Justice coordinates and reviews the proposed regulations of all federal agencies and is required to ensure that each agency enforces its regulations. In 1994, Attorney General Janet Reno issued a memorandum regarding the use of the disparate impact standard in administrative regulations under Title VI of the Civil Rights Act. Memorandum from Attorney General Janet Reno, to Heads of Departments and Agencies That Provide Federal Financial Assistance (July 14, 1994) (on file with author). She committed the Clinton Administration to "vigorously" enforcing Title VI, and asked that each agency head "ensure that the disparate impact provisions in your regulations are fully utilized so that all persons may enjoy equally the benefits of federally financed programs." Id.
\textsuperscript{40} EPA's Title VI regulations are codified at 40 C.F.R. pt. 7 (2001).
\textsuperscript{41} 40 C.F.R. § 7.30 reads, in part: "No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, [or] national origin . . . ." The EPA Office of Civil Rights (OCR) is responsible for administering and developing EPA's compliance program under the Civil Rights Act of 1964. 40 C.F.R. § 7.20.
\textsuperscript{42} Although the current administration has been criticized for its environmental policy, EPA Administrator Christine Todd Whitman has affirmed the EPA's commitment to environmental justice. Memorandum from Christine Todd Whitman, EPA Administrator, to EPA personnel (Aug. 9, 2001) (on file with author).
EPA regulations prohibit grant recipients from engaging in activities that have a *discriminatory effect*, regardless of intent.\(^{43}\) The regulations state:

A recipient shall not choose a site or location of a facility that has the purpose or *effect* of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this part applies on the grounds of race, color, or national origin or sex.\(^{44}\)

Further, a fund recipient shall not “[p]rovide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program.”\(^{45}\) Because discriminatory intent is so difficult to prove, EPA's disparate-impact regulations had been considered “the most accessible, most effective tool in the environmental justice tool chest.”\(^{46}\)

**II. METHODS OF ENFORCING VIOLATIONS OF TITLE VI**

Enforcement of EPA's regulations is of particular interest to individuals who must live with the effects of EPA's permitting decisions. The regulations enable citizens to file administrative complaints with EPA's Office of Civil Rights.\(^{47}\) EPA has the authority to “terminate or refuse to award or to continue assistance” to recipients of federal funds for non-compliance.\(^{48}\) Unfortunately, EPA has been criticized for taking a narrow view of its responsibilities and being slow to enforce its obligations under Title VI.\(^{49}\) Although EPA has received many

\(^{43}\) See 40 C.F.R. § 7.35.

\(^{44}\) Id. § 7.35(c) (emphasis added).

\(^{45}\) Id. § 7.35(a)(2).


\(^{47}\) 40 C.F.R. § 7.120 (2001). The regulations state that “a person who believes that he or she or a specific class of persons has been discriminated against in violation of this part may file a complaint.” Id. Guidelines are provided for investigating all complaints. Id. After receiving the complaint, OCR conducts a preliminary investigation, and thereafter may accept, reject, or refer the complaint to the appropriate federal agency. See id.

\(^{48}\) Id. § 7.125. Recipients may regain eligibility after their assistance has been denied, terminated, or suspended. See id. § 7.135. Neither filing nor acceptance of a Title VI complaint for investigation suspends an issued permit. See EPA Title VI Guidance, supra note 27, at 39,651.

administrative complaints, it has issued only one substantive decision. EPA's slow response suggests that environmental justice plaintiffs need an alternative forum to air their grievances and challenge discriminatory actions themselves. Environmental justice advocates have brought these challenges directly to federal court through two different enforcement mechanisms: first, by asking courts to imply a private right of action under Title VI, and second, by using 42 U.S.C. § 1983 to challenge state actors for depriving plaintiffs of their Title VI "rights."

A. An Implied Private Right of Action Under Title VI

Private citizens ordinarily cannot sue for a statutory violation in federal court unless Congress has manifested its intent to provide for a private right of action. Congress did not explicitly provide for a private right of action under Title VI. However, in cases involving implied rights of action, the federal courts are asked to supplement the remedies created by Congress for the enforcement of federal regulatory statutes. These cases typically arise where Congress has created an administrative agency with specified enforcement powers but has not explicitly authorized individuals who claim injuries from

50 The OCR maintains and regularly updates a database of all the Title VI complaints that have been filed with EPA. The database provides basic information about each complaint—such as the EPA program involved, the parties, the challenged action, and the status of the complaint. See List of Title VI Complaints Filed with EPA, available at http://www.epa.gov/civilrights/t6complnt.htm (Last visited Oct. 7 2002).


52 See infra Parts II.A & B.

53 E.g., Cannon v. Univ. of Chi., 441 U.S. 677, 732–34 (1979) (Powell, J., dissenting) (reviewing history of Supreme Court decisions implying or prohibiting a private right of action).

54 See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 597 (1983) (stating that the private cause of action under Title VI is implied by the judiciary rather than expressly created by Congress).

violations of the regulatory standards to sue for damages or equitable relief. This is the case for individuals alleging violations of Title VI or its regulations—such as environmental justice plaintiffs who claim to have been injured by violations of Title VI regulations.

Until recently, environmental justice plaintiffs—relying on the courts and on EPA's guidance—used section 602 of Title VI to bring actions to enjoin activities with a discriminatory impact. Generally, courts are reluctant to create a judicial remedy were Congress has not. Nevertheless, federal courts overwhelmingly implied a private right of action to enforce section 602 before the Alexander v. Sandoval decision. The following sections will examine the test that courts used to imply a private right of action to enforce Title VI before Sandoval.

1. The Supreme Court's Emphasis on Congressional Intent

In Cort v. Ash, the Supreme Court adopted a four-factor test—which has been used in a variety of contexts beyond Title VI—to determine when it is appropriate to imply a private right of action. First, the statute must have been meant to benefit the plaintiff. Second,

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56 JEFFRIES ET AL., supra note 55, at 283.  
57 EPA Title VI Guidance, supra note 27.  
58 Laura Lynn Tierny, Environmental Justice and Title VI Challenges to Permit Decisions: The EPA's Interim Guidance, 48 CATH. U. L. REV. 1277, 1287 (1999). EPA's Title VI Guidance clearly states that, in addition to administrative remedies, "individuals may file a private right of action in court to enforce the nondiscrimination requirements in Title VI or EPA's implementing regulations without exhausting administrative remedies." EPA Title VI Guidance, supra note 27, at 39,671. The Guidance directs the reader to Powell v. Ridge, where the Third Circuit affirmed that citizens have a private right of action under regulations promulgated according to section 602 of Title VI of the Civil Rights Act of 1964. EPA Title VI Guidance, supra note 27, at 39,671; cf. Powell v. Ridge, 189 F.3d 387, 397–400 (3d Cir. 1999), cert. denied, 528 U.S. 1047 (1999).  
59 The Supreme Court has taken the conservative position that courts should add a private right of action to a federal regulatory structure only where it is clear that such a remedy was intended by Congress. See JEFFRIES ET AL., supra note 55, at 283; PETER W. LOW & JOHN C. JEFFRIES, JR., CIVIL RIGHTS ACTIONS 251 (2d ed. 1994). Arguments against implying a private remedy invoke concerns about the over-enforcement of federal standards, invasion of agency specialization in the elaboration of statutory standards, impairment of an agency's ability to devise a consistent and coordinated policy of enforcement, and diminishing the political accountability of those who administer federal programs. JEFFRIES ET AL., supra note 55, at 285.  
60 422 U.S. 66 (1975). In Cort, the Court refused to imply a private right of action to a stockholder to secure relief for a violation of the Federal Elections Campaign Act Amendments of 1974, but provided the four-factor test to guide future decisions. Id. at 80–85. The Court determined that the remedy sought would not further the purpose of the statute. Id. at 84.  
61 Id. at 78. This question is answered by looking to the statute itself—which should expressly identify the class Congress intended to benefit. See Cannon v. Univ. of Chi., 441
the court must find implicit or explicit evidence that Congress intended to create the remedy.\textsuperscript{62} Third, the judicial remedy must be consistent with the underlying purposes of the legislative scheme.\textsuperscript{63} Finally, the creation of a federal right of action must not intrude on important state concerns.\textsuperscript{64} The \textit{Cort} test emphasizes Congress' intent to benefit the plaintiffs and also to create a judicial remedy.

Justice Scalia questioned the viability of a four-factored test in his concurring opinion in \textit{Thompson v. Thompson}.\textsuperscript{65} The \textit{Thompson} majority emphasized that "in determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute" and indicated that the four-factor \textit{Cort} test is instructive.\textsuperscript{66} Justice Scalia argued that congressional intent, one of the four elements in the \textit{Cort} test, is the "determinative factor," and that the three remaining elements are "merely indicative" of the presence or absence of congressional intent.\textsuperscript{67} Justice Scalia asserted that the Supreme Court has "long since abandoned its hospitable attitude towards implied rights of action."\textsuperscript{68} He advocated, absent explicit evidence of intent, that the Court adopt the "the categorical position that federal private rights of action will not be implied."\textsuperscript{69} Though the federal circuit courts continued to employ the \textit{Cort} test, Justice Scalia

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\item \textsuperscript{62} \textit{Cort}, 422 U.S. at 78.
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.} The Third Circuit, in \textit{Powell v. Ridge}, extended the \textit{Cort} test to apply beyond statutes, finding it "appropriate in determining whether to infer a private right of action from an agency rule or regulation." 189 F.3d 387, 397 (3d Cir. 1999), \textit{cert. denied}, 528 U.S. 1047 (1999). The case analyzed regulations promulgated by the Department of Education under section 602 of Title VI of the Civil Rights Act. \textit{Id.} at 390. \textit{Powell} is discussed in detail in Parts II.B.2.b. and II.A.2.b infra.
\item \textsuperscript{66} \textit{Id.} at 179.
\item \textsuperscript{67} \textit{Id.} at 189 (Scalia, J., concurring).
\item \textsuperscript{68} \textit{See id.} at 190 (Scalia, J., concurring). Justice Scalia noted the "recent history of our holdings is one of repeated rejection of claims of an implied right." \textit{Id.} (Scalia, J., concurring). Justice Scalia argued that announcing a "flat rule that private rights of action will not be implied in statutes hereafter enacted" will provide certainty, and would eliminate the risk of misconstruing and frustrating congressional intent. \textit{Id.} at 192 (Scalia, J., concurring). He recommended that the Court "get out of the business of implied private rights of action altogether." \textit{Id.} (Scalia, J., concurring).
\item \textsuperscript{69} \textit{Id.} at 191 (Scalia, J., concurring).
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\end{footnotesize}
clearly revealed his hand in *Thompson*, foreshadowing the Supreme Court's treatment of implied rights of action in *Sandoval*.

The Supreme Court developed its approach to implying a right of action to enforce Title VI in a series of decisions. Each case provided parts of the tests that the lower courts have used to determine whether a private right of action should be implied. In *Regents of the University of California v. Bakke*, the Supreme Court established the important principal that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." One year later, in *Cannon v. University of Chicago*, the Court explicitly held that private litigants could sue to enforce section 601 of Title VI. The Court did not doubt that "Congress . . . understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination." Building on the foundation of *Bakke* and *Cannon*, seven members of the Supreme

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70 See id. at 190–92 (Scalia, J., concurring); see Alexander v. Sandoval, 532 U.S. 275, 286 (2001) (holding that statutory intent is determinative). Some courts responded positively to Justice Scalia’s dissent in *Thompson* See, e.g., Mallet v. Wis. Div. of Vocational Rehab., 130 F.3d 1245, 1249 (7th Cir. 1997) (questioning the viability of the four-factor Cort approach and emphasizing singular focus on congressional intent); Chan v. City of New York, 1 F.3d 96, 101 (2d Cir. 1993) (whether an implied right of action exists under a federal statute is strictly a matter of congressional intent).


72 See Choate, 469 U.S. at 293, Guardians Ass’n, 463 U.S. 582, Bakke, 438 U.S. at 281–83.

73 438 U.S. at 287. The Court relied on the legislative history of Title VI to conclude that it incorporates a constitutional, that is, an intent-based, standard for discrimination. See id. at 286–87.

74 See generally 441 U.S. 677.

75 441 U.S. at 703. Although the suit in *Cannon* concerned Title IX of the 1972 Education Act Amendments, the Court’s analysis relied on a parallel comparison to Title VI, which was a model for Title IX. See id. at 680–83, 694 n.16. The Court referred to Title VI’s legislative history, prior judicial interpretation of Title VI’s language, and congressional acquiescence to conclude that Congress intended to provide a private right of action to enforce Title IX. Title VI’s legislative history reflects "an assumption that Title VI would be judicially enforceable apart from the administrative procedures contained in § 602." Id. at 712 n.49. For example, Senator Ribicoff said that “[i]n most cases, alternative remedies, principally lawsuits to end discrimination” would be a more effective and preferable remedy than terminating funding." Id. at 705 n.38 (1979) (quoting Sen. Abraham A. Ribicoff, 110 Cong. Rec. 7067 (1964)) (emphasis added). The Court wrote that “[i]t is always appropriate to assume that our elected representatives . . . know the law.” Id. at 696–97. In the case of Title VI, the Court said, “[W]e are especially justified in presuming . . . that those representatives were aware of the prior interpretation of Title VI." Id. at 697–98. Therefore, the Court interpreted the “absence of legislative action to change” the judicial implication of a private right of action to mean that “Congress at least acquiesces in, and apparently affirms” that interpretation. See id. at 703.
Court agreed that an implied right of action based on section 601 requires proof of intentional discrimination in *Guardians Ass'n v. Civil Service Commission.* Finally, in *Alexander v. Choate* the Court stated that *Guardians* provided a two-pronged holding on the nature of the discrimination proscribed by Title VI. The lessons from these cases are that "Title VI itself only directly reaches instances of intentional discrimination," and conduct that has a disparate impact on "minorities [may] be redressed through agency regulations designed to implement the purposes of Title VI."79

Thus, the Court left open the question of whether a private right should be implied to enforce a violation of the disparate-impact regulations.80 Section 601 proved an ineffective legal tool for plaintiffs because, like constitutionally based claims, it required proof of intentional discrimination.81 Therefore, environmental justice advocates believed that the disparate-impact regulations of section 602 offered the best opportunity for private citizens to bring suits against state or local agencies, but the Supreme Court had yet to expressly validate, or invalidate the approach.82

In 1998, the Supreme Court was poised to answer whether a private right of action could be implied to enforce section 602 of Title VI.83 The Court had granted *certiorari* to review a Third Circuit decision that recognized a private right of action to enforce section 602

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76 *See* 463 U.S. at 610-11 (Powell, J., joined by Burger, C.J. & Rehnquist, J., concurring in the judgment); *id.* at 612 (O'Connor, J., concurring in the judgment); *id.* at 642 (Stevens, J., joined by Brennan & Blackmun, JJ. dissenting). Little was actually agreed upon in *Guardians*—six separate opinions were written and no opinion garnered a majority of votes. Justice Powell reluctantly wrote separately and stated, "Our opinions today will further confuse rather than guide." *Id.* at 608 (Powell, J., joined by Burger, C.J., concurring in the judgment). The Court was particularly divided regarding the standard of proof in Title VI discrimination cases. *Id.* at 608 n.1 (Powell, J., joined by Burger, C.J., concurring in the judgment). Justices Brennan, Blackmun, and Stevens agreed that a violation of Title VI regulations could be established by proof of discriminating impact rather than intent. *Id.* (Powell, J., joined by Burger, C.J., concurring in the judgment).

77 *See* Choate, 469 U.S. at 294 n.11.

78 *Id.* at 293.

79 *Id.*

80 *See id.*

81 Cole, *supra* note 15, at 531 (environmental justice cases have relied on the regulations implementing Title VI, rather than the statute itself).

82 *Private Cause of Action, supra* note 49, at 23.

regulations.\textsuperscript{84} Unfortunately, the underlying case became moot before the Court could resolve the question.\textsuperscript{85} The Court did not revisit the question until the summer of 2001—in \textit{Sandoval}; in the interim, the lower courts were left to arrive at their own answers.

2. Circuit Court Construction: Implying a Private Right to Enforce Section 602 Regulations

In the absence of authoritative Supreme Court precedent, nearly all of the federal circuit courts held that a private right of action existed to enforce Title VI's disparate-impact regulations.\textsuperscript{86} The following sections will review three cases arising in the Third Circuit, culminating with the most recent federal case to imply a private right of action to enforce EPA's regulations, \textit{South Camden Citizens in Action v. New Jersey Department of Environmental Protection (Camden I)}.\textsuperscript{87} The subsequent history of \textit{Camden I} will be discussed in Part III.B \textit{infra}.

a. Chester Residents for Quality Living v. Seif: The Third Circuit Implies a Private Right of Action to Enforce Section 602 Regulations\textsuperscript{88}

The Third Circuit held that private plaintiffs could maintain an action under section 602's disparate-impact regulations in \textit{Chester Residents for Quality Living v. Seif}.\textsuperscript{89} The Supreme Court granted \textit{certiorari} to

\textsuperscript{84} \textit{Id.} Chester Residents represented the first time that an implied right of action under section 602 of Title VI had been addressed in the environmental permitting context. See Latham Worsham, \textit{supra} note 15, at 665.

\textsuperscript{85} Cole, \textit{supra} note 15, at 531.

\textsuperscript{86} Alexander v. Sandoval, 532 U.S. 275, 295 n.1 (2001) (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting). See, \textit{e.g.}, Powell v. Ridge, 189 F.3d 387, 400 (3d Cir. 1999), \textit{cert. denied}, 528 U.S. 1046 (1999); \textit{Chester Residents}, 132 F.3d at 936; David K. v. Lane, 839 F.2d 1265, 1274 (7th Cir. 1988) (“It is clear that plaintiffs may maintain a private cause of action to enforce the regulations promulgated under Title VI of the Civil Rights Act. . . . Evidence of discriminatory effect is sufficient” to prevail.); \textit{see also} N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (plaintiff alleging violation of Title VI regulations must make prima facie showing that challenged conduct has a disparate impact); Larry P. v. Riles, 793 F.2d 969, 981–82 (9th Cir. 1986) (“[P]roof of discriminatory effect suffices to establish liability when the suit is brought to enforce regulations issued pursuant to the statute rather than the statute itself.”); Castaneda v. Pickard, 781 F.2d 456, 465 n.11 (5th Cir. 1986).

\textsuperscript{87} 274 F.3d 771 (3d Cir. 2001), cert. denied, 122 S. Ct. 2621 (2002) (mem.) \textit{[Camden I]}.

\textsuperscript{88} Id.

\textsuperscript{89} \textit{Id.} The Third Circuit considered “the purely legal question of whether a private right of action exists under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964.” \textit{Id}.
review the Third Circuit's determination. The challenged permits were withdrawn shortly thereafter, however, and so the Supreme Court dismissed the case as moot and vacated the Third Circuit's decision. 90 Although the Third Circuit's opinion has been vacated, it remains instructive because it was the first decision handed down by one of the circuit courts considering a private right of action to enforce EPA's Title VI regulations, and its analysis was actually revived in subsequent Third Circuit opinions. 91

In Chester Residents, a non-profit corporation, Chester Residents Concerned for Quality Living (CRCQL), sued the Pennsylvania Department of Environmental Protection (PADEP) for issuing a permit to a waste treatment facility. 92 PADEP has the authority to issue or deny applications for permits to operate waste processing facilities. 93 PADEP receives federal funding from EPA to administer its programs; consequently, its funding is conditioned upon its assurance that it will comply with Title VI and EPA's section 602 regulations. 94 The CRCQL alleged that PADEP violated EPA's section 602 regulations because it disproportionately granted permits to waste facilities to operate in Chester, which is a minority community when compared to the make-up of the county at large, which is predominantly white. 95

The Third Circuit reviewed judicial precedent and Title VI's legislative history to determine whether the action could be maintained. 96 The court began its analysis by distinguishing between section 601 and section 602 of Title VI. 97 It said that that a private right of action exists under section 601, but that this right only reaches in-

90 See id. Where an independent event—like the revocation of permits—renders the case moot, it is the Supreme Court's practice to vacate the underlying decision; conversely, the Court will allow the judgment in a mooted case to remain valid if the parties voluntarily make the case moot. See, e.g., United States Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 22–29 (1994); United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950).

91 See Powell, 189 F.3d at 397; infra notes 122 & 123 and accompanying text.

92 132 F.3d at 927.

93 Id. at 928.

94 Id.

95 Id. At the time of the decision in Chester Residents, the city of Chester, located in Delaware County, had a predominantly minority population: 65% of its 42,000 residents were black. Id. at 928 n.1. Delaware County, excluding Chester, had a much smaller minority population: only 6.2% of its approximately one half million residents were black. Id.

96 See id. at 927. The court wrote that Guardians and its progeny "provide[] support for the existence of a private right of action." Id. While no other court had considered the precise issue, the Third Circuit found support for its conclusion among the other circuits. See id. at 936–37

97 See id. at 929.
stances of intentional discrimination as opposed to instances of discriminatory effect or disparate impact, and "section 602 merely authorizes agencies that distribute funds to promulgate regulations implementing section 601." The court approved of EPA's regulations as a valid exercise of agency authority.

The court looked to Supreme Court precedent, and it found that no case affirmed the existence of a private right of action under section 602. Finding no answer to the question, the court set out to determine whether to imply a private right of action as a matter of first impression. It previously had:

established a three prong test for determining when it is appropriate to imply private rights of actions to enforce regulations. The test requires a court to inquire: (1) whether the agency rule is properly within the scope of the enabling statute; (2) whether the statute under which the rule was promulgated permits the implication of a private right of action; and (3) whether implying a private right of action will further the purpose of the enabling statute.

The court determined that EPA's regulation satisfied the first prong. The court relied on the four-factor test announced in Case to

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98 Chester Residents, 132 F.3d at 929 (relying on Alexander v. Choate, 469 U.S. 287, 292-94 (1985)).
99 Id.
100 Id.
101 See id. at 929-30. The court engaged in a "a close reading of the opinions in Guardians" and concluded that five Justices implicitly approved "the existence of a private right of action under discriminatory effect regulations implementing section 602 of Title VI." Id. Turning to Choate, the court found no direct authority in to confirm or deny the existence of a private right of action. Id.
102 See Chester Residents, 132 F.3d at 932-33.
103 Id. This test originates from Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939 (3d Cir. 1985). In Angelastro, the court explained that:

Where the enabling statute authorizes an implied private right of action, courts should permit private suits under agency rules within the scope of the enabling statute if doing so is not at variance with the scope of the statute .... [I]f Congress intended to permit private actions for violations of the statute, it would be anomalous to preclude private parties from suing under the rules that impart meaning to the statute.

764 F.2d at 947.
104 See Chester Residents, 132 F.3d at 933 (quoting Alexander v. Choate, 469 U.S. 298, 293 (1985)) (the Supreme Court has made clear that "actions having an unjustifiable disparate impact on minorities [can] be redressed through agency regulations designed to implement the purposes of Title VI.").
It focused its analysis on two of the four Cort factors: "(1) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; and (2) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff."106

The United States, as amicus curiae, provided persuasive and uncontested evidence, that "implication of a private right of action [was] consistent with legislative intent," and the court was convinced that EPA's regulations satisfied the first Cort factor. 107 It then turned its attention to the second Cort factor: Is an implied private right consistent with the underlying purposes of the legislative scheme?108

The court reasoned that a private lawsuit provides a fund recipient with notice that their conduct is being investigated, just like an administrative complaint would.109 Therefore, private lawsuits are consistent with Title VI's legislative scheme if the section 602 procedural requirements are intended to provide notice.110 Further, a judicial remedy would not interfere with the existing administrative remedy because the administrative remedy of terminating funding is not available in a private lawsuit.111 Consequently, the court concluded that implying a private right of action satisfied the second Cort factor because it would be consistent with the legislative scheme of Title VI.112

The Third Circuit then considered if implying a right of action would satisfy the third prong of its test—whether it would further the purpose of the enabling statute.113 It was persuaded that implying a right of action would "further the dual purposes of Title VI, which are to: (1) combat discrimination by entities who receive federal funds;

105 See id.
106 See id.
107 Id. The United States relied on various sources of legislative history, such as a House Report, comments in the Congressional Record, and compilations of testimony at congressional hearings to reach its conclusion. See id. at 933–34. It is relevant to note that the United States, writing as amicus curiae, has not since offered a contrary opinion, and so the government's position in Chester Residents could be considered its current position on the issue.
108 See id. at 934.
109 See id. at 935–36.
110 Chester Residents, 132 F.3d at 935–36.
111 See id. at 935 (stating that "unlike the EPA, private plaintiffs do not have the authority to terminate funding").
112 Id. at 936.
113 Id.
and (2) provide citizens with effective protection against discrimination." The private plaintiffs would act as "private attorneys general," compensating for the reality that "EPA itself lacks sufficient resources to achieve adequate enforcement."

b. Powell v. Ridge: *The Third Circuit Resurrects Chester Residents*

In *Powell v. Ridge*, the Third Circuit again considered whether to provide a private right of action to enforce Title VI's implementing regulations—this time, regulations adopted by the Department of Education. The court recognized that the established test for implying a right of action under a statute is derived from *Cort*, and stated that a similar analysis that incorporates *Cort*'s four factors may be applied to a regulation.

The court first acknowledged that *Chester Residents*, which answered the same question, had been vacated as moot. It then proceeded to revive and adopt parts of the analysis that the *Chester Residents* court followed. The court described a hybrid test that should be used to determine whether a right of action exists under a regulation. The test instructs the court to first ascertain whether a private right of action exists under the statute through which the regulation was promulgated. The inquiry is concluded if the court finds that Congress did not intend the statute to be enforced by private actions. If, however, the court finds that a private action exists under the statute, it must answer two questions: whether the agency rule is properly within the scope of the enabling statute, and whether implying a private right of action will further the purposes of the enabling statute.

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114 Id. at 935–36 (stating that "we agree with the United States that, to the extent that a private right of action will increase enforcement, the implication of that right of action will further the dual purposes of Title VI . . . ").

115 Id.


117 Id. at 391. The plaintiffs challenged the education funding practices of the Commonwealth of Pennsylvania as having a racially discriminatory effect. Id.

118 Id. at 397. Like the *Chester* court, the court relied on *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939 (3d Cir. 1985), for this conclusion.

119 *Powell*, 189 F.3d at 397.

120 See id. at 397–400.

121 Id. at 397–98; see supra note 103 and accompanying text.

122 See id. This first step in *Angelastro* is also the objective of the *Cort* test.

123 See id. at 398.

124 Id. (relying on Chester Residents Concerned for Quality of Life v. Seif, 132 F.3d 925 (3d Cir. 1997), vacated as moot, 524 U.S. 915 (1998)).
The Powell court determined that as section 601 gives rise to a private right of action, and section 602 implements the mandate of section 601, it is proper to imply a right of action under section 602. The court was satisfied that all three prongs test were met, and held that a private right of action existed under the regulations. The court's consideration of whether the plaintiff's claim could be maintained under 42 U.S.C. § 1983 is discussed in Part II.B.2 infra.

c. South Camden Citizens in Action v. New Jersey Department of Environmental Protection: A Short-Lived Victory for Environmental Justice

The most recent case arising from the Third Circuit to consider whether Title VI authorizes a private right of action is Camden I. The case is important because it is the last federal case to imply a private right of action under section 602 before the Supreme Court ended the practice in Sandoval. The case is unique because it has been analyzed under an implied right of action framework and a § 1983 enforcement framework. The subsequent history of Camden I will be discussed in Part III.B infra.

The complaint in Camden I alleged that the New Jersey Department of Environmental Protection (NJDEP) violated Title VI when it evaluated air permit applications and issued air permits for the operation of a cement facility in a minority neighborhood of Camden, New Jersey called Waterfront South. To understand the nature of the dispute, it is important to review the facts, as the district court did.

The challenged cement facility was built by St. Lawrence Cement Co. (SLC); it grinds and processes granulated blast furnace slag (GBFS)

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125 See Powell, 189 F.3d at 399. The court relied on its reasoning in Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939 (3d Cir. 1985). See supra 103 and accompanying text.
126 See id. at 400.
127 See infra notes 203–213 and accompanying text.
131 Id. at 450. These facts were included in the portion of the court’s decision entitled “Findings of Fact and Conclusions of Law.”
to manufacture cement products. The facility will emit pollutants—including dust, mercury, lead, manganese, sulfur oxides, and volatile organic compounds—into the air when it operates. Additionally, trucks used to transport materials will contribute to air pollution by emitting ozone.

Waterfront South is predominantly a minority community; the most recent census figures reveal that ninety-one percent of its residents are persons of color. The Waterfront South community is poor: over fifty percent of the residents live at or below the federal poverty level. There is compelling evidence the community’s health is also poor. In their complaint, plaintiffs asserted that the challenged facility would aggravate and adversely impact their health through the emission of particulate matter and the production of ozone. Waterfront South residents are already exposed to many pol-

132 Id. at 452-55. GBFS is a by-product of the steel-making industry. Id. Prior to processing, particles of GBFS are the size and texture of beach sand. Id. Processing transforms the material to something that resembles powdered sugar. Id. SLC markets the processed GBFS as an additive used to strengthen cement. Id. Because of the nature of the GBFS, pollution is generated throughout the processing stages, including transport, grinding, and handling. See id.

133 Id. at 453-54.

134 See id. at 454. According to the court's statement of facts, on an annual basis, approximately 35,000 inbound delivery trucks will arrive at the facility, and 42,000 out-bound trucks will depart the facility. Id.

135 Id. at 459. The population of Waterfront South is 63% black, 28.3% Hispanic, and 9% non-Hispanic white. Id. at 459. Proportionately, Waterfront South has a larger minority population than either Camden County or the State of New Jersey. See id. In Camden County, 75.1% of the population is non-Hispanic white, 16.2% is black and 7.2% is Hispanic. Id. In the State of New Jersey, only 20.6% of the population is identified as non-white. Id.

136 Camden I, 145 F. Supp. 2d. at 459. In 1990, the median household income of Waterfront South residents was only $15,082. Id. This figure was lower than either the median household income ($40,027) or even the per capita income ($15,773) of Camden County residents. Id.

137 Id. at 460. Plaintiffs presented unchallenged findings comparing bronchial and lung cancer and asthma rates of Camden County residents to the general population of New Jersey and of different racial groups within Camden County. Id. at 460-61. The findings report that the age-adjusted rate of death of black females in Camden County from asthma is over three times that for white females in Camden County; for men, the death rate is six times higher. Id. at 461. The age-adjusted cancer rate for black females is higher than ninety percent of the rest of the state, and the rate for black males is higher than seventy percent of the rest of the state. Id.

138 Id. at 460. Plaintiffs presented testimony that the inhalation of fine particulate matter, such as that created by GBFS processing, exacerbates pre-existing respiratory illnesses, and can trigger asthma attacks. Id. at 462. The plaintiff's expert predicted that emissions from the challenged facility will increase the overall death rate by 1.2% for individuals who are most affected. Id. The court explicitly found the plaintiffs' evidence more credible, in
lutant-producing municipal and industrial facilities in or near their community. A recent study of Waterfront South, commissioned by the city of Camden, found that "the close proximity of residential and industrial uses, and unregulated truck traffic makes the spillover effects of noxious manufacturing or related industrial activity . . . detrimental to . . . residents." The conditions in Waterfront South epitomize the cumulative nature of environmental degradation, and emphasize the difficulty of assigning accountability.

In order to grant the preliminary injunction that was sought, the court had to find a prima facie case of disparate impact—namely that the NJDEP's facially neutral permitting policy was causally related to an adverse disparate impact on the plaintiffs based on their race, color or national origin. The court engaged in a thorough analysis of the evidence, and found that the permitting action would have adverse impacts on the plaintiffs' health. The court noted that "injury to the environment, such as that alleged . . . in this case, has been found . . . to be especially difficult to remedy and unusually irreparable." The court then found that the statistical evidence revealed a "significant association between the permitting and placement of environmentally regulated facilities in New Jersey" and the racial composition of communities. Finally, the court was persuaded that the NJDEP's permitting practices were causally linked to the disparate distribution of noxious facilities in New Jersey. The defendants were unable to provide a substantial legitimate explanation or a legitimate

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part because of the failure of defendants to refute that evidence with medical or scientific evidence. *Id.* at 466.

*Id.* at 459. Municipal facilities in the area include a sewage treatment plant, a trash-to-steam incinerator, and a co-generation facility that converts waste energy to produce heat or electricity. *Id.* Waterfront South is home to two Superfund sites, and the EPA has identified four sites within one-half mile of the challenged facility for the release or threatened release of hazardous substances. *Id.* Additionally, the NJDEP has identified fifteen known contaminated sites in the Waterfront South neighborhood. *Id.*

*Id.* at 460.

*Id.* at 484–85.

*Camden I*, 145 F. Supp. 2d. at 485–88. Importantly, the court rejected the defense argument that compliance with the National Ambient Air Quality Standards (NAAQS) will ensure that the impacts of a facility are not sufficiently adverse to trigger Title VI. *Id.* at 487. Rather, such a showing only creates a presumption of non-adversity. *Id.*

*Id.* at 499.

*Id.* at 493.

*See id.* at 494–95. The court pointed out the simple fact that without a permit from the NJDEP, industrial facilities cannot operate in New Jersey. *See id.* at 495.
non-discriminatory reason to rebut the court’s finding of a prima facie case of disparate impact.\textsuperscript{146}

The district court implied a private right of action, relying on \textit{Powell}, where the Third Circuit explicitly reaffirmed its conclusion in \textit{Chester Residents} that an implied right of action exists under section 602 of Title VI.\textsuperscript{147} The defense did not contest the existence of a private right of action under Title VI, conceding that \textit{Powell} supports an implied private right of action.\textsuperscript{148} The defendant did, however, assert that it “expects that the Supreme Court will find that there is no private right of action . . . .”\textsuperscript{149} The court acknowledged that the Supreme Court was contemporaneously reviewing a Title VI case—\textit{Alexander v. Sandoval}\textsuperscript{150}—that raised the same legal question: whether a private right of action may be implied under Title VI.\textsuperscript{151}

Regardless of defendant’s suspicions, absent explicit Supreme Court authority to the contrary, \textit{Powell} controlled the decision.\textsuperscript{152} The permits that were issued to the cement company were vacated: SLC was enjoined from operating its proposed facility.\textsuperscript{153} Injunctive relief was appropriate because SLC’s conduct posed a continued threat to the environment, and the harm to the environment was not outweighed by harm to the defendant or the public interest.\textsuperscript{154} The victory was brief; \textit{Sandoval}, discussed at Part III.A \textit{infra}, followed closely on its heels.

\textbf{B. Using 42 U.S.C. § 1983 to Enforce Title VI}

Instead of seeking an implied private right of action to enforce Title VI or its regulations, litigants have used 42 U.S.C. § 1983 to bring suit. Section 1983 provides a cause of action to any person who is deprived of “any rights, privileges, or immunities secured by the Constitution and laws” of the United States by any person acting under color

\textsuperscript{146} See \textit{id.} at 496–97.

\textsuperscript{147} \textit{Id.} at 474 (citing \textit{Powell v. Ridge}, 189 F.3d 387, 397–400 (3d Cir. 1999)). The law was apparently so clear that the court devoted only one and one half pages of its nearly sixty-page decision to determine that a private cause of action exists under Title VI. \textit{See id.} at 473–74.

\textsuperscript{148} \textit{Camden I}, 145 F. Supp. 2d. at 474.

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} 532 U.S. 275 (2001).

\textsuperscript{151} \textit{Camden I}, 145 F. Supp. 2d at 473.

\textsuperscript{152} \textit{Id.} at 473.

\textsuperscript{153} \textit{Id.} at 505.

\textsuperscript{154} \textit{See id.} at 500–02.
of state law. Thus, litigants use § 1983 to enforce their rights that are provided by Title VI.

Statutory § 1983 claims differ from implied private rights of action, and generally are favorable to plaintiffs. These § 1983 claims do not present the same separation of powers concerns as an implied private right of action because Congress has expressly authorized § 1983 suits. Because congressional intent is explicit, the plaintiff does not need to prove that Congress intended to allow private suits, as she does in implied right of action cases.

A judicial determination that § 1983 is available to remedy a statutory violation involves a two-step inquiry. As a threshold matter, the plaintiff must assert the violation of a federal right. Then, once the court finds that there is an enforceable right, the burden shifts to the defendant to show that Congress has explicitly or implicitly precluded the suit.

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

Id. (emphasis added). Section 1983 limits the pool of potential defendants to state actors and those acting "under the color of state law." Therefore, a litigant employing § 1983 will be more limited than someone using an implied right, but this issue is beyond the scope of this Note.


158 Samuels, 770 F.2d at 194. Because § 1983 creates an express cause of action against state officials for violations of federal law, "section 1983 plaintiffs do not bear the burden of demonstrating that Congress specifically intended to preserve the ability of private parties to enforce the relevant provisions of federal law against those officials." Id. It has been suggested that Congress is "presumed to legislate against a background of section 1983 and thus to contemplate private enforcement against state and municipal actors absent fairly discernable intent to the contrary." Id. Again, the accuracy of this reasoning depends of course on whether Congress is actually aware of what the courts are doing.

159 See, e.g., Golden State Trans. Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989); Sea Clammers, 453 U.S. at 20; Section 602 Regulations, supra note 157, at 323.

160 See Golden State, 493 U.S. at 106.

161 See id.

In Maine v. Thiboutot, the Supreme Court held that § 1983 provides a cause of action for violations of federal statutes as well as the Constitution. The Court rejected the argument that the phrase "and laws" should be limited to civil rights or equal protection laws, stating that the "legislative history does not demonstrate that the plain language was not intended." The Supreme Court has consistently held that § 1983 speaks in terms of "rights, privileges or immunities," not merely violations of federal law, and so, the first question to answer is: What is a "right"?

The Court has fashioned a three-pronged test to determine whether a statute creates an enforceable right. This test originated in Wilder v. Virginia Hospital Ass’n and was affirmed in Blessing v. Free-
First, a court must find that Congress intended that the provision benefit the plaintiff. Second, the provision must create a binding obligation on the government—the language of the statute must be mandatory. Finally, the provision must be judicially enforceable—it must be "sufficiently specific and definite." The Court has not yet provided a similar test for determining whether an administrative regulation creates an enforceable right; the hints that the Court has revealed are discussed in Part II.B.2.a infra.

If the plaintiff demonstrates that there is indeed a federal right, a presumptive remedy exists under § 1983. The burden then shifts to the defendant, who must rebut this presumption by demonstrating that Congress intended to foreclose the remedy. This is a difficult burden; there is a strong presumption in favor of the § 1983 remedy. The Supreme Court has said, "We do not lightly conclude that..."
Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right.”

Congress may foreclose a remedy under § 1983 expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.Absent express withdrawal, the Court has found that Congress has foreclosed private enforcement by implication based on a sufficiently comprehensive remedial scheme only twice. In *Middlesex County Sewerage Authority v. National Sea Clammers*, intent to foreclose resort to § 1983 was found in the comprehensive remedial scheme provided by Congress. The scheme was sufficient to preclude the § 1983 remedy because it “provided for private actions and left no room for additional private remedies.” Similarly, in *Smith v. Robinson*, the Court held that a carefully tailored statutory remedial scheme precluded plaintiff's actions under § 1983. More often however, the Supreme Court found that the statutory remedy—such as an agency's authority to cut off funding—is insufficient to preclude access to the § 1983 remedy.

__Explanation for the difference must be that the Court is sufficiently confident that Congress intended that there be a remedy in the § 1983 context.__


176 453 U.S. at 20.

177 See *Wright*, 479 U.S. at 423.

178 468 U.S. at 1012.

179 See, e.g., *Blessing*, 520 U.S. at 347-48; *Wilder*, 496 U.S. at 508; *Wright*, 479 U.S. at 428.
2. Can Administrative Regulations Create Enforceable § 1983 Rights?

Since *Thiboutot*, federal courts have been asked to take the Court's rationale "one step further," to find that § 1983 can provide a remedy for violations of rights secured by *regulations*, in addition to statutes. 180 The Supreme Court has not decisively answered the question of whether *regulations* may create a right that is enforceable under § 1983—but different members of the current Supreme Court have revealed their biases on occasion. 181 It is instructive to review the limited guidance that Supreme Court Justices have provided before examining the conclusions that the lower federal courts have reached.

a. *The Supreme Court's Conflicting Signals*

In *Cannon v. University of Chicago*, Justice Stevens mentioned that, in some circumstances, § 1983 may provide an "alternative and express cause of action" to an implied right of action in Title VI cases. 182 While *Cannon* was limited to the statute itself, Justice Stevens further developed his § 1983 analysis from *Guardians Ass'n v. Civil Service Commission*. 183 There, he wrote, "[i]t is clear that the § 1983 remedy is intended to redress the deprivation of rights secured by all valid federal laws, including statutes and *regulations having the force of law*." 184 Justice Stevens first used the phrase "force of law," in *Chrysler Corp. v. Brown*, which was not a § 1983 case. 185 There, the Court opined that "[i]n order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." 186

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180 See Pettys, *supra* note 164, at 52.
181 See id. at 71.
182 See 441 U.S. 677, 696–97 n.21, 702–03 n.33 (1979); see *supra* text accompanying note 75. This alternative would not be available in a suit against private defendants.
184 Id. at 638 (Stevens, J., joined by Brennan & Blackmun, JJ., dissenting) (emphasis added).
185 Id. at 501. The Court applied a three-part test to determine whether a regulation has the "force of law." See id. at 301–03, 313–14. First, the regulation must be a "substantive rule[,]" rather than an interpretive rule. Id. at 301–02. This means that the regulation must "affect individual rights and obligations." Id. at 302. Second, the agency's authority must be rooted in a grant of such power by Congress. Id. at 302–03. Third, the agency must have conformed with any congressional procedural requirements when it promulgated the regulation. Id. at 313–14. The Court noted that it had given weight to the Attorney General's Manual on the Administrative Procedure Act (1947), which referred to substantive rules as those "that 'implement' the statute." Id. at 302 n.31.
Justice Stevens recognized that *Thiboutot* concerned federal statutes, not regulations, but asserted that its § 1983 analysis “applies equality to administrative regulations having the force of law.” He argued that Title VI’s section 602 regulations have “the force of law” and are therefore enforceable under § 1983. Justice O’Connor strongly disagreed with Justice Stevens’ assessment, suggesting that the regulations are actually inconsistent with the statute itself because they exceed the statute’s mandate.

In *Wright v. City of Roanoke Housing & Redevelopment Authority*, the Court found that plaintiffs enjoyed a cause of action under § 1983 to challenge a violation of the Department of Housing and Urban Development’s section 602 regulations. The dissenting Justices, O’Connor, Rehnquist, Powell and Scalia, discussed their concern that a regulation could independently create an actionable right under § 1983. Justice O’Connor worried that lurking behind the Court’s analysis may be the view that, once it has been found that a statute creates some enforceable right, any regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result.

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187 Guardians, 463 U.S. at 638 n.6 (Stevens, J., joined by Brennan & Blackmun, JJ., dissenting).
188 See id. (Stevens, J., joined by Brennan & Blackmun, JJ., dissenting). In dissent, Justice Stevens asserted that “[i]t is well settled that when Congress explicitly authorizes an administrative agency to promulgate regulations implementing a federal statute ... those regulations have the force of law so long as they are ‘reasonably related to the purposes of the enabling legislation.’” *Id.* at 643 (Stevens, J., joined by Brennan & Blackmun, J., dissenting) (quoting *Mourning v. Family Publ’ns Serv., Inc.*, 411 U.S. 356, 359 (1973)). Stevens concluded that “[b]y prohibiting grant recipients from adopting procedures that deny program benefits to members of any racial group, the administrative agencies have acted in a reasonable manner to further the purposes of Title VI.” *Id.* at 643-44 (Stevens, J., joined by Brennan & Blackmun, J., dissenting). While plaintiffs must prove discriminatory intent to prove a violation of the statute, they must only show that the challenged actions produce discriminatory effects to prove a violation of valid federal law—namely the regulations. See *id.* at 645 (Stevens, J., joined by Brennan & Blackmun, J., dissenting).
189 See *id.* at 615 (Stevens, J., joined by Brennan & Blackmun, J., dissenting).
190 479 U.S. 418, 419 (1986).
191 See *id.* at 432-41 (O’Connor, J., joined by Rehnquist, C.J., Powell & Scalia, J., dissenting). The Court found that plaintiffs enjoyed a cause of action under § 1983 to challenge a violation of the Department of Housing and Urban Development’s section 602 regulations. *Id.* at 419.
192 *Id.* at 438 (O’Connor, J., joined by Rehnquist, C.J., Powell & Scalia, J., dissenting).
The dissenters reaffirmed their commitment to finding congressional intent, writing that "[s]uch a result, where determination of § 1983 'rights' has been unleashed from any connection to congressional intent, is troubling indeed." The dissent in Wright is cited as persuasive by federal courts as often as the majority opinion. These cases establish the positions that the Justices have aligned themselves with, and the possible routes that the lower courts might follow. And they provide the foundation for hypotheses regarding the Court's ultimate resolution of the matter.

b. The Circuit Courts Reach Different Conclusions

As the preceding discussion demonstrates, the Supreme Court guidance lacks clarity. Consequently, a split exists among the circuit courts. Some courts have held that regulations may create rights enforceable under § 1983 if the regulations meet certain criteria, and other courts are unwilling to find that regulations can create § 1983 rights under any circumstances, if the right is not explicit in the statute. Prior to Alexander v. Sandoval, the Sixth and Third Circuit had allowed for a § 1983 remedy for violations of federal rights, and the Fourth and Eleventh Circuits denied the remedy. These positions

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193 See id. (O'Connor, J., joined by Rehnquist, C.J., Powell & Scalia, JJ., dissenting).
194 See, e.g., Harris v. James, 127 F.3d 993, 1009-12 (11th Cir. 1997); Pettys, supra note 164, at 73; infra text accompanying note 221.
195 Compare Powell v. Ridge, 189 F.3d 387, 403 (3d Cir. 1999) (holding that a § 1983 claim is not incompatible with Title VI or its regulations), cert. denied, 528 U.S. 1047 (1999), and Loschiavo v. City of Dearborn, 33 F.3d 548, 551 (6th Cir. 1994), cert. denied, 513 U.S. 1150 (1995) (observing that a regulation can create an enforceable right under § 1983), with Harris, 127 F.3d at 1009 (holding that a regulation does not create a right unless it defines a right already provided in the statute), and Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987) (holding that an administrative regulation cannot create a right that is not implicit in the statute), and Smith v. Palmer, 24 F. Supp. 2d 955 (N.D. Iowa 1998) (rejecting the argument that mandatory language in a regulation alone is sufficient to create a protected right). See generally Pettys, supra note 164, at 72 (discussing discord among circuits).
196 See Pettys, supra note 164, at 76.
197 Compare Powell, 189 F.3d. at 401-03, and Boatman v. Hammons, 164 F.3d 286, 289 (6th Cir. 1998) (holding federal regulations “must be characterized as 'law' under section 1983” because they have the force of law), and Levin v. Childers, 101 F.3d 44, 47 (6th Cir. 1996) (adopting three-part test to determine whether a federal statute or regulation creates rights enforceable under § 1983), and Loschiavo, 33 F.3d at 550, with Harris, 127 F.3d 993 (administrative regulation cannot create a right not rooted in the statute), and Smith, 821 F.2d 980 (same).
have shifted since *Sandoval*. The following section will discuss the circuit positions prior to the *Sandoval* decision.

In *Loschiavo v. City of Dearborn*, the Sixth Circuit considered whether plaintiffs had a right to enforce a Federal Communications Commission regulation under § 1983. It began by asserting: "As federal regulations have the force of law, they likewise may create enforceable rights." The court then applied the Supreme Court's three-pronged test directly to the regulation to determine whether it actually defined a right that is enforceable under § 1983. It concluded that the plaintiffs were entitled to bring a § 1983 action.

Prior to *Sandoval*, the Third Circuit also held that regulations could create rights that are enforceable under § 1983. In *Powell v. Ridge*, in addition to implying a private right of action under the regulations, the court held that a claim could be maintained under § 1983 for violation of the Department of Education's Title VI regulations. The court determined two issues: first, it found that the regulations created an enforceable right, and second, that a § 1983 remedy was not precluded.

Much of the court's § 1983 analysis built upon its conclusions concerning implied rights of action. The court addressed traditional separation of powers concerns, and rejected the argument that "holding that private suits may be brought under the regulation would effectively permit administrative regulations to create substantive law." The court reasoned that the regulations, though created under section 602, implemented section 601 and said that "[o]bviously, the Supreme Court did not believe that that administr-
tive regulations that prohibit disparate impact were an impermissible creation of substantive law." It is not clear that the court would have found an enforceable § 1983 right if had not first determined that an implied right of action was also appropriate.

The defendants had the difficult burden of proving that allowing a § 1983 remedy would be inconsistent with Congress' carefully tailored scheme because the court found no direct evidence that "Title VI [or its] regulations were intended to restrict the availability of relief under § 1983." The court distinguished Powell from the two rare situations in *Sea Clammers* and *Robinson*, where the Supreme Court "found a remedial scheme sufficiently comprehensive to supplant § 1983." Rather, the court compared Powell to those instances where the Supreme Court found that an agency's authority to cut off federal funding was insufficient to justify the denial of a § 1983 remedy, concluding that a § 1983 suit is not incompatible with Title VI and the Title VI regulation.

Conversely, the Fourth Circuit held that "[a]n administrative regulation . . . cannot create an enforceable § 1983 interest not already implicit in the enforcing statute." The Eleventh Circuit reached a similar conclusion in *Harris v. James*. In *Harris*, the plaintiffs-appellees brought a class action under § 1983, alleging that Alabama's Medicaid plan did not comply with a federal regulation that required state plans to ensure transportation of recipients to and from providers. The right that the plaintiffs asserted did not appear...

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208 Id. at 399-400. The court may be overreading what the Supreme Court has said. Some Justices have made clear that they are concerned that the regulations themselves may not be valid. See Wright v. City of Roanoke Hous. & Redevel. Auth., 479 U.S. 418, 438 (1986) (O'Connor, J., joined by Rehnquist, C.J., Powell & Scalia, JJ., dissenting); Guardians Ass'n v. Civil Servo Comm'n, 463 U.S. 582, 614-15 (1983) (O'Connor, J., concurring in the judgment).

209 See Powell, 189 F.3d at 399-401.

210 Id. at 401.

211 Id. at 401-02; see supra notes 175-178 and accompanying text.

212 Powell, 189 F.3d at 402. The court emphasized that the mere availability of administrative enforcement mechanisms—such as Title VI's termination of funding—is not sufficient to defeat a "plaintiff's ability to invoke § 1983." Id. The court reasoned that Title VI "does not specifically provide individual plaintiffs with any administrative remedy" because although an individual may file a complaint with the funding agency, she "has no role in the investigation or adjudication . . . of the complaint." Id. at 402.

213 Id. at 403.


215 127 F.3d 993 (11th Cir. 1997).

216 Id. at 995.
explicitly in the Medicaid Act, but in a regulation, which plaintiffs argued was a valid interpretation of statutory provisions.  

The court held that the plaintiffs did not have a federal right to transportation that could be enforced through § 1983. The regulation was not enforceable in a § 1983 action because the regulation did not define the content of any specific statutory right. The court dismissed Justice Stevens' "force of law" approach in favor of the dissent in Wright that suggested that "federal rights' enforceable under § 1983 cannot derive either from valid regulations alone or from any and all valid administrative interpretations of statutes creating federal rights." The court confidently relied on the arguments expressed by the Wright dissent because it determined that the majority in Wright did not reject the dissent's position.

According to the Eleventh Circuit, federal rights must ultimately be rooted, either implicitly or explicitly, in the statute. It asserted that "the driving force behind the Supreme Court's case law . . . is a requirement that courts find a [c]ongressional intent to create a particular federal right." This requirement reflects the focus on intent that dominates the implied right of action analysis, suggesting that a plaintiff who fails under that standard will similarly fail under a § 1983 standard. The court stated:

[I]f the regulation defines the content of a statutory provision that creates no federal right under the three-prong test, or if the regulation goes beyond explicating the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provision, we think the regulation is too far removed from [c]ongressional intent to constitute a "federal right" enforceable under § 1983.

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217 *Id.* at 1005. Plaintiffs asserted that the regulatory and statutory provisions, read together, create a federal right to transportation to and from Medicaid providers. *Id.*

218 *Id.* at 1012.

219 *See id.* at 1007–08.

220 *Id.* at 1006. The court also relied on the Fourth Circuit’s position in Smith. *Id.* at 1007.

221 *Harris*, 127 F.3d at 1007. The court acknowledged that if the Wright majority had rejected the dissent’s position, then the majority approach would have been binding. *See id.*

222 *Id.* at 1009 n.21.

223 *Id.* at 1008.

224 *Id.* at 1009. The court specifically rejected the Sixth Circuit’s approach: "finding a ‘federal right’ in any regulation that in its own right meets the three-prong ‘federal rights’ test." *Id.*
The court's reasoning emphasizes the same concerns expressed by Justice O'Connor about Title VI in *Guardians*, where she noted that section 602 regulations may be inconsistent with the language of the statute itself. 225

In summary, these cases demonstrate that the circuit courts disagree substantially on whether a regulation may create an enforceable federal right under 42 U.S.C. § 1983. Prior to *Sandoval*, some courts required a nexus between the regulation and the statute. Although the right of action under § 1983 is explicit, this requirement reflects an unwillingness to enforce a right that Congress may have never intended to create.

III. CLOSING THE COURTROOM DOOR TO TITLE VI “DISPARATE IMPACT” PLAINTIFFS

A. The Supreme Court’s Surprising Decision in Alexander v. Sandoval

The implied right of action debate came to a close before the Supreme Court in 2001; in *Alexander v. Sandoval*, the Court severely limited access to federal courts for plaintiffs asserting a violation of Title VI of the Civil Rights Act. 226 The Court held that individuals do not have a private right of action to enforce section 602 regulations. 227 Justice Scalia, writing for the majority, reversed an Eleventh Circuit decision, ruling that individuals cannot sue federally funded state agencies over policies that have a disparate impact on members of minority groups. 228 The Court was sharply divided five to four; Justice Stevens’ dissent, joined by Justices Souter, Ginsburg, and Breyer, criticized the majority decision as “unfounded in our precedent and hos-

225 See id. at 1011–12; supra note 192 and accompanying text. The court suggested that the nexus between the regulation and congressional intent might be strong enough to “support the validity of a regulation,” even though it was too weak to support the conclusion that Congress had intended to create a right that would be enforceable under § 1983. See 127 F.3d at 1011–12.


227 *Sandoval*, 532 U.S. at 293.

228 The case concerned the Alabama Department of Public Safety’s compliance with Federal Department of Transportation regulations. *Id.* at 278–79. The Department of Public Safety elected to only administer driver’s license exams in English. *Id.* The plaintiffs sought to enjoin the English-only policy, arguing that it violated the federal regulations because it had the effect of subjecting non-English speakers to discrimination based on their national origin. *Id.*
tile to decades of settled expectations." Sandoval forced environmental justice advocates and plaintiffs—including the parties in the Camden cement case—to rethink their litigation strategies.

The Supreme Court first affirmed that private individuals can sue to enforce section 601 of Title VI, but ruled that section 601 prohibits only intentional discrimination. Then, for the purpose of its inquiry, the Court assumed that the regulations promulgated under section 602 validly proscribe activities that have a disparate impact on racial groups. Because section 602 forbids conduct that section 601 permits, the section 602 regulations "do not simply apply" section 601's directive. The Court emphasized that "[f]ar from displaying congressional intent to create new rights, § 602 limits agencies to 'effectuat[ing]' rights already created by § 601," and that right is to be free from intentional discrimination.

The Court focused on evidence of congressional intent to create a private right under section 602. Under the Cort test, intent was one of four factors to be considered, but under Sandoval, "[s]tatutory

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229 Id. at 294 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting). The decision reversed nearly three decades of precedent, including, as Justice Stevens emphasized, the unanimous views of the nine federal appeals courts to have addressed the issue. Stevens wrote that the "settled expectations the Court undercuts today derive not only from judicial decisions, but also from the consistent statements and actions of Congress." Id. at 302 n.9 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).

230 Id. at 280–81. See generally Alexander v. Choate, 469 U.S. 287 (1985) (holding that Title VI itself only reaches intentional discrimination); Guardians Ass'n v. Civil Servo Comm'n, 463 U.S. 582 (1983) (finding that section 601 only forbids intentional discrimination).

231 Sandoval, 532 U.S. at 281–82. Justice Scalia took care to emphasize that no Supreme Court opinion has ever held that section 602 disparate-impact regulations are in fact valid. Id. Some commentators worry that Justice Scalia is inviting a challenge to the validity of disparate-impact regulations themselves. See Supreme Court Puts Skids on EJ Litigation, 14 CAL. ENVTL. INSIDER 2 (2001). Whether the Supreme Court ultimately explicitly supports an agency's authority to promulgate disparate-impact regulations under section 602—that go beyond the prohibition of intentional discrimination in section 601—will be critical to the future viability of environmental justice claims. See Bruce Taterka, Environmental Justice Rises from the Ashes of Title VI, 16 NAT. RESOURCES & ENV'T 317, 319–20 (2001).

232 Sandoval, 532 U.S. at 289.

233 Id. Justice Stevens, in dissent, argued that "the majority’s statutory analysis does violence to both the text and the structure of Title VI." Id. at 304 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting). Rather than section 601 and section 602 existing in isolation, Stevens writes that the Supreme Court has "treated § 602 as granting the responsible agencies the power to issue broad prophylactic rules aimed at realizing the vision laid out in § 601, even if the conduct captured by these rules" is broader than that prohibited by section 601. Id. at 305 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).

234 See id. at 286.
The Court was troubled by the absence of private plaintiffs from the statutory language, it wrote:

[T]he focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection. . . . Section 602 . . . focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating.

The Court reasoned that statutes that focus on the person regulated rather than the individuals protected create "no implication of an intent to confer rights on a particular class of persons." Any benefit to the plaintiffs should be considered incidental, as they are, in essence, strangers to the statute.

The Court rejected the argument that the "regulations contain rights-creating language and so must be privately enforceable . . .."

It found that the rights creating language that compelled the Court to imply a right of action under section 601 in Cannon v. University of Chicago is totally absent from section 602. The Court demanded that the right originate in the statute because although "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, . . . it may not create a right that Congress has not." Justice Scalia warned that it is "incorrect to say that language in a regulation can conjure up a private cause of action that has not . . ."

See id. The Court's singular focus on congressional intent calls to mind Justice Scalia's dissent in Thompson v. Thompson, 484 U.S. 174, 188-91 (1988), where he questioned the validity of the four-factor Cort test. It is now clear that absent intent to create a right and a remedy "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." Sandoval, 532 U.S. at 286-87. Justice Scalia was not persuaded to revert to the Court's earlier, more favorable treatment of private causes of action; he said, "Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink." Id. at 289.

Sandoval, 532 U.S. at 289.

See id. (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).

See id. This reflects the message of the concurrence by Justice Scalia and Justice Kennedy in Blessing v. Freestone, 520 U.S. 329, 349-50 (1997) (Scalia, J., joined by Kennedy, J., concurring). There, the Justices compared the position of the plaintiffs to third party beneficiaries to a contract. Id. (Scalia, J., joined by Kennedy, J., concurring). The contract existed between the Federal Government and the entities that receive Title VI funds. Id. (Scalia, J., joined by Kennedy, J., concurring). The Justices suggested that third party plaintiffs, who are strangers to the contract, should not be able to sue to enforce the contract. See id. (Scalia, J., joined by Kennedy, J., concurring).

Sandoval, 532 U.S. at 291.

Id. at 290; see supra notes 75 & 76 and accompanying text.

Sandoval, 532 U.S. at 291.
been authorized by Congress." 242 The Court was clearly concerned with granting administrative agencies the power to create federal rights. 243 In fact, the Court found that the enforcement mechanisms contemplated by the section 602 regulations "tend to contradict a congressional intent to create privately enforceable rights . . . ." 244

The dissent criticized the Court's decision to grant certiorari in the absence of conflict among the lower courts on the issue. 245 Justice Stevens noted that the Court's decision not only undercut the "settled expectations" of the federal courts, but of Congress as well. 246 The dissent had no difficulty identifying Congress' intent to create an enforceable right. 247 The text of Title VI itself "reveals Congress' intent to provide . . . agencies with sufficient authority to transform the statute's broad aspiration [of non-discrimination] into a social reality." 248 Cognizant of the loss to plaintiffs, Justice Stevens raised the possibility that plaintiffs could proceed with their disparate impact claims by restyling them as § 1983 actions. 249 As discussed in Part II.B

242 Id. Emphasizing the limit on agency power, Justice Scalia wrote, "Agencies may play the sorcerer's apprentice but not the sorcerer himself." Id. The Court is clearly worried about separation of powers concerns that would surface if agencies were allowed to create enforceable rights that Congress did not intend. See id.

243 See id.

244 See id. at 290. The Court asserted that the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." Id. The Court relied upon its reasoning from cases involving § 1983, such as Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 19-20 (1981), where it found that "some remedial schemes foreclose a private cause of action to enforce even those statutes that admittedly create substantive private rights." Sandoval, 532 U.S. at 290. The Court stopped short of finding that the remedial scheme provided by section 602 would preclude a private cause of action on Sea Clammers grounds because it was convinced that Congress did not intend to create a private right to enforce the regulations. See id.

245 Sandoval, 532 U.S. at 317 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).

246 See id. at 302 n.9 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting) (Congress' actions reflect a clear understanding of a private right of action to enforce Title VI and its implementing regulations).

247 See id. at 305-06 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting). Stevens argued that the section 602 disparate-impact regulations are "inspired by, at the service of, and inseparably intertwined with § 601's antidiscrimination mandate." Id. at 307 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting). He concluded that "[i]f the regulations . . . are either an authoritative construction of § 601's meaning or prophylactic rules necessary to actualize the goals enunciated in § 601, then it makes no sense to differentiate between private actions to enforce § 601 and . . . § 602." Id. at 310 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).

248 Id. at 300 (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting). Justice Stevens wrote that "[l]itigants who in the future wish to enforce Title VI regulations . . . in all likelihood must only reference § 1983 to obtain relief . . . ." Id. (Stevens, J., joined by
supra, Congress has explicitly authorized a private right of action to sue for violations of federal rights under § 1983.

B. The Lower Courts Respond

After Sandoval was decided, lower federal courts reacted to the decision almost immediately.250 Sandoval made clear that a private right of action no long existed under section 602 of Title VI or corresponding regulations.251 The following section will discuss how the federal courts have read Sandoval to affect the ability of plaintiffs to enforce their rights through the alternative mechanism of § 1983. Only a few federal courts have had the opportunity to consider the issue; the following sections will highlight the impact that Sandoval had on the Camden cement factory case.252

1. Attempting to Keep the Door Open Through 42 U.S.C. § 1983

A recent environmental justice case, South Camden Citizens in Action v. New Jersey Department of Environmental Protection, provides a unique lens through which to examine the importance of a private right of action and a discriminatory impact standard to environmental justice plaintiffs.253 As discussed above, on April 19, 2001, the district court in Camden I granted plaintiffs an injunction based on its holding that an implied right of action existed to enforce EPA regulations.254 Five days after the court filed its opinion and order, the Supreme Court yanked the rug from under the plaintiffs' feet.

The district court was quick to amend its decision.255 This time, in Camden II, the court asked: Can the disparate-impact regulations

Souter, Ginsburg & Breyer, JJ., dissenting). Justice Stevens believed that the plaintiffs in the present case retained the option to obtain relief by drafting a new complaint that invokes § 1983. Id. (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting).


251 532 U.S. at 293.

252 See generally Camden II, 145 F. Supp. 2d 505.

253 See supra Part II.A.2.c.

254 See supra notes 152–154 and accompanying text.

255 Less than one month after Sandoval was decided the district court issued a new opinion. See generally Camden II, 145 F. Supp. 2d 505. When the district court made its original ruling in Camden I, it recognized that the same legal question—whether a private right of action may be implied under Title VI—was currently pending before the Supreme Court. See Camden I, 145 F. Supp. 2d 446, 473 (D.N.J. 2001), op. modified & supplemented by 145 F. Supp. 2d 505 (D.N.J. 2001), order rev'd, 274 F.3d 771 (3d Cir. 2001), cert. denied, 122
promulgated to enforce Title VI be enforced through an action rooted in 42 U.S.C. § 1983? The court first determined that the Supreme Court’s holding in Sandoval did not answer the question. Therefore, it reasoned that Sandoval’s limited holding did not foreclose, as a threshold matter, the plaintiffs from bringing a claim for disparate-impact discrimination under § 1983.

The Camden II court defined the question as “whether, applying the three-factor test the Supreme Court articulated in Blessing v. Freestone, plaintiffs in this case can demonstrate that section 602, and specifically, the implementing regulations promulgated by EPA thereunder, give rise to a federal right enforceable under § 1983.” The court emphasized the difference between implying a private right of action and determining whether a plaintiff may enforce those rights under § 1983. The distinction between the implied right and the § 1983 inquiries is important because it explains why courts may find that a statute which does not contain a private right of action nonetheless creates rights which are enforceable through § 1983. Prior to Sandoval, other courts had found that there could well be federal

S. Ct. 2621 (2002) (mem.). The district court may have anticipated the fate of its original ruling. See id.

256 Camden II, 145 F. Supp. 2d at 509.

257 See id. at 514–15, 517, 518. The court found that Sandoval only answered the narrow question of whether a private right of action existed to enforce the regulation. See id. Therefore, the court concluded that “the impact of the Supreme Court’s holding in Sandoval on this case is limited to its holding that § 602 of Title VI does not create an implied cause of action . . . .” Id. at 517. Sandoval’s limited holding did not foreclose, as a threshold matter, plaintiffs “from bringing a claim for disparate impact discrimination . . . under 42 U.S.C. § 1983.” Id. at 518.

258 See id.

259 Id. at 520.

260 See id. The court took care to distinguish the Cort v. Ash “four-factor test” used to determine whether an implied right of action exists under a statute, from the Blessing/Wilder test used to determine whether a plaintiff may assert a claim to enforce the same rights under § 1983. See id. at 520–21. The Cort test “reflects a concern, grounded in separation of powers, that Congress rather than the courts control the availability of remedies . . . .” Id. at 521 (quoting Wilder v. Va. Hosp. Ass’n, 496 U.S. 498, 509 n.9 (1990)). Section 1983 already provides an express remedy, so the Blessing/Wilder test is “concerned with whether the statute creates a federal right in favor of the plaintiff.” Camden II, 145 F. Supp. 2d at 521.

261 Id. at 523. The court relied on a number of federal decisions for support of this proposition. See, e.g., Mallet v. Wis. Div. of Vocational Rehab., 130 F.3d 1245, 148–57 (7th Cir. 1997); Chan v. City of New York, 1 F.3d 96, 102–06 (2d Cir. 1993); Fay v. S. Colonie Cent. Sch. Dist., 802 F.2d 21, 33 (2d Cir. 1986); Keaukaha-Panaewa Comm. Ass’n v. Hawaiian Homes Comm’n, 739 F.2d 1467, 1470–71 (9th Cir. 1984); Santiago v. Hernandez, 53 F. Supp. 2d 264, 284 (E.D.N.Y. 1999). Notably, the court relied on cases that all predate Sandoval, and it is not at all clear that these courts would hold the same today.
rights enforceable under § 1983 which are not enforceable by means of a private right of action under the statute creating them.\textsuperscript{262}

Although the \textit{Cort} test and the \textit{Blessing/Wilder} § 1983 test are distinct, they share a common connection.\textsuperscript{263} Both require, as threshold matter, that the plaintiff is the intended beneficiary of a given statute.\textsuperscript{264} If the plaintiff cannot make this showing, then she does not have a federally enforceable right under § 1983, or a private right of action.\textsuperscript{265} If however, the plaintiff proves that she is the intended beneficiary, but fails on any other of the \textit{Cort} factors, she may still succeed on a § 1983 action because the tests are otherwise unique.\textsuperscript{266}

The \textit{Camden II} court accepted the plaintiff's contention that \textit{Wright v. City of Roanoke Housing & Redevelopment Authority} stood for the "general proposition \[that\] ... agency regulations can create 'rights' within the meaning of § 1983."\textsuperscript{267} Noting that this interpretation was consistent with other Third Circuit holdings, the court concluded that "valid federal regulations as well as federal statutes may create rights enforceable under § 1983."\textsuperscript{268} The court deferred to Justice Stevens's logic in \textit{Chrysler Corp. v. Brown} to find that EPA's regulations have the force and effect of law, and therefore \textit{may} create rights that are enforceable under § 1983.\textsuperscript{269} The court then considered, ap-

\begin{itemize}
\item \textsuperscript{262} Boatowners & Tenants Ass'n, Inc. v. Port of Seattle, 716 F.2d 669 (9th Cir. 1983).
\item \textsuperscript{263} Dumas v. Kipp, 90 F.3d 386, 391 (9th Cir. 1996); Santiago, 53 F. Supp. 2d at 268.
\item \textsuperscript{264} See Santiago, 53 F. Supp. 2d at 268.
\item \textsuperscript{265} See Dumas, 90 F.3d at 391; Boatowners, 716 F.2d at 673 (holding that satisfaction of the first \textit{Cort} factor is required to support a § 1983 action); Santiago, 53 F. Supp. 2d at 268.
\item \textsuperscript{266} See Dumas, 90 F.3d at 391; Boatowners, 716 F.2d at 673; Santiago, 53 F. Supp. 2d at 268.
\item \textsuperscript{267} See Camden II, 145 F. Supp. 2d 505, 526 (D.N.J. 2001), order rev'd, 274 F.3d 771 (3d Cir. 2001), \textit{cert. denied}, 122 S. Ct. 2621 (2002) (mem.). The Supreme Court, in \textit{Wright}, "held that the regulations created rights enforceable under § 1983 because they conferred benefits on tenants, which were 'sufficiently specific to qualify as enforceable rights'" and were not beyond the competence of the judiciary to enforce. \textit{Id.} at 527 (quoting \textit{Wright}, 479 U.S. at 432.)
\item \textsuperscript{268} See \textit{id.} at 527. The court also relied upon other circuit holdings, and inferred congressional approval because "although [Congress] has amended the Civil Rights Act numerous times ... it has never acted to correct, reverse, or otherwise change this consistent \[judicial\] interpretation of Congress' intent in enacting § 602." See \textit{id.} at 532.
\item \textsuperscript{269} \textit{Id.} at 528-29. The court focused on the language of section 602 itself, in particular, the statute says that "'[e]ach Federal department and agency ... is \textit{authorized and directed} to effectuate the provisions of section [601] ... by issuing rules, regulations, or orders of general applicability.'" \textit{Id.} at 529 (quoting Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (2000)); \textit{see supra} notes 185-186 and accompanying text.
\end{itemize}
plying the three-part Blessing/Wilder test, whether EPA's regulations, in particular, actually create rights enforceable under § 1983.270

The court asserted that "there can be little doubt" that Title VI of the Civil Rights Act, and implementing regulations promulgated pursuant to section 602, were intended to benefit the class or persons to which plaintiffs belong, namely, persons of color.271 Furthermore, "the specific language of EPA's implementing regulations clearly reveals an intent to benefit individuals such as the [p]laintiffs."272 The court reviewed Title VI's legislative and regulatory history, finding that "Congress wanted to avoid the use of federal resources to support discriminatory practices . . . [and] it wanted to provide individual citizens effective protection against those practices."273 The court rejected the argument that section 602 and EPA's regulations are too broadly worded to invoke individual rights.274

In addition, the court held that Title VI and EPA's regulations demonstrate that Congress intended to place mandatory obligations on the recipients of federal funding.275 The plain language of Title VI and the regulations "succinctly set forth a congressional command . . . which is wholly uncharacteristic of a mere suggestion or nudge."276 First, section 601 provides that "no person shall' be discriminated

270 Camden II, 145 F. Supp. 2d at 529. The three relevant factors are: (1) whether the EPA regulations were intended to benefit the plaintiff; (2) whether the alleged right is judicially enforceable; and (3) "whether the provision allegedly creating the right is couched in mandatory or merely precatory terms." Id.

271 Id. at 536. The court determined that the plaintiff's membership comes from a community that has a predominantly minority population, and therefore the plaintiffs "clearly belong to the class of persons Congress intended to benefit." Id.

272 Id. at 537. The language in the regulations refers to "individuals," and persons, and is "mandatory and clear." See id. at 536–37. Compare this to the analysis in Sandoval, which requires that such language be found in the statute itself. See 532 U.S. 275, 286–87 (2001) (holding that the search for congressional intent begins and ends with the text of the statute).

273 Camden II, 145 F. Supp. 2d at 537. The district court said it must look to the entire statute and its policy objective to determine whether the statute creates a right. See id. Compare this approach with Sandoval's singular focus on intent. See 532 U.S. at 287. (holding that legal context matters only to the extent that it clarifies the statutory text).

274 Camden II, 145 F. Supp. 2d at 537. The court distinguished this case and Blessing v. Freestone, 520 U.S. 329, 330–31 (1997), where the Supreme Court found that the plaintiffs "failed to allege with adequate specificity the rights which they claimed were being violated, and instead, had merely alleged a violation of a general provision of the statute." Camden II, 145 F. Supp. 2d at 538. Compared to the Blessing plaintiffs, these plaintiffs "have not merely requested 'substantial compliance' with a 'general provision,' but rather, have identified with precision both the regulator provisions upon which they base their claim . . . and the compliance they seek . . . ." Id. at 539.


against," and this is a "[c]ongressional mandate, not merely a 'preference' or policy guidance."277 Following section 601 in the statutory scheme, "[s]ection 602 'authorizes and directs' each federal agency to implement the mandate contained in [s]ection 601."278 EPA regulations then incorporate the mandatory statutory language of section 601.279

Finally, the court determined that EPA's regulations are not so vague and amorphous that their enforcement would strain judicial competence.280 The court asserted that the judiciary, through a substantial body of case law, has demonstrated its capacity to enforce federal regulations prohibiting disparate impact.281 Furthermore, the federal courts have specifically demonstrated their ability to enforce the rights created by EPA's regulations on at least two occasions.282

Satisfied that EPA's regulations passed the Blessing/Wilder test—that they did indeed create an enforceable right—the court moved to the second step of the § 1983 inquiry, and concluded that Congress had not foreclosed the § 1983 remedy.283 EPA's regulatory enforcement scheme simply does not qualify as "an 'elaborate enforcement provision' such as those which the Supreme Court considered in [Middlesex County Sewerage Authority v. National Sea Clammers and Smith v. Robinson]."284 EPA's limited regulatory enforcement power is not sufficient to meet the Supreme Court's high threshold that regulations must meet before they demonstrate a congressional intent to foreclose recourse to § 1983.285

Importantly, the court found that EPA's own interpretation of its regulations anticipates private actions.286 In fact, EPA's Draft Investigation Guidance "specifically addresses the possibility that individuals will seek judicial relief to vindicate their right to be free of discrimina-

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277 Id. at 532.
278 Id.
279 Id. The court asserted that the use of the term "shall" indicates a mandatory obligation. Id. The regulations use the terms "shall" and "shall not." 40 C.F.R. §§ 7.30, 7.35 (2001).
280 Camden II, 145 F. Supp. 2d. at 540.
281 Id.
284 Id. at 545; see supra notes 175–178.
286 See id. at 545–46.
tion . . . .”287 The court held that plaintiffs could enforce EPA’s disparate-impact regulations under § 1983, and specifically stated that the Supreme Court’s recent decision in Sandoval did not affect its conclusion.288

2. Interpreting Sandoval to Preclude a Section 1983 Remedy: The Third Circuit Reverses

On December 17, 2001, the Third Circuit overturned the district court’s restyled opinion in Camden II, holding that EPA’s regulations did not create a right enforceable via § 1983 because the alleged right did not appear explicitly in the statute.289 The Third Circuit concluded that the district court’s decision was erroneous because the plaintiffs did not advance a federal right.290 The decision is significant because the court changed the position that it had taken prior to Sandoval, and shifted the balance of the circuit courts, leaving only the Sixth Circuit advocating that regulations may independently create § 1983 rights.291

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287 Id. at 545; see EPA Title VI Guidance, supra note 27, at 39,673 (noting that EPA endorses the concept of a private right of action).

288 See Camden II, 145 F. Supp. 2d at 546, 548. The Sandoval court did not address whether EPA’s section 602 remedies “could overcome the strong presumption created in favor of enforceability under § 1983.” Id. at 546.

289 See generally Camden III, 274 F.3d 771 (3rd Cir. 2001), cert. denied, 122 S. Ct. 2621 (2002) (mem.). The court said that, post-Sandoval, “it can hardly be argued reasonably that the right alleged to exist in the EPA’s regulations, namely the right to be free of disparate impact discrimination . . . , can be located in either section 601 or section 602 of Title VI.” Id. at 788.

290 Id. The court rejected the district court’s reliance on Wright because “Wright dealt with an issue that differs from that presented in the district court and here.” Id. at 782. Compared to the regulation in Wright, which “merely defined the specific right that Congress already had conferred through the statute,” the right asserted in Camden only appears in the regulation, not in the statute. See id. at 782-83. The Third Circuit stated that the district court’s reliance on Wright was misplaced because “Wright does not hold that a regulation alone . . . may create an enforceable federal right.” Id. at 783.

291 Other federal courts have considered the issue in light of Sandoval, but the Third Circuit is the only appellate court that has reversed its earlier position. A district court in the Eleventh Circuit considered whether a disparate impact claim brought pursuant to § 1983 could survive the Supreme Court’s decision in Sandoval. See Bonnie v. Bush, 180 F. Supp. 2d 1321, 1341 (S.D. Fla. 2001). It found that the Supreme Court had determined that section 602 itself “does not create any ‘rights-creating’ language and focuses on the agencies rather than individuals,” and that the regulations “impose[] distinct obligations beyond the specific content of the statute.” Id. at 1344. It reasoned that to hold that these disparate-impact regulations, which are not enforceable through an implied private right of action, are enforceable through § 1983, “would be equivalent to holding that while Congress did not intend section 602 regulations to be enforceable against private entities,
The court declined to find that any of its own precedent justified the district court’s conclusion.\footnote{292} Although the district court relied heavily on \textit{Powell v. Ridge}, the Third Circuit warned that \textit{Powell} “should not be overread.”\footnote{293} In \textit{Powell}, the majority said that the court “did not analyze the foundation issue that is central here, \textit{i.e.}, whether a regulation in itself can create a enforceable right under section 1983,” but rather, “we seemed simply to assume for section 1983 purposes that it could.”\footnote{294} This characterization of \textit{Powell} is accurate. As discussed above, the court’s § 1983 analysis in \textit{Powell} was based on the conclusion that plaintiffs enjoyed a private right of action to bring suit based on the section 602 regulations.\footnote{295} That conclusion is no longer valid after \textit{Sandoval}.

The court turned to precedent from its sister courts and examined—as had the district court below—the contrasting positions between the Sixth Circuit and the Fourth and Eleventh Circuits.\footnote{296} The court explicitly rejected the Sixth Circuit’s approach and adopted the position that a federal regulation alone may not create a right that is not already found in the enforcing statute.\footnote{297}

In light of \textit{Sandoval}, the court determined that the right to be free from disparate-impact discrimination is not located in either section 601 or section 602, and therefore, “the regulations, though assumedly valid, are not based on any federal right present in the statute.”\footnote{298} The court found that EPA’s regulations extend the scope of Title VI beyond what Congress contemplated and therefore, they are “too far removed from [c]ongressional intent to constitute a federal right enforceable under § 1983.”\footnote{299} The court recognized the broad and serious implications of its holding,\footnote{300} but asserted that “if

\footnotesize{it intended them to be enforceable against state actors.” \textit{Id.} The \textit{Bonnie} decision reflects the Third Circuit’s rationale in denying the § 1983 remedy.\footnote{292} \textit{Camden III}, 274 F.3d at 783.\footnote{293} \textit{Id.} at 784.\footnote{294} \textit{Id.; see Powell v. Ridge,} 189 F.3d 387, 400–03 (3d. Cir. 1999), \textit{cert. denied,} 528 U.S. 1046 (1999).\footnote{295} \textit{See supra notes} 206–208 and accompanying text.\footnote{296} \textit{See Camden III}, 274 F.3d at 785–88.\footnote{297} \textit{Id.} at 790.\footnote{298} \textit{See id.} at 789–90. The court examined the Supreme Court’s opinion in \textit{Sandoval} to conclude that the Court found “no evidence of congressional intent to create new rights under section 602.” \textit{Id.} at 789.\footnote{299} \textit{Id.} (quoting \textit{Harris v. James}, 127 F.3d 993, 1009 (11th Cir. 1997)). The court compared the case to \textit{Smith} and \textit{Harris}, where the regulations did more than “define or flesh out the content of a specific right conferred upon the plaintiffs” by a statute. \textit{Id.} at 790.\footnote{300} \textit{See id.}
there is to be a private enforceable right under Title VI to be free from disparate-impact discrimination, Congress, and not an administrative agency or a court, must create this right.\textsuperscript{301}

One judge filed a dissenting opinion, and criticized the majority for unnecessarily overreading \textit{Sandoval} to overrule \textit{Powell}.\textsuperscript{302} Judge McKee wrote that the court in \textit{Powell} did not simply assume, but explicitly held that a cause of action existed under § 1983.\textsuperscript{303} Judge McKee reasoned that by refuting defendant's arguments in \textit{Powell} that § 1983 does not allow a private cause of action to enforce the regulations, the court actually held that plaintiffs had a cause of action under § 1983.\textsuperscript{304} The difficulty with Judge McKee's position is that the Third Circuit's § 1983 analysis in \textit{Powell} was built upon its determination that the plaintiffs enjoyed an implied right of action.\textsuperscript{305}

Like the court below, Judge McKee emphasized that the question before the Supreme Court in \textit{Sandoval} was narrow: Did section 602 create a private cause of action to enforce Title VI's disparate-impact regulations?\textsuperscript{306} In contrast, the issue before the Third Circuit in \textit{Camden III}, is whether § 1983 provides an independent avenue to enforce disparate-impact regulations.\textsuperscript{307} Judge McKee asserts the court answered the question affirmatively in \textit{Powell}, and that \textit{Sandoval} did not overturn that holding.\textsuperscript{308} She argues that the majority wrongly interprets the fact that the Supreme Court "did not find the requisite [c]ongressional intent for a private cause of action" to mean that "there can be no enforceable right under § 1983" because implying a right of action under a statute is an entirely different inquiry than de-

\textsuperscript{301}Id. (emphasis added).

\textsuperscript{302} \textit{Camden III}, 274 F.3d at 791 (3rd Cir. 2001) (McKee, J., dissenting). Judge McKee pointedly noted that the court overread \textit{Sandoval} in spite of its own warning not to overread \textit{Powell}. \textit{Id.} (McKee, J., dissenting).

\textsuperscript{303} \textit{Id.} at 794 (McKee, J., dissenting).

\textsuperscript{304} See \textit{id.} (McKee, J., dissenting). "The majority's attempt to suggest the contrary is tantamount to arguing that 'merely rejecting' the argument that 2 plus 2 does not equal 4 does not at the same time establish that 2 plus 2 does equal 4." \textit{Id.} (McKee, J., dissenting).

\textsuperscript{305} See \textit{Powell v. Ridge}, 189 F.3d 387, 400–02 (3d. Cir. 1999), cert. denied, 528 U.S. 1046 (1999). The court simply imported its conclusion that plaintiffs had a right to an implied right of action to enforce the Department of Education's section 602 regulations and inserted it into the first step of it's § 1983 analysis. See \textit{id.}; supra notes 206–208, 295 and accompanying text.

\textsuperscript{306} See \textit{Camden III}, 274 F.3d. at 796 (McKee, J., dissenting).

\textsuperscript{307} \textit{Id.} (McKee, J., dissenting).

\textsuperscript{308} \textit{Id.} (McKee, J., dissenting). The dissent emphasized "holding" because it criticizes the majority for treating dicta as binding. See \textit{id.} (McKee, J., dissenting).
termining whether a right is enforceable under § 1983.309 The Supreme Court recently denied certiorari in the case.310

IV. WHAT REMAINS AFTER SANDOVAL?

Alexander v. Sandoval clearly holds that Title VI itself does not create a right to be free from disparate-impact discrimination—it forbids only intentional discrimination.311 Therefore, if there is a federal right to be free from disparate-impact discrimination, that right is a purely regulatory right—because it originates in EPA’s section 602 regulations.312 The question that remains for environmental justice plaintiffs—and all other Title VI disparate impact plaintiffs—is whether they can enforce a purely regulatory right through § 1983. All but one federal circuit has said no.313

How should litigants react to the Supreme Court’s denial of certiorari in the appeal from the Third Circuit in the Camden cement factory case? Although the denial was certainly a victory for the defendants, it should not be overread as an express affirmation of the Third Circuit’s ruling. After all, the Supreme Court similarly denied certiorari when the Third Circuit had found that § 1983 could be used to bring a claim for violations of regulatory rights in Powell v. Ridge.314 The Supreme Court may deny certiorari for a number of reasons.315

509 See id. (McKee, J., dissenting). The dissent, as did the court below, describes the difference between the Court four-factor “implied right test” and the Blessing/Wilder § 1983 enforceable right test. Further, it stressed that the separation of powers concerns that pervade implied right analyses are not present in § 1983 inquiries because § 1983 “provides an alternative source of express congressional authorization of private suits.” Id. (McKee, J., dissenting) (quoting Wilder v. Va. Hospital Ass’n, 496 U.S. 498, 508 n.9 (1990)). This argument is compelling when the § 1983 claim concerns a statutory right, but it seems that separation of powers concerns reemerge to weaken the argument when the claim concerns a regulatory right.


511 523 U.S. 275, 285–93 (2001); see supra Part III.A.

512 532 U.S. at 285–86; supra text accompanying note 233.

513 The Sixth Circuit appears to be the only federal circuit clinging to the position that administrative regulations have the force of law, and so may be privately enforced through a claim based on § 1983. See supra notes 199–202 and accompanying text.


515 See Kevin A. Smith, Certiorari and the Supreme Court Agenda: An Empirical Analysis, 54 OKLA. L. REV. 727 (2001). Each term the Court receives more than 5000 petitions, and chooses to hear approximately 100 of those on the merits. Id. at 729. The Court’s decision to hear a case is influenced by a number of factors. See id. at 730. The decision may reflect the Court’s (1) reluctance to act as an arbiter in disputes involving the allocation of power between the branches of the federal government, (2) will-
This section will first review the policy arguments that have been advanced to support some version of a private action to enforce Title VI rights. Then, it will consider whether a § 1983 action can be maintained where a private right of action is not available in the post-
*Sandoval* era.

A. *The Policy Behind a Private Enforcement Action*

Advocates used similar policy arguments to promote the use of § 1983 as they did to encourage courts to imply a private right of action to enforce Title VI.316 Some of these arguments retain their force, and merit review, in spite of the Supreme Court’s decision in *Sandoval*. The Supreme Court has lately avoided considering the benefits of some form of a private action, making congressional intent its singular focus.317 In *Sandoval*, the Court clearly said that absent congressional intent, even strong policy arguments cannot persuade it to imply a right of action.318 The Court did not discredit the policy arguments because it did not even consider them.319

Arguments in favor of some form of a private action emphasize the unique nature of a private remedy and the idea that a private action would not interfere with EPA’s enforcement of its regulations.320 A private action provides plaintiffs with a different remedy than they would receive through the administrative complaint process.321 The role of *plaintiff* may be more satisfying because a *complainant* may not directly participate in the administrative remedy process, and the complainant may only enjoy the indirect remedy of terminated funding to the recipient.322 There may be intangible benefits to a private

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*Id.*

316 See generally *Private Cause of Action*, supra note 49; *Section 602 Regulations*, supra note 157.

317 See *Sandoval*, 532 U.S. at 286; supra text accompanying notes 234–238.

318 532 U.S. at 286–87.

319 *Id.*

320 See generally *Private Cause of Action*, supra note 49.

321 Bradford Mank argues that the “administrative process does not guarantee individual participation nor does [sic] its remedies protect individual rights.” *Id.* at 60. Therefore, he argues that an implied right of action is the only effective way to protect individual rights under Title VI. *Id.* at 60.

322 *Id.* at 55.
action: compared to the environment justice complainant, the environmental justice plaintiff may enjoy a greater sense of validation, and may generate more attention for her cause by directly participating in the litigation.323 One commentator has suggested that the enforcement of Title VI may be a political tool, rather than a legal tool for environmental justice advocates because it "forces the public airing and recognition of disparate impacts and environmental injustice."324

A private action would not interfere with EPA's enforcement of its administrative sanctions because a private party may not request that a court terminate funding.325 Therefore, the agency retains full control over the decision to terminate.326 Prior to Sandoval, EPA argued that its regulations "(1) do not preclude a private right of action; (2) will not interfere with the agency's enforcement program; and (3) that this remedy will, in fact, advance the statute's purposes in light of the agency's limited resources."327 These private actions may serve an intermediate role in cases where the violations "are not pervasive enough to justify termination of the EPA's funding to the recipient."328 Further, by deputizing individuals as private attorneys general, a private remedy would advance the statute's purposes in light of EPA's limited resources.329

To compare, arguments raised against using § 1983 generally fall into four categories.330 First, there is concern that Congress has specifically designed the statutory right, sanction, and enforcement mechanism, and that adding a cause of action under § 1983 could produce more enforcement than Congress intended.331 Second, it is possible that courts lack specialized fact-finding and policymaking competence of the responsible agency.332 Third, decentralized courts

323 Id.
325 Private Cause of Action, supra note 49, at 48.
326 Id. at 55.
327 Id. at 56. Accordingly, the argument goes, EPA's interpretation should be respected because courts normally defer to an "agency's interpretation of its own regulations unless its interpretation is 'plainly erroneous or inconsistent with the regulation.'" Id. at 55; see, e.g., Auer v. Robbins, 519 U.S. 452, 460-62 (1997); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).
328 Private Cause of Action, supra note 49, at 55.
329 Id. at 47; supra note 115 and accompanying text.
330 Sunstein, supra note 157, at 416.
331 Id.
332 Id. at 417.
might produce inconsistency, and might treat similarly situated litigants differently, as opposed to a centralized, responsible administrative agency. Finally, it has been suggested that the use of § 1983 may diminish political control over the content of regulatory programs because courts are relatively immune from political pressures. These arguments would have more force if EPA itself wasn’t an advocate of private rights of action. The obvious problem for environmental justice litigants, however, as the Supreme Court announced in Sandoval, absent intent, even the strongest policy arguments are unpersuasive.

B. The Fate of the Private Enforcement Action for Title VI Disparate-Impact Discrimination

In spite of compelling arguments in favor of a private right of action, whether through an implied right or a § 1983 remedy, the Supreme Court’s strong language in Sandoval, which focuses only on congressional intent, cannot be ignored. In Sandoval, the Supreme Court condensed the Cort four-factor test to the singular question of whether Congress intended to create a right of action. The Court dismissed any policy arguments in favor of an implied right in the absence of congressional intent. It is difficult to imagine that the Supreme Court would find, as the district court did in Camden II, that § 1983 might be used to enforce a right that does not originate in the statute itself. Principles of separation of powers and the Court’s focus on congressional intent suggest that § 1983 should not provide a remedy for violations of purely regulatory rights.

Long before Sandoval, Professor George Brown argued, “section 1983 should not be permitted to serve as an end run around difficult issues of statutory construction. If the real battleground is implied

333 Id.
334 Id. at 418.
335 Supra notes 27, 286 & 287 and accompanying text (discussing EPA's endorsement of a private right of action).
337 Id. at 286–87.
338 See Pettys, supra note 164, at 83. Pettys argues that the fundamental distinction between laws and regulations, and a review of the historical record “demonstrates that Congress almost certainly did not intend to provide a remedy for violations of regulatory rights when it added the words ‘and laws’ to the Civil Rights Act of 1871.” Id. at 99. “Congress would have used the word ‘laws’ to refer to regulations only if it wished to disregard [the] basic constitutional restraint” of the non-delegation doctrine. Id.
rights, the issues ought be debated there." The plaintiffs lost the battle for an implied right of action in Sandoval. Professor Brown's comment suggests that Sandoval actually ended the § 1983 debate and eliminated a private cause of action to enforce Title VI's disparate-impact regulations. Although there is a strong presumption in favor of a § 1983 remedy when a statutory right is violated, it is unlikely that the same will prove true for regulatory rights when the Supreme Court finally ends the debate.

To determine whether a statutory right exists and is enforceable under § 1983, a court must find, as a threshold matter, that Congress intended to create the right. While it might be possible to simply substitute the word "agency" for the word "Congress" when the question relates to a violation of a regulatory "right," to do so would clearly steer the inquiry away from congressional intent, a factor that the Supreme Court has stated is "determinative." Such action would essentially grant administrative agencies congressional authority.

Prior to Sandoval, some courts were willing to allow plaintiffs to enforce rights through § 1983 even when they were unwilling to imply a private right of action to enforce those same rights. The Blessing/Wilder § 1983 test and the Cort "implied rights test" both present the threshold question: Does the provision intend to confer special benefits to the plaintiff? Prior to Sandoval, courts reasoned that so long as the plaintiff could demonstrate that she was intended to benefit, she could maintain a § 1983 action, even absent an implied right of action, because beyond this first question, the tests used were otherwise different. As Justice Scalia suggested in Thompson v. Thompson, and emphasized in Sandoval, however, the Supreme Court is singularly concerned with whether there is evidence that Congress intended to a right and a remedy. With respect to statutory § 1983 claims, the Court has long said that congressional intent to provide

339 Brown, supra note 163, at 63.
340 See id.
341 See supra notes 171–173 and accompanying text.
342 See Pettys, supra note 164, at 83.
343 See supra note 164 and accompanying text.
344 See supra notes 263–266 and accompanying text.
345 Alexander v. Sandoval, 532 U.S. 275, 286 (2001). Absent evidence of this intent, a cause of action does not exist, and the judiciary may not create one. Id. at 286–87.
347 See supra note 261 and accompanying text.
the remedy is assumed. But the Supreme Court has said this in relation to statutory rights, and the right to be free of disparate-impact discrimination, if it is a right at all, is a regulatory right.

The environmental justice plaintiff does not enjoy the presumption of a § 1983 remedy when the right she asserts is regulatory. The majority of the circuit courts to decide the issue have said that a purely regulatory right is not enforceable under § 1983—that the right must be rooted in the statute. The Third Circuit's analysis in Camden III reflected the Supreme Court's singular focus on congressional intent. The court did not examine the Blessing/Wilder factors because it found that Congress did not intend to create the particular right at issue. Before Sandoval, courts had required that the first Cort factor—intent to benefit the plaintiff—be met in order to support a § 1983 action. In Camden III, the court required that the Cort test—which has been reduced to the single factor of intent to create a right of action—be met in order to support a § 1983 action. Therefore, in the Third Circuit, it is no longer possible for a plaintiff who is denied a private right of action to use § 1983 to enforce her regulatory rights.

The Third Circuit's conclusion, though unfortunate for private plaintiffs, is the correct one. An implied right of action, or a right of action via 42 U.S.C. § 1983 are both enforcement mechanisms. They are the vehicles that get plaintiffs to federal court. But these vehicles cannot operate without some fuel—namely, without a federal right to enforce. The Supreme Court plainly said that the plaintiffs in Sandoval did not advance a federal right—their tank was empty.

Justices Scalia and Kennedy aptly characterized the relationship between federal administrative agencies and Title VI fund recipients as contractual in Blessing v. Freestone. Private plaintiffs are, at best, third parties to this relationship. The text of section 602 makes no mention of them. When 42 U.S.C. § 1983 was enacted, a third party beneficiary was considered a stranger to the contract and could not

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549 Supra notes 157–158 and accompanying text.
551 See id. at 785–89.
552 See id. at 790.
554 See id.
sue upon it. In *Sandoval*, the Court was troubled by the absence of private plaintiffs from the statutory language, finding that the statute focused on the federal agencies and the fund recipients. It would seem that if Congress intended to benefit the private plaintiffs, to bestow upon them an enforceable right to be free from disparate-impact discrimination, then surely they should be mentioned in the statute.

**CONCLUSION**

The Supreme Court's decision in *Alexander v. Sandoval* to eliminate an implied right of action to enforce the disparate-impact regulations promulgated pursuant to Title VI also signaled the impossibility of using 42 U.S.C. § 1983 as an enforcement mechanism. The current relationship between EPA's disparate-impact regulations and the express language of Title VI is too tenuous to support a private action. Agency objectives cannot supplant congressional intent.

The termination of a private right of action to enforce disparate-impact discrimination under Title VI will create a void that is not likely to be filled by administrative enforcement. Title VI empowers administrative agencies to terminate funding. But agencies, like EPA, cannot offer private plaintiffs what the courts have denied them. It remains to be seen whether the absence of a right of action will encourage EPA to be more responsive to administrative complaints. What can be said to minimize the loss to environmental justice advocates who will likely lose their day in court? Activism must fill the void. Public awareness, scrutiny, and condemnation are powerful tools for the environmental justice movement. The courts are constrained in the absence of proof of intent, but the legislature may provide relief. Congress, should there be a private right of action?

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356 Blessing, 520 U.S. at 349–50.