Federal Courts: *Alexander v. Sandoval*: Civil Rights without Remedies

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The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.  

I. Introduction

Since Congress enacted Title VI of the Civil Rights Act of 1964, which prohibits agencies that receive federal funds from discriminating based on race, color, or national origin, the United States Supreme Court has debated how to interpret that title. Interpreting the statute is inherently difficult because the statutory language itself is ambiguous. Specifically, the statute does not define "discrimination" and fails to make clear whether a private right of action is available to enforce violations of the statute itself and/or regulations issued by administrative agencies pursuant to the statute. This ambiguity has forced the U.S. Supreme Court to determine whether to imply a private right of action under the statute. The Court, in discerning whether it should imply a private right of action, has struggled to reach a consensus on what factors to assess when making such a determination.

In Cannon v. University of Chicago, the Court addressed the private right of action issue and held that a private right of action is available to enforce Title VI. Twenty-two years later, however, in Alexander v. Sandoval, the Court limited the holding in Cannon to section 601 of Title VI, which prohibits only intentional discrimination. The Alexander Court refused to imply a private right of action to enforce regulations issued under section 602 of Title VI. As a consequence of Alexander, victims of disparate impact discrimination, which section 602 regulations prohibit, are left without an adequate remedy to protect their rights.

Part II of this note reviews Supreme Court precedent to explain the differing burdens of proof a plaintiff must establish when trying to prove either disparate impact or intentional discrimination. Part III surveys Supreme Court precedent

3. Id.
5. Id. at 709.
7. Id. at 294.
to see how the Court has defined the scope of discrimination under Title VI. Part IV reviews the methods the Supreme Court uses to determine whether a statute provides an implied private right of action and examines the decisions of circuit courts in relation to the availability of a private right of action under Title VI. Part V explains how the Alexander Court determined that an implied right of action is available under section 601 of Title VI but not under section 602 of the same title. Part VI analyzes the majority’s reasoning in Sandoval and discusses why the Court should have looked outside the text of section 602 to determine its implications. Part VII discusses Title VI enforcement through 42 U.S.C. § 1983, and Part VIII suggests that the Court may soon find section 602 disparate impact regulations to be invalid.

II. Understanding Discrimination: The Intent Requirement

Significant differences exist between disparate impact and intentional discrimination. For example, each carries a different burden of proof for establishing a prima facie case of discrimination. Two important Supreme Court cases dealing with discrimination lawsuits help to explain these differences.

A. Washington v. Davis

In Washington v. Davis, the District of Columbia police department denied employment to a group of black males after they failed to meet the score requirement on a written personnel test administered by the department. The applicants filed a class action suit against the department, claiming that the test had a racially disproportionate impact and therefore violated the Due Process Clause of the Fifth Amendment of the federal Constitution.

The applicants in Davis based their claim solely on a disparate impact standard, arguing that the racially disproportionate effect of the test alone violated the Fifth Amendment. The Supreme Court disagreed with the plaintiffs’ contention, holding that where a statute or regulation is facially neutral, a showing of a racially disproportionate impact alone cannot establish a prima facie case of discrimination under the Constitution. The Court stated

9. Id. at 233.
10. The Due Process Clause of the Fifth Amendment provides that “[n]o person shall be... deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.
11. Davis, 426 U.S. at 234.
12. Id. at 235.
13. Id. at 242.
that a plaintiff must prove intentional, or invidious, discrimination to establish a constitutional violation.\textsuperscript{14}

\textbf{B. Arlington Heights}

In Village of Arlington Heights v. Metropolitan Housing Development Corp.,\textsuperscript{15} the Supreme Court elaborated on the factors that courts should weigh in establishing the existence of intentional discriminatory purpose. The Court noted that although a racially disproportionate impact may provide a starting point to establishing a case of intentional discrimination, a plaintiff must present other evidence, either direct or circumstantial, to support such an allegation.\textsuperscript{16} The Court listed historical background of the decision, specific sequence of events leading up to the decision, departures from normal procedure, and legislative or administrative history as a few of the many factors that courts should consider when determining the presence of intentional discriminatory purpose.\textsuperscript{17}

Both the \textit{Davis} and \textit{Arlington Heights} Courts noted that in some cases a showing of racially disproportionate impact alone might establish the existence of intentional discriminatory purpose.\textsuperscript{18} But the \textit{Arlington Heights} Court noted that "such cases are rare" and involve "a clear [discriminatory] pattern, unexplainable on grounds other than race."\textsuperscript{19} Therefore, after the rulings in \textit{Davis} and \textit{Arlington Heights}, if an agency can justify its policies on grounds other than race, and the policies are facially neutral, courts will consider the policies valid even though they may disproportionally impact racial minorities.\textsuperscript{20} Absent a showing of intentional discriminatory purpose through the difficult gathering of circumstantial evidence, a racially disproportionate impact alone does not amount to a constitutional violation.

\begin{itemize}
\item \textsuperscript{14} \emph{Id}.
\item \textsuperscript{15} \textit{429 U.S. 252} (1977).
\item \textsuperscript{16} \emph{Id.} at 266.
\item \textsuperscript{17} \emph{Id.} at 267-68.
\item \textsuperscript{18} \textit{See id.} at 266; \textit{Davis}, 426 U.S. at 242.
\item \textsuperscript{19} \textit{Arlington Heights}, 429 U.S. at 266.
\end{itemize}
III. Defining Discrimination Under Title VI

A. The Structure of Title VI

Section 601 of Title VI is the substantive portion of the Civil Rights Act that serves as a mandate from Congress. Section 601 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." As evidenced by the language itself, section 601 is broad, ambiguous, and requires judges to interpret the meaning of the statute, particularly the scope of the term "discrimination."

In contrast to the substantive prohibition on discrimination mandated in section 601, section 602 of Title VI acts as a procedural mandate from Congress to federal agencies responsible for administering federal assistance. Section 602 provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of [section 601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

Section 601, as well as the rules and regulations issued by federal agencies and departments under section 602, share a common purpose: to prohibit federal funds from being distributed in a discriminatory manner based on "race, color, or national origin." Section 601 acts as a substantive mandate from Congress, and section 602 directs federal departments and agencies responsible for the distribution of federal funds to issue rules and regulations to "effectuate" this substantive mandate. Because the statute does not define the term "discrimination," however, the scope of the term in the context of section 601, as well as under the rules and regulations issued under section 602, is unclear.

22. See id.
23. Id. § 2000d-1 (emphasis added).
24. Id. § 2000d.
25. See id. § 2000d-1.
26. See id. § 2000d.
This ambiguity has required the Supreme Court to undertake the difficult task of interpreting what constitutes impermissible discrimination under Title VI.

B. Prior U.S. Supreme Court Decisions Interpreting Title VI

In the case *Lau v. Nichols*, the Supreme Court faced the task of deciding whether San Francisco’s policy of refusing to provide English language instruction in its public schools violated the Title VI rights of Chinese-speaking students. The Court answered the question in the affirmative. Notably, the students prevailed on their claim without demonstrating that the school system had intentionally discriminated against them. Rather than require the students to prove intentional discrimination, the Court allowed the students to prove a Title VI violation based solely on a showing of discriminatory effects, or disparate impact.

Four years after the *Lau* decision, the Court cast a cloud of doubt over the validity of that ruling when it decided *Regents of University of California v. Bakke*. In *Bakke*, the Court confronted whether a university’s affirmative action admissions policy favoring minority applicants violated Title VI’s ban on discrimination. The policy of discrimination in *Bakke* was intentional on its face, and therefore the applicant challenging the university policy easily satisfied the burden of proof with respect to intent. In deciding the case, however, the Court addressed the issue of intent with respect to which type of discrimination violates Title VI. Justice Powell, announcing the decision of the Court in an opinion that was his alone, reasoned that the legislative history behind Title VI revealed that Congress did not intend Title VI to reach beyond the scope of the Constitution. Although the case resulted in several opinions, a five-Justice majority held that Title VI is coextensive with the Fourteenth Amendment. Therefore, based on its decision in *Washington v. Davis*, the Court held that Title VI only prohibits intentional discrimination.

The *Bakke* decision clarified that Title VI requires plaintiffs to shoulder the same burden-of-proof problems with intent as they would under a Fourteenth

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28. Id. at 564.
29. Id. at 568.
30. Id.
32. Id. at 269-70.
33. Id. at 289.
34. Id. at 287.
35. Justice Powell, writing for the Court, and Justices Brennan, White, Marshall, and Blackmun, concurring in the judgment in part and dissenting in part, reached this result. Id.; id. at 325 (Brennan, J., concurring in part and dissenting in part).
Amendment claim as illustrated in Davis and Arlington Heights.\textsuperscript{36} Requiring intent under Bakke seems to conflict with the holding in Lau, which requires only discriminatory impact to establish a prima facie case under Title VI. Although the Court in Bakke explicitly called into doubt the holding in Lau, the Court did not clearly overrule it.\textsuperscript{37} The Bakke Court predicated its decision on section 601 of Title VI.\textsuperscript{38} Therefore, the Court did not address whether rules and regulations issued under section 602 of Title VI were bound by the constitutional intent requirement or whether, as Lau had previously held, a plaintiff could prove a Title VI violation based on section 602 disparate impact regulations.

In Guardians Ass'n v. Civil Service Commission,\textsuperscript{39} the Court once again confronted issues dealing with the scope of discrimination under Title VI. Although the case rendered several opinions, the Court finally dealt with both sections 601 and 602 and seemingly formed a majority\textsuperscript{40} in deciding the scope of prohibited discrimination under both sections. Seven Justices, as opposed to five in Bakke, joined to reaffirm the holding in Bakke that Title VI is coextensive with the Fourteenth Amendment, and, therefore, under section 601, a plaintiff must prove intentional discrimination.\textsuperscript{41} Five Justices in Guardians also held,

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  \item \textsuperscript{36} See id. at 287 ("Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause . . . "); id. at 325 (Brennan, J., concurring in part and dissenting in part) ("Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself.").
  \item \textsuperscript{37} Justice Brennan, joined by Justices White, Marshall, and Blackmun, wrote in his concurring opinion:
    \begin{quote}
      We recognize that Lau, especially when read in light of our subsequent decision in Washington v. Davis, which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision.
    \end{quote}
  \item \textsuperscript{38} Id. at 352 (Brennan, J., concurring in part and dissenting in part) (citation omitted).
  \item \textsuperscript{39} 463 U.S. 582 (1983).
  \item \textsuperscript{40} See infra Part VII.B, for a discussion relating to the validity of the Guardians holding with respect to section 602 of Title VI.
  \item \textsuperscript{41} Chief Justice Burger and Justices Powell, Rehnquist, O'Connor, Brennan, Blackmun, and Stevens stated that section 601 of Title VI prohibited only intentional discrimination. Guardians, 463 U.S. at 607 (Powell, J., concurring); id. at 612 (O'Connor, J., concurring); id. at 635 (Stevens, J., dissenting).
\end{itemize}
however, that despite the fact that Title VI requires proof of discriminatory intent, violations of the rules and regulations issued under section 602 do not require proof of discriminatory intent.\textsuperscript{42}

Two years later, the Court clarified and reaffirmed the \textit{Guardians} holdings in \textit{Alexander v. Choate}.\textsuperscript{43} Justice Marshall, writing for a unanimous Court, stated:

[A] two-pronged holding on the nature of the discrimination proscribed by Title VI emerged in [\textit{Guardians}]. First, the Court held that [section 601] itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of [section 601].\textsuperscript{44}

Although the Court in \textit{Choate} clarified its holding in \textit{Guardians} with respect to the scope of the prohibited discrimination under section 602 regulations, it left unanswered whether private plaintiffs could enforce such regulations through an implied right of action.

\textbf{IV. Should Courts Allow an Implied Right of Action?}

Aside from the problem of determining the scope of the term "discrimination" under Title VI, the Supreme Court has struggled to determine whether an implied right of action is available to enforce the statute. In \textit{Lau}, the Court allowed a private right of action under section 602 but never explicitly addressed the issue.\textsuperscript{45} In \textit{Bakke}, though not all the Justices agreed,\textsuperscript{46} Justice

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    \item [\textsuperscript{42}] Justices White, Marshall, Stevens, Brennan, and Blackmun reached this result, although for different reasons. Justices Marshall and White believed that Title VI itself, including both sections 601 and 602, could prohibit disparate impact discrimination despite \textit{Bakke}. \textit{Id.} at 590; \textit{id.} at 623 (Marshall, J., dissenting). Justices Stevens, Brennan, and Blackmun believed that section 601 could only prohibit intentional discrimination, but that section 602 regulations could prohibit disparate impact discrimination because they were "reasonably related" to the purposes of section 601. \textit{Id.} at 643 (Stevens, J., dissenting).
    \item [\textsuperscript{43}] 469 U.S. 287 (1985).
    \item [\textsuperscript{44}] \textit{id.} at 293 (footnote omitted).
    \item [\textsuperscript{45}] The plaintiffs in \textit{Lau} filed a class action. \textit{Lau} v. Nichols, 414 U.S. 563, 564 (1974). The Court granted relief to the class based solely on Title VI. \textit{Id.} at 566. In particular, the Court noted that the respondents had violated Department of Health, Education, and Welfare regulations issued under section 602. \textit{Id.} at 567-68. From these facts, it seems reasonable that the Court assumed that a private right of action was available to enforce section 602 regulations.
    \item [\textsuperscript{46}] Justice White addressed the issue in a separate opinion and concluded that no private right of action was available under Title VI. \textit{Regents of Univ. of Cal. v. Bakke}, 438 U.S. 265, 387 (1978) (opinion of White, J.).
\end{itemize}
Powell stated that a private right of action was available under section 601 to decide the case, but refused to address the issue separately.\(^{47}\) In *Guardians*, several Justices debated the availability of a private right of action under section 602, but no majority emerged to answer definitively the question.\(^{48}\)

**A. Cort v. Ash: Searching for Congress's Intent**

In *Cort v. Ash*,\(^ {49}\) the Court examined a federal statute in which Congress had not expressly provided for a private right of action. In attempting to set guidelines for finding an implied right of action,\(^ {50}\) the Court identified four separate factors for courts to analyze: (1) whether the plaintiff is an intended beneficiary under the statute; (2) whether there is any explicit or implicit indication of legislative intent to either create or foreclose a private right of action; (3) whether a private right of action is "consistent with the underlying purposes of the legislative scheme"; and (4) whether "the cause of action [is] one traditionally relegated to state law... so that it would be inappropriate to infer a cause of action based solely on federal law."\(^ {51}\)

**B. Applying the Cort Factors to Title VI**

In *Cannon v. University of Chicago*,\(^ {52}\) the Court utilized the four factors defined in *Cort* to determine whether it should imply a private right of action under Title VI. Unlike many courts that had applied the four factors more flexibly,\(^ {53}\) however, the *Cannon* Court utilized the factors as the sole means to

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\(^{47}\) Id. at 284.

\(^{48}\) Justice Powell, joined by Chief Justice Burger, argued that no private right of action existed at all under Title VI. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 608 (1983) (Powell, J., concurring). Justice O'Connor argued that a plaintiff could not obtain relief under section 602 regulations prohibiting disparate impact discrimination because the regulations themselves were invalid. Id. at 612 (O'Connor, J., concurring). Justice White argued that a private right of action was available under section 602, but that the statute limited private plaintiffs to injunctive relief absent a showing of intentional discrimination. Id. at 598. Justice Marshall argued that a private right of action was available under section 602 and that full compensatory and injunctive relief was available for plaintiffs both in cases of intentional and disparate impact discrimination. Id. at 624 (Marshall, J., dissenting).

\(^{49}\) 422 U.S. 66 (1975).

\(^{50}\) Id. at 78.

\(^{51}\) Id.

\(^{52}\) 441 U.S. 677 (1979).

\(^{53}\) See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 316-17 (1979) (analyzing the Trade Secrets Act using the *Cort* factors); *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 37-41 (1977) (analyzing the Williams Act under the *Cort* factors, with particular emphasis on the intended class of beneficiaries); *Mason v. Belieu*, 543 F.2d 215, 221 (D.C. Cir. 1976) (finding the *Cort* factors to be "determinative of courts' authority to imply remedies" under the Federal Aviation Act).
discern legislative intent. In Cannon, the Court faced the task of deciding whether it should imply a private right of action under Title IX of the Civil Rights Act, the gender counterpart to Title VI.

The Court quickly satisfied the first of the Cort factors by looking to the language of the statute itself. Instead of prohibiting discrimination in a broad sense as a criminal statute might, the statute prohibited discrimination against a particular class of persons. Therefore, the Court reasoned that Congress intended these persons to be the beneficiaries of the statute. The Court also quickly satisfied the fourth Cort factor by noting that protection against discrimination had historically been a matter delegated to the federal government and federal courts.

In analyzing the second Cort factor, the Cannon Court examined whether Title VI provided an implied private right of action. Congress enacted Title VI several years prior to Title IX, and it served as the model for Title IX. The Court noted that during the years between the enactment of Title VI and Title IX, several lower federal courts had held that Title VI contained an implied right of action. The Court reasoned that Congress must have been aware of court interpretations of Title VI when it enacted Title IX. Therefore, the Court concluded that such interpretations reflected congressional intent with respect to Title IX.

When examining the third Cort factor, the Cannon Court considered the purposes of the legislative schemes of both Title VI and Title IX. In doing so, the Court noted that Title VI served a dual purpose: (1) to prevent federal funds from being used in a discriminatory manner; and (2) to protect individuals from

54. At the outset of its inquiry, the Cannon Court stated that "before concluding that Congress intended to make a remedy available to a special class of litigants, a court must carefully analyze the four factors that Cort identifies as indicative of such intent." Cannon, 441 U.S. at 688 (emphasis added).
55. Id. at 683.
56. The Cannon Court noted, "Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefitted class." Id. at 694-95 (footnote omitted).
57. Id. at 689.
58. Id. at 690.
59. Id. at 694.
60. Id. at 708.
61. Id. at 694.
62. Id.
63. Id. at 696.
64. Id. at 696-98.
65. Id.
66. Id. at 704.
those discriminatory practices. The Court then reasoned that an implied right of action was consistent, and in some cases necessary, with the second purpose of Title VI because it served to protect an individual’s rights under the statute.

After a thorough analysis of the four Cort factors, the Cannon Court held that an implied right of action exists under both Title IX and Title VI. The Court did not, however, explicitly state whether its holding was limited to section 601 of Title VI or whether it applied to the rules and regulations issued under section 602 as well. In the years following the Cannon decision, circuit courts across the country would attempt to resolve that issue.

C. The Circuit Courts Speak and Allow an Implied Right of Action Under Section 602

Because no clear holding emerged from any of the Supreme Court’s Title VI opinions as to whether an implied right of action existed under the rules and regulations issued under section 602, the issue became one of first impression for the circuit courts. Every circuit court in the country to consider the issue either explicitly or implicitly conceded that a private right of action was available under section 602 of Title VI. Though most of the circuit courts

67. Id.
68. Id. at 706.
69. Id. at 709.
70. See Powell v. Ridge, 189 F.3d 387, 398 (3d Cir. 1999) (explicitly holding that an implied right of action exists under section 602 of Title VI); Buchanan v. City of Bolivar, 99 F.3d 1352, 1356 n.5 (6th Cir. 1996) (citing Guardians for the proposition that “[a] plaintiff may pursue a claim under a disparate impact theory” pursuant to section 602 of Title VI); Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996) (“Although Title VI itself proscribes only intentional discrimination, certain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of discriminatory intent.”); N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (per curiam) (stating that “[a] plaintiff alleging a violation of [section 602] regulations must make a prima facie showing that the alleged conduct has a disparate impact”); 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. Moreover, plaintiffs need not show intentional discriminatory conduct to prevail on a claim brought under these administrative regulations.”) (citation omitted); Castaneda by Castaneda v. Pickard, 781 F.2d 456, 465 n.11 (5th Cir. 1986) (“[A] Title VI action can now be maintained in either the guise of a disparate treatment case, where proof of discriminatory motive is critical, or in the guise of a disparate impact case . . . . In this latter type of case, proof of discriminatory intent is not necessary.”); Latinos Unidos de Chelsea En Accion (LUCHA) v. Sec’y of Hous. & Urban Dev., 799 F.2d 774, 785 n.20 (1st Cir. 1986) (“Under [Title VI] itself, plaintiffs must make a showing of discriminatory intent; under the [section 602] regulations, plaintiffs simply must show a discriminatory impact.”); Larry P. by Lucille P. v. Riles, 793 F.2d 969, 981-82 (9th Cir. 1984) (noting that a majority of Justices in Guardians held that “proof of discriminatory effect suffices to establish liability when the suit
decided the issue without conducting a detailed analysis of Title VI or the case law surrounding it, at least two courts engaged in detailed analyses to reach the conclusion that an implied right of action existed under section 602.71

Rather than rely exclusively on prior Supreme Court decisions, the Third Circuit, in Powell v. Ridge, conducted an independent inquiry based on Cort and its progeny to determine whether an implied right of action was available under section 602 of Title VI.72 Ultimately, after looking to factors such as legislative intent and the underlying purposes of the legislative scheme, the Third Circuit determined that a plaintiff could enforce section 602 rules and regulations through a private action.73

Shortly after the Third Circuit’s ruling in Powell, the Eleventh Circuit, in Sandoval v. Hagan, also reached the conclusion that an implied right of action was available under section 602 of Title VI.74 Much like the Third Circuit in Powell, the Eleventh Circuit engaged in a detailed analysis of Title VI in making this determination.75 After granting certiorari to the appellants in Sandoval, however, the Supreme Court in Alexander v. Sandoval would disrupt the settled expectations of circuit courts across the country and hold, in a 5-4 decision, that no implied right of action exists under section 602 of Title VI.76

V. Alexander v. Sandoval: No Private Right of Action Under Section 602

A. The Facts

In 1990, the State of Alabama amended its constitution to declare English to be its official language.77 Pursuant to this declaration, the Alabama Department of Public Safety administered state driver’s license examinations solely in English.78 The Alabama Department of Public Safety had accepted financial assistance grants from the United States Department of Justice (DOJ) as well as the Department of Transportation (DOT).79 Because the Alabama Department

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71. See Sandoval v. Hagan, 197 F.3d at 484, 507 (11th Cir. 1999); Powell v. Ridge, 189 F.3d at 387 (3d Cir. 1999).
72. Powell, 189 F.3d at 398; see also Chester Residents Concerned for Quality Living v. Seif, 132 F.3d at 925 (3d Cir. 1997) (an earlier decision by the Third Circuit that is referenced throughout the analysis in Powell).
73. Powell, 189 F.3d at 399.
74. Hagan, 197 F.3d at 507.
75. Id.
77. Id. at 278.
78. Id. at 279.
79. Id. at 278.
of Public Safety had accepted such federal financial assistance, it subjected itself to the rules and regulations issued by the DOJ under section 602 of Title VI.  

Pursuant to section 602 of Title VI, the DOJ had issued a regulation prohibiting funding recipients from administering federal funds in a manner that had the effect of subjecting individuals to discrimination. Sandoval brought suit against the Department of Public Safety, arguing that its policy of administering driver's license examinations exclusively in English had the effect of subjecting non-English speakers to discrimination based on their national origin.  

The District Court for the Middle District of Alabama agreed with Sandoval, enjoined the policy, and ordered the Department of Public Safety to accommodate non-English speakers. On appeal to the Eleventh Circuit, the State argued that the district court should not have permitted Sandoval to initiate suit because section 602 does not contain an implied right of action. The Court of Appeals for the Eleventh Circuit disagreed with the State, held that an implied right of action did exist under section 602, and affirmed the judgment of the district court.

B. The Majority Opinion

Justice Scalia, writing for the majority, rejected Sandoval's notion that arguments favoring an implied right of action under section 602 could be based on language from earlier Supreme Court decisions such as Guardians and Cannon. Instead, Justice Scalia stated unequivocally, "This Court is bound by holdings, not language." Bound by holdings, Justice Scalia reasoned that because neither Cannon nor Guardians, nor any other decision of the Court, had explicitly held that section 602 contains a private right of action, the

80. Id.
81. Id. The DOJ regulation provided:
    A recipient . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.
82. Sandoval, 532 U.S. at 279.
84. Sandoval v. Hagan, 197 F.3d 484, 487 (11th Cir. 1999).
85. Id. at 511.
86. Sandoval, 532 U.S. at 282.
87. Id.
respondents’ arguments relying on the language of those decisions were foreclosed. 88

Instead, Justice Scalia focused on section 602 itself to determine whether it contains an implied right of action. Justice Scalia reasoned that if an implied right of action exists under section 602, it could not be found by looking to section 601 or its legislative history but instead had to come “from the independent force of § 602.” 89 In focusing on section 602, Justice Scalia argued that “statutory intent” determined whether an implied right of action exists. 90

In his analysis, Justice Scalia determined that there was no evidence that Congress intended to provide a private right of action to enforce the rules and regulations under section 602. 91 Indeed, Congress had expressly provided in section 602 that the departments and agencies responsible for issuing the rules and regulations could terminate funding to recipients who refused to comply with such rules. 92 Because Congress had already expressly provided for this remedy under section 602, Justice Scalia argued that it was unlikely that Congress also intended a private right of action to be available to enforce section 602 rules and regulations. 93 Therefore, based on an independent analysis of section 602 focusing exclusively on statutory construction, the majority concluded that Congress did not intend section 602 to contain an implied private right of action. 94

C. The Dissent

Justice Stevens, writing for the dissent, stated, “Today, in a decision unfounded in our precedent and hostile to decades of settled expectations, a majority of this Court carves out an important exception to the right of private action long recognized under Title VI.” 95 Justice Stevens argued that the

88. Id. at 283-84.
89. Id. at 286. This view seems to conflict directly with the Court’s statement in Cannon that “the Court analysis requires consideration of legislative history.” Cannon v. Univ. of Chi., 441 U.S. 677, 694 (1979).
90. Sandoval, 532 U.S. at 286.
91. Id. at 288-91.
92. Section 602 of Title VI of the Civil Rights Act of 1964 provides:
   Compliance with any requirement adopted pursuant to this section may be effected
   (1) by the termination of or refusal to grant or to continue assistance under such
   program or activity to any recipient as to whom there has been an express finding
   on the record, after opportunity for hearing, of a failure to comply with such
   requirement . . . or (2) by any other means authorized by law.
93. Sandoval, 532 U.S. at 289-91.
94. Id. at 293.
95. Id. at 294 (Stevens, J., dissenting).
majority misunderstood the relationship between section 601 and section 602, misinterpreted the reasoning of past Supreme Court decisions endorsing a private right of action under Title VI, and misconstrued the "theoretical linchpin" of the *Cannon* decision. 96

According to the dissent, the Court could resolve the issue in *Sandoval* by canvassing prior Court opinions. 97 Unlike the majority, the dissent argued that to resolve the issue the Court should look to the reasoning of past decisions instead of limiting itself to the holdings. 98 After reviewing such decisions, the dissent concluded that the Court had already considered the question presented and had concluded that section 602 provides a private right of action. 99 In fact, the dissent noted in its closing remarks that "[g]iven the prevailing consensus in the Courts of Appeals, the Court should have declined to take this case." 100

**VI. Analysis: Why the Court Erred in Denying a Private Right of Action Under Section 602**

**A. The Majority Treats Section 602 as Separate and Distinct from Section 601**

When looking to the holdings of prior decisions, the *Sandoval* majority distinguished between section 601 and section 602. 101 Section 602, however, explicitly states that rules and regulations issued under section 602 are to "effectuate" the provisions of section 601 in a manner that is "consistent with achievement of the objectives of the statute." 102 As evidenced from the language of section 602 itself, Congress did not intend courts to interpret section 602 as separate and distinct from section 601. Furthermore, in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 103 the Supreme Court held that courts must give controlling weight to agency regulations that interpret a broadly worded statute unless they present an unreasonable construction of the statutory text. 104 As the dissent in *Sandoval* argued, the Court should not read section 601

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96. *Id.* at 295 (Stevens, J., dissenting).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 317 (Stevens, J., dissenting).
101. Justice Scalia wrote, "It is clear now that the disparate-impact regulations do not simply apply § 601 — since they indeed forbid conduct that § 601 permits — and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations." *Id.* at 285.
104. *Id.* at 843-44.
and section 602 as incongruent under \textit{Chevron}. Instead, the Court should read section 602 as granting federal agencies the authority to issue regulations that offer a reasonable construction of section 601's purpose.

The majority's incorrect assumption that the two sections warrant different treatment stems from a misinterpretation of \textit{Guardians}. In \textit{Guardians}, three of the five Justices who voted to uphold section 602 disparate impact regulations reasoned that rules and regulations issued under section 602 could prohibit disparate impact discrimination because such rules and regulations furthered the purpose of section 601. Because the Court in \textit{Bakke} held that Title VI prohibited only intentional discrimination, the \textit{Sandoval} majority reasoned that the holding in \textit{Guardians} with respect to section 602 was inconsistent with the holding in \textit{Bakke}. Therefore, the majority attempted to resolve this inconsistency by treating section 601 and section 602 as separate and distinct. In doing so, the majority retroactively applied their separate-and-distinct method of analysis and limited the holding in \textit{Cannon} to section 601.

The \textit{Cannon} Court saw no need to distinguish between section 601 and section 602, arguably because the Court had not yet decided \textit{Guardians} and

\begin{itemize}
\item 105. \textit{Sandoval}, 532 U.S. at 309 (Stevens, J., dissenting).
\item 106. \textit{id}.
\item 107. Justice Scalia quoted Justice O'Connor's concurring opinion in \textit{Guardians}, \textit{id.} at 286 n.6, in which she wrote, "If, as five members of the Court concluded in \textit{Bakke}, the purpose of Title VI is to proscribe \textit{only} purposeful discrimination ..., regulations that would proscribe conduct by the recipient having only a discriminatory \textit{effect} ... do not simply 'further' the purpose of Title VI; they go well \textit{beyond} that purpose," Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 613 (1983) (O'Connor, J., concurring). In \textit{Guardians}, however, Justice O'Connor was not one of the five Justices to conclude that section 602 disparate impact regulations were valid. Of those five Justices, none found section 602 disparate impact regulations to conflict with the purpose of section 601. \textit{See supra} note 42 and accompanying text.
\item 108. \textit{Guardians}, 463 U.S. at 643 (Stevens, J., dissenting).
\item 109. Justice Scalia wrote: [W]e must assume for purposes of deciding this case that regulations promulgated under \S 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under \S 601. ... These statements are in considerable tension with the rule of \textit{Bakke} and \textit{Guardians} that \S 601 forbids only intentional discrimination, but petitioners have not challenged the regulations here.
\item 110. \textit{Sandoval}, 532 U.S. at 281-82 (citations omitted); \textit{see also supra} note 107.
\item 111. In \textit{Cannon}, the Court wrote, "We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination." \textit{Cannon} v. Univ. of Chi., 441 U.S. 677, 703 (1979); \textit{see also Justice Stevens' dissent in \textit{Sandoval} in which he argues that \textit{Cannon} does not distinguish between section 601 and section \textit{not}...}
\end{itemize}
no reason existed to believe that the two sections should receive separate analysis. Therefore, much as the Sandoval majority believed that the holding in Bakke should apply to all of Title VI,\textsuperscript{112} including section 602, so should the holding in Cannon. Just because the majority believed that the Guardians Court created an inconsistency with respect to the holding in Bakke does not mean that the Court should permit further inconsistencies by limiting the holding in Cannon to section 601.

The Sandoval majority focused exclusively on holdings of previous cases. It is imperative, however, to examine the facts that gave rise to those holdings. As Justice Stevens argued in his dissent, "Cannon was itself a disparate-impact case."\textsuperscript{113} In Cannon, the university admissions policies the Court regarded as sexually discriminatory were neutral on their face.\textsuperscript{114} The Court based its decision on section 901 of Title IX, the gender counterpart to section 601 of Title VI, but the proof offered by the plaintiff did not reach beyond a disparate impact standard.\textsuperscript{115} If the Court had required the plaintiff to show intentional discrimination in line with the standards set forth in Davis and Arlington Heights, then she would not have met the burden of proof by presenting evidence of disparate impact discrimination alone.\textsuperscript{116} As evidenced from the facts in Cannon, however, the plaintiff offered little more than such disparate impact evidence.\textsuperscript{117} Therefore, because the Court in Cannon allowed the plaintiff to pursue her private right of action under a disparate impact standard, the Sandoval majority should have concluded that the holding in Cannon applied to both section 601 and section 602.

B. The Majority's Holding Conflicts with the Dual Purpose of Title VI

In determining whether an implied right of action exists under Title VI, the Court in Cannon noted that Title VI serves a dual purpose: it prohibits the recipient from distributing federal funds in a discriminatory manner and protects

\textsuperscript{602} Sandoval, 532 U.S. at 297 (Stevens, J., dissenting).

\textsuperscript{112} See supra note 109 and accompanying text.

\textsuperscript{113} Sandoval, 532 U.S. at 298 (Stevens, J., dissenting).

\textsuperscript{114} The policies disfavored applicants over the age of thirty unless they already possessed advanced degrees. Because the incidence of interrupted higher education was higher among women than men, the plaintiffs alleged that the policies had the effect of discriminating on the basis of sex. Cannon, 441 U.S. at 682 n.2.

\textsuperscript{115} After noting that the incidence of interrupted higher education was higher among women than men, the Court in Cannon stated that "the existence of the criteria either makes out or evidences a violation of the medical school's duty under Title IX to avoid discrimination on the basis of sex." \textit{Id}.

\textsuperscript{116} See supra Part II for a discussion of the burden of proof in cases involving intentional versus disparate impact discrimination.

\textsuperscript{117} See supra notes 114-15.
individuals from those discriminatory spending practices.\textsuperscript{118} The \textit{Sandoval} holding undermines the second objective — protecting individuals from discrimination.

Unlike the \textit{Cannon} Court, the \textit{Sandoval} majority limited its inquiry to whether it could determine Congress's intent from the language of section 602 alone.\textsuperscript{119} According to the \textit{Cort} factors, as well as the \textit{Cannon} Court's application of those factors, however, the Court should have also analyzed the legislative scheme or purpose behind the statute to determine whether Congress intended to create an implied right of action.\textsuperscript{120} If the \textit{Sandoval} majority had looked at the legislative purpose behind section 602, they would have found that a private right of action to enforce the rules and regulations under section 602 is fully consistent with Congress's intent.

As the \textit{Cannon} Court stated, one legislative purpose behind Title VI is to provide individuals with effective protection against discriminatory spending practices.\textsuperscript{121} Section 602 expressly provides that federal departments and agencies may terminate funding to recipients who fail to comply with the rules and regulations issued under section 602.\textsuperscript{122} The \textit{Sandoval} majority reasoned that the existence of an express remedy under section 602 precluded a finding that Congress also intended a private right of action to enforce the section 602 rules.\textsuperscript{123} However, the express remedy under section 602 only furthers the first of Title VI's purposes: prohibiting federal funds from being distributed in a discriminatory manner. The express remedy does not adequately protect individuals from discrimination — the second of Title VI's purposes. Therefore, an implied right of action under section 602 is necessary.

The Court reached a similar conclusion in \textit{Allen v. State Board of Elections}.\textsuperscript{124} In \textit{Allen}, a group of disenfranchised voters sought a declaratory judgment that certain state law voting amendments were subject to section 5 of the Voting Rights Act of 1965.\textsuperscript{125} The Court noted that an express remedy existed under the Voting Rights Act, which allowed the Attorney General to institute litigation, but that Congress had granted no express private right of action.\textsuperscript{126} In determining whether to imply a private right of action to enforce the Voting

\textsuperscript{118} \textit{Cannon}, 441 U.S. at 704.

\textsuperscript{119} \textit{See supra} Part V.B.

\textsuperscript{120} The third inquiry under \textit{Cort} is whether "it [is] consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." \textit{Cort} v. \textit{Ash}, 422 U.S. 66, 78 (1975).

\textsuperscript{121} \textit{Cannon}, 441 U.S. at 704.

\textsuperscript{122} \textit{See supra} note 92.


\textsuperscript{124} 393 U.S. 544 (1969).

\textsuperscript{125} \textit{Id.} at 550.

\textsuperscript{126} \textit{Id.} at 555 n.18.
Right Act, the Court looked to the purpose of the Act and the adequacy of the express remedy.\textsuperscript{127} The Court stated that the Act's purpose was to secure rights guaranteed by the Fifteenth Amendment for all citizens.\textsuperscript{128} The Court also reasoned that the purpose of the statute would be "severely hampered" if the Court left enforcement to the sole discretion of the Attorney General.\textsuperscript{129} Therefore, the Court held that "a federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implie[s] a private right of action."\textsuperscript{130}

Much like the victims in \textit{Allen}, the victims of disparate impact discrimination under Title VI cannot rely on agency enforcement alone adequately to protect them. Nor could agency enforcement further the statute's purpose of preventing recipients from spending federal funds in a discriminatory manner. For example, even though the Environmental Protection Agency promulgated section 602 disparate impact regulations as early as 1973, it failed to enforce the regulations until 1993.\textsuperscript{131} If agencies cannot effectively enforce the rules and regulations they issue under section 602, then courts should consider a private right of action as an alternative means of enforcement.\textsuperscript{132} Such a remedy is consistent with the second purpose of Title VI — to protect individuals from discrimination. Therefore, because courts can infer legislative intent, in part, by looking to the purpose behind a statute, they could legitimately conclude that Congress intended such a remedy.

Agency enforcement alone does not adequately protect individual rights. An agency's administrative investigations provide limited judicial review and give injured individuals no formal role in the process.\textsuperscript{133} Furthermore, because agency enforcement is often slow, projects receiving short-term federal funding, such as construction projects, will most likely reach completion by the time an investigation reveals a Title VI violation.\textsuperscript{134} Therefore, allowing private plaintiffs to seek injunctive relief in the courts through a private right of action

\textsuperscript{127} Id. at 556.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 557.
\textsuperscript{133} See Bradford C. Mank, \textit{Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs}, 24 COLUM. J. ENVTL. L. 1, 23 (1999).
is sometimes the only mechanism that will protect the individuals who Congress enacted Title VI to protect.

The Sandoval majority reasoned that individuals have adequate protection under Title VI because they have a private right of action under section 601. As previously discussed, the Cannon Court did not distinguish between intentional and disparate impact discrimination in its holding. In fact, the Cannon Court never raised the subject of intentional discrimination in its analysis. The Sandoval majority reasoned that because Bakke held that section 601 prohibits only intentional discrimination, the Cannon Court must have looked to Bakke, a prior decision, and, therefore, intended its holding to apply only to cases of intentional discrimination as well.

The Sandoval majority's line of reasoning, however, ignores the fact that Cannon itself was brought under a disparate impact burden of proof. Also, as previously discussed, when the Court decided Cannon it had yet to distinguish between sections 601 and 602 as it later would in Guardians. Therefore, it is much more probable that the Cannon Court intended its holding to reach cases of disparate impact discrimination under section 602 in addition to section 601 cases of intentional discrimination. Quoting language from Cannon, the Sandoval dissent argued, "A private right of action exists for 'victims of the prohibited discrimination.' Not some of the prohibited discrimination, but all of it."

C. Textualism and Implied Rights of Action: Searching for Scalia's Intent

The most obvious, and perhaps greatest, problem in determining whether an implied right of action exists under a statute is determining the intent of the legislature. In Cort v. Ash, the Court formulated four factors for courts to examine when determining whether to imply a private right of action under a federal statute. In Sandoval, however, the Court failed to apply the Cort test. Instead, the majority stated, "We . . . begin (and find that we can end) our search

136. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); see also supra Part II for a discussion of the burden of proof for intentional discrimination cases.
137. See supra Part VI.A.
138. See Sandoval, 532 U.S. at 282 n.2 ("[I]t is absurd to think that Cannon meant, without discussion, to ban under Title IX the very disparate-impact discrimination that Bakke said Title VI permitted.").
139. See supra notes 114-15 and accompanying text.
140. Sandoval, 532 U.S. at 297 (Stevens, J., dissenting) (citation omitted) (quoting Cannon v. Univ. of Chi., 441 U.S. 677, 703 (1979)).
for Congress's intent with the text and structure of Title VI. The Court's focus on the text of section 602 comes as no surprise, given that Justice Scalia, the Court's chief proponent of textualism, authored the opinion. The use of textualism, however, in the implied right of action context is not only squarely at odds with the Court's decision in Cannon, in which the Court recognized the four-factor Cort test as the appropriate means to determine Congress's intent, but also runs contrary to the very concept of an implied right of action.

The use of textualism in the implied right of action context is inherently problematic. After all, the text of section 602 says nothing about a private right of action. Therefore, by focusing exclusively on the text of the statute, the Sandoval majority easily concluded that Congress did not intend a private right of action under section 602. But the Sandoval majority's exclusive focus on the text of the statute to determine intent only seems to beg the question. If the text of section 602 had provided a private right of action, there would be no need for the Court to imply one. Textualist analysis in the implied right of action context, therefore, is outcome determinative. In other words, it is hardly analysis at all.

The notion that textualist analysis in the implied right of action context is nothing more than pretense is underscored by Justice Scalia's concurrence in Thompson v. Thompson. In Thompson, the Court held that no implied right of action exists to enforce the Parental Kidnapping Prevention Act. The Court began its analysis by recognizing the appropriateness of the four-factor Cort test as a means to determine congressional intent. In reaching its decision, the Court not only looked to the text and structure of the statute, but also to the legislative history surrounding its enactment. In his concurring opinion, Justice Scalia attacked the validity of the four-factor Cort test. In fact, Justice

142. Sandoval, 532 U.S. at 288.
145. Sandoval, 532 U.S. at 293.
147. Id. at 187.
148. Id. at 179.
149. Id. at 183-84.
150. Id. at 189 (Scalia, J., concurring).
Scalia rejected the use of any congressional-intent test in the implied right of action context.\textsuperscript{151} Instead, Justice Scalia offered this solution: "'[W]e should get out of the business of implied rights of action altogether."\textsuperscript{152}

In \textit{Sandoval}, Justice Scalia was apparently unable to persuade four of his colleagues to join him in an opinion that would explicitly put an end to implied rights of action. Instead, Justice Scalia convinced the Court to use textualism as a means to narrow its congressional-intent test. In doing so, Justice Scalia achieved essentially the same result as explicitly ending implied rights of action while alleviating any stare decisis concerns such a result may have raised. Justice Scalia's disingenuousness in the \textit{Sandoval} opinion is surprising. After all, Justice Scalia purportedly adheres to the textualist movement based on notions of political accountability — that Congress should \textit{say what it means}. In \textit{Sandoval}, however, Justice Scalia has done just the opposite. Rather than render a separate opinion and explicitly state his true intention, as he did in \textit{Thompson}, Justice Scalia has struck a compromise to form a majority. As a result, to discover the full consequence of the \textit{Sandoval} decision — no more implied rights of action — Justice Scalia forces us to read between the lines: a practice in which he himself has consistently refused to engage.

\textit{VII. Private Enforcement of Section 602 Under § 1983: A Short-Lived Remedy}

\textit{A. Cases Establishing the Availability of § 1983}

In \textit{Golden State Transit Corp. v. City of Los Angeles},\textsuperscript{153} the Supreme Court held that a two-step inquiry would determine whether § 1983 is available to remedy a statutory violation.\textsuperscript{154} First, a plaintiff must allege that a federal right, as opposed to a federal law, has been violated.\textsuperscript{155} Second, the plaintiff must show that Congress did not intend to foreclose a remedy under § 1983.\textsuperscript{156} To satisfy the first step of the \textit{Golden} inquiry, the Court in \textit{Blessing v. Freestone}\textsuperscript{157} used a three-part analysis to determine whether a federal statute creates an individual right.\textsuperscript{158} The Court in \textit{Blessing} held that (1) Congress must have

\textsuperscript{151} \textit{id}. at 191 (Scalia, J., concurring) ("[I]f the current state of the law were to be changed, it should be moved . . . away from our current congressional intent test to the categorical position that federal private rights of action will not be implied.").
\textsuperscript{152} \textit{id}. at 192 (Scalia, J., concurring).
\textsuperscript{153} 493 U.S. 103 (1989).
\textsuperscript{154} \textit{id}. at 106.
\textsuperscript{155} \textit{id}.
\textsuperscript{156} \textit{id}.
\textsuperscript{157} 520 U.S. 329 (1997).
\textsuperscript{158} \textit{id}. at 340-41.
intended that the statute benefit the plaintiff; (2) the right protected by the statute cannot be "vague and amorphous" and therefore unenforceable by the judiciary; and (3) "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms."\(^\text{159}\)

In \textit{Sandoval}, the dissent asserted that despite the majority's holding that an individual could not bring a private suit under section 602, the same individual could bring suit under § 1983.\(^\text{160}\) The \textit{Sandoval} dissent did not engage, however, in a detailed analysis of how a plaintiff could apply § 1983 to remedy violations of the agency regulations issued under section 602. The \textit{Sandoval} dissent left unanswered whether agency regulations issued under section 602 of Title VI constitute "laws" under § 1983, and if so, whether they create enforceable federal "rights."

\textbf{B. Application of § 1983 Analysis to Section 602}

In \textit{South Camden Citizens in Action v. New Jersey Department of Environmental Protection},\(^\text{161}\) the U.S. District Court for the District of New Jersey, in the first post-\textit{Sandoval} case to address the issue, held that individuals may enforce section 602 rules and regulations through § 1983.\(^\text{162}\) The \textit{South Camden} court noted that in \textit{Chrysler Corp. v. Brown}\(^\text{163}\) the Supreme Court held that federal regulations could have the "force and effect of law."\(^\text{164}\) Applying \textit{Chrysler} to the section 602 regulations, the \textit{South Camden} court concluded that section 602 regulations have the "force and effect of law."\(^\text{165}\) Relying on \textit{Chrysler} and \textit{Wright v. City of Roanoke Redevelopment & Housing Authority},\(^\text{166}\)

\textbf{159. Id.}


\textbf{161. 145 F. Supp. 2d 505 (D.N.J. 2001).}

\textbf{162. Id. at 549.}

\textbf{163. 441 U.S. 281 (1979).}

\textbf{164. \textit{South Camden}, 145 F. Supp. 2d at 528. In determining whether federal regulations could have the "force and effect of law," the \textit{Chrysler} Court engaged in a three-part inquiry. \textit{Chrysler}, 441 U.S. at 301-03. The \textit{South Camden} court summarized the inquiry as follows: [R]egulations have the "force and effect of law" if they: (1) are substantive, meaning they function as a "legislative-type rule" which affects individual rights and obligations; (2) Congress granted the agency which issued the regulations the authority to promulgate such regulations; [and] (3) the regulations were promulgated in accordance with any procedural requirements imposed by Congress . . . . \textit{South Camden}, 145 F. Supp. 2d at 528.}

\textbf{165. \textit{South Camden}, 145 F. Supp. 2d at 528-29.}

\textbf{166. 479 U.S. 418 (1987).}
a case in which the Supreme Court allowed a plaintiff to enforce a federal regulation under § 1983, the court concluded that section 602 regulations fall within the definition of "laws" under § 1983.167

The South Camden court then applied the three-part Blessing analysis to determine whether the section 602 regulation at issue created federal rights.168 The court found that the first inquiry under Blessing — whether the provision was intended to benefit the plaintiff — was easily satisfied by looking to the language of the section 602 regulation, which provided that no "person" shall be made the subject of discrimination based on "race, color, [or] national origin.""169

The South Camden court also satisfied the second inquiry under Blessing — whether the right assertedly protected by the provision is so vague and amorphous that its enforcement would strain judicial competence.170 The court concluded that "[b]ased on ... the experience federal courts have in applying disparate impact analysis in a variety of contexts," the right of a plaintiff to be free from disparate impact discrimination "is neither vague, nor amorphous, and is well within the competence of the judiciary to enforce."171

Finally, the court applied the third inquiry under Blessing — whether the provision unambiguously imposes a binding obligation on the states — to the section 602 regulation at issue.172 The court satisfied this inquiry by looking to the language of Title VI.173 The court relied on the use of the word "shall" in section 601, "directed" in section 602, and similar mandatory language in the regulation at issue to support the finding of a mandatory obligation.174 After satisfying the three-part analysis set forth in Blessing, the court held that section 602 regulations could create rights within the meaning of § 1983, thereby satisfying the first inquiry under Golden.175

The South Camden court then turned to the second inquiry under Golden, which asks whether Congress expressly or impliedly foreclosed a plaintiff's ability to enforce section 602 regulations under § 1983.176 The court rejected the

169. Id. at 536 (alteration in original) (quoting 40 C.F.R. § 7.30 (2001)).
170. Id. at 541.
171. Id.
172. Id.
173. Id. at 542.
174. Id.
175. Id.
176. Id.
notion that agency enforcement of section 602 regulations impliedly foreclosed enforcement under § 1983.\textsuperscript{177} The court noted that to rebut the strong presumption of the availability of enforcement under § 1983, a defendant must demonstrate that an elaborate enforcement provision already exists.\textsuperscript{178} The South Camden court, relying on Supreme Court precedent, rejected the notion that agency power to terminate funds under section 602 constituted such an elaborate enforcement provision.\textsuperscript{179} Therefore, the court concluded that because the defendant failed to rebut the presumption of enforcement under § 1983, the plaintiff had satisfied the second inquiry under Golden.\textsuperscript{180} After satisfying the two-step inquiry under Golden, the South Camden court held that § 1983 was available to remedy violations of the agency regulations prohibiting disparate impact discrimination issued pursuant to section 602 of Title VI.\textsuperscript{181}

On appeal, the Third Circuit disagreed with the district court's analysis and reversed.\textsuperscript{182} In particular, the court of appeals held that section 602 disparate impact regulations do not create enforceable rights. The court of appeals concluded that the analysis set forth in Blessing is not determinative and that a regulation alone cannot create a right enforceable under § 1983.\textsuperscript{183} Instead, much like the majority in Sandoval, the court of appeals focused its inquiry on congressional intent. The court of appeals stated that to determine "whether a plaintiff is advancing an enforceable right, the primary consideration [is] to determine if Congress intended to create the particular federal right sought to be enforced."\textsuperscript{184} Because the Supreme Court had previously held that section 601 forbids only intentional discrimination, the court of appeals reasoned that "it does not follow that the right to be free from disparate impact discrimination can be located in section 602."\textsuperscript{185}

\begin{itemize}
  \item \textsuperscript{177} Id. at 546.
  \item \textsuperscript{178} Id. at 545.
  \item \textsuperscript{179} Id.
  \item \textsuperscript{180} Id. at 546.
  \item \textsuperscript{181} Id. at 549.
  \item \textsuperscript{182} S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 790-91 (3d Cir. 2001).
  \item \textsuperscript{183} Id. at 788.
  \item \textsuperscript{184} Id.
  \item \textsuperscript{185} Id. at 789-90. The court of appeals went on to state:
    
    In sum, the regulations, though arguably valid, are not based on any federal right present in the statute. . . . [T]he regulations do more than define or flesh out the content of a specific right conferred upon the plaintiffs by Title VI. Instead, the regulations implement Title VI to give the statute a scope beyond that Congress contemplated, as Title VI does not establish a right to be free of disparate impact discrimination. Thus, the regulations are "too far removed from Congressional intent to constitute a 'federal right' enforceable under § 1983."

    \textit{Id.} at 790 (quoting Harris v. James, 127 F.3d 993, 1009 (11th Cir. 1997)).
\end{itemize}
The dissent took issue with the majority's use of congressional intent as the means to determine whether a regulation can create a right enforceable through § 1983.\textsuperscript{186} The dissent argued that whether a statute creates enforceable rights under § 1983 "is a different inquiry than that involved in determining whether a private right of action can be implied in a particular statute."\textsuperscript{187} Therefore, the dissent concluded that courts should use the test set forth in Blessing solely for the former inquiry and the test set forth in Cort v. Ash for the latter.\textsuperscript{188} Although the Supreme Court denied certiorari in South Camden,\textsuperscript{189} the Court affirmed the appropriateness of using congressional intent as the means to determine whether a statute creates enforceable rights under § 1983 in another case, Gonzaga University v. Doe.\textsuperscript{190}

In Gonzaga, the Court held that "[a] court's role in discerning whether personal rights exist in the § 1983 context" is no different "from its role in discerning whether personal rights exist in the implied right of action context."\textsuperscript{191} The Court further held that


\textsuperscript{186} See id. at 796-97 (McKee, J., dissenting).
\textsuperscript{187} Id. at 796 (McKee, J., dissenting).
\textsuperscript{188} See id.

In Alexander v. Sandoval the majority stated:

\textit{[W]}e must assume for the purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups,
even though such activities are permissible under § 601. . . . These statements are in considerable tension with the rule of Bakke and Guardians that § 601 forbids only intentional discrimination, but petitioners have not challenged the regulations here.193

The Sandoval majority had no opportunity to hold that section 602 regulations prohibiting disparate impact discrimination are invalid because the validity of the regulations was not at issue in the case. By adding the language "but petitioners have not challenged the regulations here" to the end of a statement that casts doubt on the validity of such regulations, however, the majority seemed to encourage future litigants to contest the issue. If, in fact, a defendant in a section 602 disparate impact case challenged the regulations themselves, it appears from the majority's language that the Court would most likely find the regulations to conflict with section 601 and therefore to be invalid.194

The Sandoval majority's opinion is not the only evidence that the Court seems ready and willing to invalidate section 602 regulations forbidding disparate impact discrimination. In her concurring opinion in Guardians, Justice O'Connor wrote

If, as five members of the Court concluded in Bakke, the purpose of Title VI is to proscribe only purposeful discrimination in a program receiving federal financial assistance, it is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory effect. Such regulations do not simply "further" the purpose of Title VI; they go well beyond that purpose.195

Justice O'Connor concluded, "Regulations imposing an impact standard are not valid."196

Additionally, because the five Justices in Guardians who agreed that section 602 disparate impact regulations were valid offered differing reasons in reaching that conclusion, the question as to whether such regulations are valid remains open.197 In Marks v. United States,198 the Court stated that "[w]hen a fragmented

194. The Court would most likely invalidate section 602 disparate impact regulations under the Chevron doctrine, which states that courts must give agency regulations "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).
196. Id. at 612 (O'Connor, J., concurring).
Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds ....' Because the opinions of the five Justices supporting disparate impact regulations cannot be considered as anything more than dicta, some commentators argue that, under Marks, they do not constitute a holding of the Court. Because it is questionable whether Guardians upheld the validity of section 602 disparate impact regulations, and because Sandoval cast serious doubt as to the validity of such regulations, it is highly probable that a litigant will successfully challenge section 602 disparate impact regulations in the near future.

Conclusion

As long as the Court holds section 602 disparate impact regulations to be valid, it should allow a private right of action to enforce those regulations. To hold otherwise creates inconsistencies between section 601 and section 602 that Congress never intended. Furthermore, to hold otherwise conflicts with one of the primary objectives of Title VI: to protect individuals from discriminatory spending practices. By focusing exclusively on the text of section 602 to determine congressional intent, the Court has effectively signaled an end to its willingness to imply private rights of action. If this is the Court's intention, it should say so explicitly rather than using textualism as a means to mask its intent.

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1155, 1204-07 (2000).
199. Id. at 193 (alteration in original) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).
200. Lambert, supra note 197, at 1207.