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ALEXANDER V. SANDOVAL AND THE INCREDIBLE DISAPPEARING CAUSE OF ACTION

Tanya L. Miller⁺

In an address to the nation on June 11, 1963, President John F. Kennedy described a nation embroiled in a struggle for racial equality.¹ Recognizing the need for change, President Kennedy urged Congress to take action.² After extensive debate within the halls of Congress, the

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1. President John F. Kennedy, Televised Address to the Nation on Civil Rights (June 11, 1963), available at <http://www.jfklibrary.org/j061163.htm>. President Kennedy's address ensued, in part, as a result of the use of National Guard troops to enforce a court ruling allowing African-American students admission to the University of Alabama. *Id.*; see also Tom Wicker, *President in Plea, Asks Help of Citizens to Assure Equality of Rights to All*, N.Y. TIMES, June 12, 1963, at A1 (describing the President's address and the context in which it was given and providing the full text of the address). The standoff at the University of Alabama was prompted by a statement from Alabama's Governor, George C. Wallace, indicating that he would prevent the entrance of African-American students into the school. See Claude Sitton, *Governor Leaves, But Fulfills Promises to Stand in Door and to Avoid Violence*, N.Y. TIMES, June 12, 1963, at A1 (providing a news account of the events at the University of Alabama and the full text of Governor Wallace's proclamation against integration). The civil rights situation had certainly been escalating even before the events at the University of Alabama; for example, there had been a similar standoff at the University of Mississippi and demonstrations in Birmingham, led by Dr. Martin Luther King, Jr. See Robert D. Loevy, *Introduction: The Background and Setting of the Civil Rights Act of 1964*, in THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION 39-40 (Robert D. Loevy ed., 1997) (discussing the situations at both the University of Mississippi and the University of Alabama); Joseph L. Rauh, Jr., *The Role of the Leadership Conference on Civil Rights in the Civil Rights Struggle of 1963-1964*, in THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION, *supra*, at 51-52 (describing the demonstrations in Birmingham). These events certainly provided the impetus for President Kennedy to act. See David B. Filvaroff & Raymond E. Wolfinger, *The Origin and Enactment of the Civil Rights Act of 1964*, in LEGACIES OF THE 1964 CIVIL RIGHTS ACT 11-13 (Bernard Grofman ed., 2000) (discussing the Birmingham events as leading to the introduction of the civil rights legislation); Paula D. McClain, *Foreword* in LEGACIES OF THE 1964 CIVIL RIGHTS ACT, *supra*, at xii (explaining that "Birmingham caused the nation to recognize black civil rights as an important policy issue deserving of governmental attention"); John G. Stewart, *The Senate and Civil Rights*, in THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION, *supra*, at 154 (observing that the civil rights bill proposed by President Kennedy was a "direct outgrowth of the violence and racial strife which gripped Birmingham, Alabama, in April and May of [1963]").

2. Kennedy Address, *supra* note 1. Characterizing the need to address racial equality as a moral issue, President Kennedy said:

Civil Rights Act of 1964³ (the Act) was passed.⁴ The Act prohibited discrimination in several contexts and held significant promise to end discrimination in many areas of American life, from public accommodations to employment.⁵

Included in the Act, Title VI is a provision that aims to end discrimination in federally funded programs.⁶ At the heart of Title VI,

Now the time has come for this Nation to fulfill its promise. The events in Birmingham and elsewhere have so increased the cries for equality that no city or State or legislative body can prudently choose to ignore them. . . . We face, therefore, a moral crisis as a country and as a people. . . . It is time to act in the Congress, in your State and local legislative body and, above all, in all of our daily lives.

Id. The address sparked positive reaction within the civil rights movement, and Dr. Martin Luther King, Jr. wrote to President Kennedy in a telegram:

I have just listened to your speech to the nation. It was one of the most eloquent, profound, and unequivocal pleas for justice and the freedom of all men ever made by any President. You spoke passionately to the moral issues involved in the integration struggle. I am sure that your encouraging words will bring a new sense of hope to the millions of disinherited people of our country. Your message will become a hallmark in [the] annals of American history. The legislation which you will propose, if enacted and implemented, will move our nation considerably closer.

Telegram from Dr. Martin Luther King, Jr. to President John F. Kennedy (June 11, 1963), available at http://www.jfklibrary.org/images/cr_doc35.jpg. The press reaction to the speech was also positive; for example, the New York Times noted: "Mr. Kennedy's address was one of the most emotional speeches yet delivered by a President who has often been criticized as being too 'cool' and intellectual. . . . [T]here was a fervor in his voice when he talked of the plight of some Americans." Wicker, *supra* note 1.

In the week following the address to the nation, President Kennedy transmitted proposed legislation to Congress. See Robert D. Loevy, *A Chronology of the Civil Rights Act of 1964*, in THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION, *supra* note 1, at 353 (providing a timeline of key events in the passage of the Civil Rights Act of 1964); Tom Wicker, *Message Somber, Bids Congress Remain in Session to Enact Omnibus Program*, N.Y. TIMES, June 20, 1963, at A1 (detailing the introduction of the bill and including the entire text of President Kennedy's message, which accompanied the proposed legislation, to Congress).

3. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h (1994).

4. See generally CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985) (providing an account of the struggles and debates within Congress as the Act was considered).

5. See Robert D. Loevy, *The Impact and Aftermath of the Civil Rights Act of 1964*, in THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION, *supra* note 1, at 333-34 (observing that the "primary impact of the Civil Rights Act of 1964 was the almost immediate elimination of racial discrimination in places of public accommodation" and that arguably the "most important provision of the Civil Rights Act of 1964 was the one instituting equal employment opportunity").

6. 42 U.S.C. §§ 2000d-2000d-7 (1994).

section 601 prohibits discrimination by recipients of federal funding.⁷ To enforce this prohibition, section 602 instructs federal executive agencies to promulgate regulations.⁸ Shortly following the enactment of Title VI, the agencies enacted such regulations.⁹

As courts began interpreting the scope of the newly enacted legislation, a narrowing trend emerged.¹⁰ Most significantly, the Supreme Court limited the scope of section 601 to prohibit only intentional discrimination.¹¹ Therefore, cases involving only discriminatory impact were no longer covered by section 601.¹² Despite the narrowing of section 601, disparate impact discrimination was still addressed by regulations of the executive agencies,¹³ and claims could be brought using

7. *Id.* § 2000d. Section 601 provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” *Id.*

8. *Id.* § 2000d-1. Section 602 provides in part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity. . . is authorized and directed to effectuate the provisions of section 2000d of this title. . . by issuing rules, regulations, or orders. . . which shall be consistent with achievement of the objectives of the statute.

Id.

9. See *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 619 n.7 (1983) (Marshall, J., dissenting) (listing regulations as examples); see also, e.g., 7 C.F.R. §§ 15.1-15.12 (2001); 15 C.F.R. §§ 8.1-8.15 (2001); 32 C.F.R. §§ 195.1-195.14 (2001); 34 C.F.R. §§ 100.1-100.13 (2001); 28 C.F.R. §§ 42.101-42.112 (2001); 40 C.F.R. §§ 7.10-7.135 (2001).

10. See generally ABRAHAM L. DAVIS & BARBARA LUCK GRAHAM, *THE SUPREME COURT, RACE, AND CIVIL RIGHTS* (1995).

11. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (holding that the reach of section 601 goes no further than the Fourteenth Amendment which addresses only intentional discrimination). Bakke, a white medical school applicant who had been rejected by the University of California Medical School, challenged the school’s admission policy. *Id.* at 277-78. The admissions program employed a racial preference by setting aside a specified number of acceptances for minority candidates. *Id.* at 272-76 (explaining the history and operation of the admissions program). The Court affirmed the lower court ruling and invalidated the admissions program. *Id.* at 319-20. See generally Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan’s Account of Regents of the University of California v. Bakke*, 19 YALE L. & POL’Y REV. 341 (2001) (providing an inside view of the deliberations that took place within the Court).

12. *Bakke*, 438 U.S. at 287.

13. See, e.g., 28 C.F.R. § 42.104(b)(2)(2001). The Department of Justice regulation is similar to those of the other agencies and reads in part: “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.” *Id.*; see also 7 C.F.R. § 15.3(b)(2)(2001); 15 C.F.R. § 8.4(b)(2)(2001); 32 C.F.R. § 195.4(b)(2) (2001); 34 C.F.R. § 100.3(b)(2)(2001).

these regulations.¹⁴ In the wake of *Alexander v. Sandoval*,¹⁵ however, this is no longer the case.¹⁶ Addressing the issue, the Court held that an independent cause of action does not exist to enforce the ban on discriminatory effects contained in the regulations promulgated under Title VI.¹⁷

Following an Alabama state constitutional amendment declaring English as the official state language,¹⁸ the Alabama Department of Public Safety adopted a policy of administering driver license tests exclusively in English.¹⁹ Representing a class of similarly situated individuals, Martha Sandoval filed suit under Title VI and its implementing regulations in addition to other laws.²⁰ The complaint

14. See *Alexander v. Sandoval*, 532 U.S. 275, 295 n.1 (2001)(Stevens, J., dissenting) (citing cases in which the courts of appeals have held that a cause of action exists to enforce Title VI regulations, including regulations regarding disparate impact).

15. 532 U.S. 275 (2001).

16. *Id.* at 293 (holding that no cause of action exists to enforce the disparate impact regulations under Title VI).

17. *Id.*

18. ALA. CONST. amend. 509. In addition to adopting English as “the official language of the state of Alabama,” the amendment also calls on state officials to take “all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced.” *Id.*

19. *Sandoval*, 532 U.S. at 279 (noting that the Department of Public Safety claimed that it decided to administer English-only driver license examinations to promote safety and to comply with Amendment 509); see also *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1285-86 (M.D. Ala. 1998). In response to Amendment 509, the Department of Public Safety issued “Driver License Policy Order No. 40” in December 1991, which read in part: “It is the policy of the Director and the Driver License Division that all driver license examinations will be printed and administered in English.” *Id.* at 1285. The procedures established by the policy prohibited the use of interpreters or translation dictionaries. *Id.* An Alabama Attorney General Opinion affirmed the policy and stated:

While requiring an ability to understand English as a requirement to participate in some state programs might be a violation of Title VI of the Civil Rights Act of 1964, or the Equal Protection Clause of the Fourteenth Amendment, consideration of safety and the integrity of the licensing process would support a requirement that driver license examinations be given in English.

Id. at 1286.

20. *Id.* at 1244 (“Mrs. Sandoval’s [c]omplaint was brought pursuant to 42 U.S.C. § 1981, 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964 and its implementing regulations.”). Mrs. Sandoval is a permanent resident of the United States and her primary language is Spanish. *Id.* at 1293. She attempted to get an Alabama state driver’s license, but did not understand enough English to take the examination and was not allowed to use an interpreter. *Id.* The court described Mrs. Sandoval as follows:

Ms. Sandoval cleans homes early in the morning five days per week. She then returns home to clean-up and change before going to work at the restaurant and store that she and her husband own. . . . For the past year or so, Ms. Sandoval has either driven illegally to her jobs, or [she] has waited for friends or her husband to provide her with transportation. Prior to either driving illegally or waiting

alleged that the Department of Public Safety's English-only testing policy had the effect of discriminating against non-English speakers based on their national origin.²¹ The suit sought to enjoin the Department of Public Safety from engaging in this practice and asked the court to declare the English-only policy unlawful under Title VI and its implementing regulations.²² Title VI applied to the Department of Public Safety because the department accepted federal funding from both the Departments of Justice and Transportation.²³

Following a bench trial, the United States District Court for the Middle District of Alabama ruled in favor of the plaintiff, Mrs. Sandoval.²⁴ The court found that an English-only policy had a disparate impact in its application, which resulted in discrimination against non-English speakers.²⁵ The court specifically held that the disparate impact regulations implemented under Title VI provided a viable cause of action under which to bring the suit.²⁶ Concluding that the English-only policy was in violation of the implementing regulations, the court issued a permanent injunction to prevent the Alabama Department of Public Safety from using the English-only policy in driver license testing.²⁷

The Alabama Department of Public Safety appealed the ruling to the United States Court of Appeals for the Eleventh Circuit, which affirmed the lower court's ruling.²⁸ The Eleventh Circuit pointed to its own precedent and to Supreme Court precedent to affirm the lower court's

until relatives or friends could provide transportation, however, Ms. Sandoval would spend hours each day walking to and from work and other locations, whatever the weather.

Id.

21. *Id.* at 1244 ("Mrs. Sandoval contends that '[t]he defendants' refusal to administer the examination in languages other than English. . . discriminates against the plaintiff and others similarly situated.'").

22. *Id.*

23. *Sandoval*, 532 U.S. at 278.

24. *Sandoval*, 7 F. Supp. 2d at 1315.

25. *Id.* at 1297-98. The court based its conclusion on testimony as to the statewide effect of the English-only driver's license testing policy as well as individual testimony from the plaintiffs. *Id.* Dr. Donald Bogie, an expert in demographic data analysis, testified that based on census data, over 13,000 non-English-speaking adult Alabama residents "would have difficulty in obtaining an Alabama driver's license because of the Department's English-Only Policy." *Id.* at 1294, 1297. The court also noted that by "providing special accommodations" to illiterate English-speaking residents and handicapped applicants, the English-only testing policy "singles out resident non-English speakers." *Id.* at 1298.

26. *Id.* at 1264 (explaining the factors that led the court to conclude that a private cause of action exists to enforce section 602 and the implementing regulations).

27. *Id.* at 1315.

28. *Sandoval v. Hagan*, 197 F.3d 484, 508, 510 (11th Cir. 1999).

holding and reject the Alabama Department of Public Safety's claims that the lower court's finding of a disparate impact cause of action was erroneous.²⁹ The court noted its prior recognition of a cause of action to enforce the regulations promulgated under Title VI.³⁰

The Alabama Department of Public Safety appealed the Eleventh Circuit's decision to the Supreme Court, which granted certiorari on the issue of whether a private cause of action exists to enforce the regulations under Title VI.³¹ In a five-to-four decision,³² the Court reversed the Eleventh Circuit and held that no private right of action exists.³³ Writing for the majority, Justice Scalia noted that the Court had never explicitly ruled on the issue.³⁴ After examining Court statements from prior case law and Title VI itself, Justice Scalia concluded that Title VI does not support a finding that a cause of action exists.³⁵

Dissenting from the majority, Justice Stevens stated that in the Court's previous decisions, it had already concluded that a cause of action under Title VI's implementing regulations exists.³⁶ Justice Stevens argued that, even if the issue had not been previously decided, the legislative history of Title VI, as well as the treatment of the cause of action by the lower courts, would lead to a conclusion that the cause of action exists.³⁷

This Note first examines previous Court statements regarding a cause of action to enforce the Title VI implementing regulations. Second, this Note reviews the treatment of this cause of action by the lower courts. This Note then analyzes the reasoning of the majority and dissenting opinions in *Sandoval*. This Note is in accord with the dissenting opinion that the issue had been previously decided and, even assuming it had not,

29. *Id.* at 502-07. The court pointed to three of its own previous cases. *Id.* at 502-04 (citing *Burton v. Belle Glade*, 178 F.3d 1175 (11th Cir. 1999), *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394 (11th Cir. 1993), and *Ga. State Conference of Branches of NAACP*, 775 F.2d 1403 (11th Cir. 1985)); see also *infra* notes 86-88 and accompanying text.

30. *Sandoval*, 197 F.3d at 502 (observing that the court had "repeatedly recognized an implied cause of action under Title VI to enforce the disparate impact regulations").

31. *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001).

32. The majority included Chief Justice Rehnquist, Justices Scalia, O'Connor, Kennedy, and Thomas. The dissent included Justices Stevens, Souter, Ginsburg, and Breyer. *Id.* at 277, 293.

33. *Id.* at 293.

34. *Id.* at 281-84; see also *id.* at 295 (Stevens, J., dissenting) (stating that "[t]he majority is undoubtedly correct that the Court has never said in so many words that a private right of action exists to enforce the disparate-impact regulations promulgated under § 602").

35. *Id.* at 280-93.

36. *Id.* at 294.

37. *Id.* at 303-07.

a properly reasoned analysis would conclude that such a cause of action exists. Finally, this Note examines the impact of further limiting the availability of Title VI for future civil rights enforcement litigation.

I. STATEMENTS BY THE SUPREME COURT LEAVE THE LOWER COURTS TO DETERMINE THE EXISTENCE OF A CAUSE OF ACTION

Whether a cause of action to enforce the disparate impact regulations promulgated under Title VI exists was not an issue explicitly addressed by the Supreme Court until *Sandoval*.³⁸ To a certain extent, however, the Court had dealt with the issue in several other cases.³⁹ An interpretation of key cases led many lower courts to conclude that a cause of action exists.⁴⁰ The interpretation of these cases became a key factor in the *Sandoval* decision.⁴¹

A. The Supreme Court Case Law Leaves Unanswered Questions Regarding the Cause of Action

*Lau v. Nichols*⁴² presented the Court with an action similar to that of *Sandoval*.⁴³ In *Lau*, a group of non-English-speaking school children of Chinese ancestry brought suit against the school system for failing to provide English instruction.⁴⁴ The suit alleged that this failure by the school system violated Title VI and its implementing regulations due to its discriminatory effect.⁴⁵ In finding that the school system was required to provide English instruction for the students, the Court appeared to

38. *Id.* at 282-84; *see also id.* at 294 (Stevens, J., dissenting).

39. *See infra* notes 42-70 and accompanying text.

40. *Sandoval*, 532 U.S. at 295 n.1.

41. *Id.* at 281-84. The majority noted that “[r]espondents assert that the issue in this case . . . has been resolved by our cases. To reject a private cause of action to enforce the disparate-impact regulations, they say, we would ‘[have] to ignore the actual language of *Guardians* and *Cannon*.’” *Id.* at 282. In the dissent, Justice Stevens wrote:

In separate lawsuits spanning several decades, we have endorsed an action identical in substance to the one brought in this case, demonstrated that Congress intended a private right of action to protect the rights guaranteed by Title VI, and concluded that private individuals may seek declaratory and injunctive relief against state officials for violations of regulations promulgated pursuant to Title VI.

Id. at 294 (citing *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582 (1983), *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), and *Lau v. Nichols*, 414 U.S. 563 (1974)).

42. 414 U.S. 563 (1974).

43. *See id.* at 564-65.

44. *Id.* at 564.

45. *See id.* at 564-65.

base its decision solely on section 601 of Title VI.⁴⁶ Regardless, the Court included a detailed analysis of the implementing regulations promulgated by the Department of Health, Education, and Welfare and concluded that the regulations require the school district to provide English instruction.⁴⁷

The concurring opinion in *Lau*, written by Justice Stewart and joined by the Chief Justice and Justice Blackmun, expressed the view that section 601 of Title VI alone is not enough to find the school in violation.⁴⁸ Justice Stewart focused on the implementing regulations as the key to requiring the school system to provide English instruction.⁴⁹

In *Cannon v. University of Chicago*,⁵⁰ a woman was denied admission to medical school and claimed that the denial was based on her sex.⁵¹ Although *Cannon* primarily concerned Title IX,⁵² the case was illustrative for a discussion of Title VI because Title VI served as a model for Title IX.⁵³ After careful consideration of the inherent similarities between

46. *Id.* at 566 (“We do not reach the Equal Protection Clause argument which has been advanced but rely solely on [section] 601 of the Civil Rights Act of 1964, 42 U.S.C. [section] 2000d, to reverse the Court of Appeals.”).

47. *Id.* at 566-68. In light of the regulations established by the Department of Health, Education, and Welfare, the Court observed that “[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents’ school system which denies them a meaningful opportunity to participate in the educational program -- all earmarks of the discrimination banned by the regulations.” *Id.* at 568 (footnote omitted). In finding the school system had violated Title VI, the Court observed that the school district was bound by Title VI and the Department of Health, Education, and Welfare’s regulations because it accepted federal funding. *Id.* at 568-69.

48. *Id.* at 569-70 (Stewart, J., concurring). The students did not contend that the school district affirmatively acted to discriminate, but the students argued that the discrimination was present because of the district’s failure to provide language assistance. *Id.* at 569-70. For this reason, Justice Stewart questioned whether section 601 could independently address the problem. *Id.* at 570.

49. *Id.* at 570-71 (Stewart, J. concurring). Justice Stewart relied on the regulations and argued that they required affirmative action by the school system to provide language training for non-English-speaking students. *Id.*

50. 441 U.S. 677 (1979).

51. *Id.* at 680.

52. 20 U.S.C. § 1681 (2000). Section 901 of Title IX reads in part: “No person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” *Id.*

53. *Cannon*, 441 U.S. at 694 (“Title IX was patterned after Title VI of the Civil Rights Act of 1964. . . . The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been. . . .”) (footnotes omitted).

Title VI and Title IX, the Court determined that a cause of action exists to enforce Title IX.⁵⁴

The Court's discussion was unclear, however, as to whether the holding in *Cannon* was limited to section 901 of Title IX, which was patterned after section 601 of Title VI.⁵⁵ The Court referred simply to a congressional intention to create a cause of action for the "victims of the prohibited discrimination."⁵⁶ It was also unclear whether the Court addressed the intentional discrimination reached by the statute itself or if it included the discriminatory effects prohibited by the regulations.⁵⁷ If limited in this manner, the cause of action found to exist by the Court would clearly apply only to intentional discrimination.⁵⁸ It should be noted that *Cannon* involved a discriminatory effect suit, which adds to the confusion over what the Court meant.⁵⁹

*Guardians Association v. Civil Service Commission*⁶⁰ presented the Court with a question regarding the remedies available to Title VI plaintiffs.⁶¹ The case involved minority employees of the city's police department who alleged that the department's pre-employment testing and subsequent layoff policy were discriminatory.⁶² While the Court

54. *Id.* at 694-95.

55. Alexander v. Sandoval, 532 U.S. 275, 284 n.2 (2001) (Stevens, J., dissenting).

56. *Cannon*, 441 U.S. at 703.

57. See Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1, 30 (1999) (noting that the Court did not make a distinction in *Cannon* as to intentional or disparate impact discrimination).

58. See 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, 158 (1994) (acknowledging that the distinction between intentional and disparate impact discrimination is key in the context of examining Title VI and its implementing regulations).

59. *Cannon*, 441 U.S. at 680 n.2 (detailing the basis for the plaintiff's claim of gender discrimination). See also *Sandoval*, 532 U.S. at 298 (Stevens, J., dissenting). Justice Stevens explained his view that *Cannon* was a disparate impact case as follows:

In that case, the plaintiff brought suit against two private universities challenging medical school admissions policies that set age limits for applicants. Plaintiff, a 39-year-old woman, alleged that these rules had the effect of discriminating against women because the incidence of interrupted higher education is higher among women than among men.

Id.

60. 463 U.S. 582 (1983).

61. *Id.* at 595.

62. *Id.* at 585. The pre-employment test was found to have a discriminatory effect on minorities who statistically had lower scores. *Id.* The ranking for seniority and the order of appointment were determined using the pre-employment test scores. *Id.* As a result, minority individuals who passed the examination were hired later than white applicants with higher scores. *Id.* When layoffs became necessary, the minority individuals who

ultimately decided the issue of remedies,⁶³ multiple opinions in the case addressed the Title VI regulations.⁶⁴ A majority of the Justices agreed that the disparate impact regulations adopted under Title VI are valid.⁶⁵ In arriving at this conclusion, the Court reviewed its previous decision in *Lau* for guidance in light of the Court's opinion in *Regents of the University of California v. Bakke*, which held that section 601 only addresses intentional discrimination.⁶⁶ For the sake of argument, the Court reasoned that even if *Bakke* overruled the conclusion in *Lau* in regard to the reach of section 601, it would not necessitate a finding that the regulations are invalid.⁶⁷ Furthermore, several Justices expressed the opinion that the regulations could be enforced through court actions.⁶⁸ It is unclear, however, whether the Justices believed a separate cause of action exists or whether another statute, such as 42 U.S.C. § 1983, must be used.⁶⁹ Justice Stevens seemed to infer that either could be used.⁷⁰

B. Lower Courts Overwhelmingly Conclude That a Cause of Action Exists

Against the background of the Court's statements, lower courts were left to make their own determinations as to the existence of a cause of action to enforce the regulations under Title VI.⁷¹ In approaching that

were hired later as a result of their lower test scores were the first to be laid off. *Id.* The plaintiffs in this case passed the pre-employment examination but were laid off. *Id.*

63. *Id.* at 602-03 (concluding that "[c]ompensatory relief, or other relief based on past violations of the conditions attached to the use of federal funds, is not available as a private remedy for Title VI violations not involving intentional discrimination").

64. *Id.* at 593-95.

65. *Id.* at 584 n.2 (noting the views of Justices Stevens, Brennan, Blackmun, Marshall, and White that the disparate impact regulations are valid).

66. *Id.* at 589-93 (discussing the tensions between *Lau* and *Bakke* and the application of both decisions to the instant case).

67. *Id.* at 591-92.

68. *Id.* at 593-95.

69. *Alexander v. Sandoval*, 532 U.S. 275, 300 n.5 (2001) (Stevens, J., dissenting) ("None of the relevant opinions was absolutely clear as to whether it envisioned such suits as being brought directly under the statute or under 42 U.S.C. § 1983.").

70. *Id.* Speaking of his decision in *Guardians Association*, Justice Stevens noted that he "made it quite clear that [he] believed the right to sue to enforce the disparate-impact regulations followed directly from *Cannon* and, hence, was built directly into the statute." *Id.* (citing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 635-36 (1983) (Stevens, J., dissenting)). Justice Stevens further observed that "in the alternative, relief would be available in that particular case under § 1983." *Id.*; see also *Guardians Ass'n*, 463 U.S. at 645 n.18 (Stevens, J., dissenting) ("Because respondent . . . acted under color of state law in making appointments, § 1983 authorizes a lawsuit against it, based on its violation of the governing administrative regulations.").

71. See *infra* notes 72-74.

task, several courts have explicitly held that a cause of action exists,⁷² while others have implied that a cause of action exists by ruling on the merits of disparate impact cases.⁷³ Only one court has opined that the question was still open for decision,⁷⁴ and no lower court has held that a cause of action did not exist.⁷⁵

1. Courts Have Explicitly Ruled on the Issue

The United States Court of Appeals for the Third Circuit has held twice that an independent disparate impact cause of action exists.⁷⁶ After concluding that Supreme Court precedent and its own case law were

72. See, e.g., *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999), *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *David K. v. Lane*, 839 F.2d 1265 (7th Cir. 1988).

73. See, e.g., *Latinos Unidos De Chelsea v. Sec'y of Hous. & Urban Dev.*, 799 F.2d 774 (1st Cir. 1986); *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031 (2d Cir. 1995); *Ferguson v. Charleston*, 186 F.3d 469 (4th Cir. 1999); *Castaneda v. Pickard*, 781 F.2d 456 (5th Cir. 1986); *Buchanan v. Boliver*, 99 F.3d 1352 (6th Cir. 1996); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1986); *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996).

74. *N.Y. City Envtl. Justice Alliance v. Giuliani*, 214 F.3d 65 (2d Cir. 2000).

75. *Sandoval*, 532 U.S. at 295 n.1 (Stevens, J., dissenting).

76. *Powell*, 189 F.3d at 399; *Chester Residents*, 132 F.3d at 927. In *Chester Residents*, the Third Circuit examined the issuance of a permit by the Pennsylvania Department of Environmental Protection to an industrial operation to be located in a minority community. *Chester Residents*, 132 F.3d at 927. The complaint alleged several distinct violations by the Department in issuing the permit, including an argument that the Department violated both section 601 of Title VI and the implementing regulations. *Id.* The district court dismissed the section 601 claim because intentional discrimination had not been proven. *Id.* at 928. The district court dismissed the claim pursuant to the implementing regulations, finding that no cause of action existed. *Id.* *Chester Residents* appealed this dismissal. *Id.* The Third Circuit reversed the district court and found that a cause of action existed. *Id.* at 937.

Interestingly, this decision was appealed and the Supreme Court granted certiorari. *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 915 (1998). However, the case later became moot when the permit was withdrawn by the Department. See Mank, *supra* note 57, at 50-52 (detailing the procedural aspects of the *Chester Residents* case). The Supreme Court then vacated and remanded the case with instructions to dismiss. *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 974 (1998).

Nonetheless, the following year, the Third Circuit reiterated its belief that a cause of action existed. *Powell*, 189 F.3d at 399. The district court in *Powell* dismissed a complaint alleging that the education funding practices of the Commonwealth of Pennsylvania had a discriminatory effect on minority children in violation of the Title VI implementing regulations. *Id.* at 391. The Third Circuit, however, did not reach the merits of the case. *Id.* at 405. Rather, having found that a cause of action existed to pursue the claim, the court reversed the lower court's decision dismissing the case and allowed the claim to move forward. *Id.* at 400. In doing so, the Third Circuit relied on the reasoning of its previous *Chester Residents* decision and restated its prior analysis. *Id.* at 397-99.

inconclusive,⁷⁷ the Third Circuit analyzed section 602 to determine whether a cause of action to enforce the regulations existed.⁷⁸ In *Chester Residents*, the Third Circuit reached the conclusion that a cause of action does exist⁷⁹ and upheld this finding in a subsequent ruling.⁸⁰ The court noted that it was following many other lower courts in reaching its conclusion.⁸¹

In *David K. v. Lane*,⁸² the Seventh Circuit heard the claims of white inmates who alleged that the prison's policy of not enforcing rules against predominately black and Hispanic gang activity discriminated against the white inmates who were not gang members.⁸³ The inmates argued that

77. *Chester Residents*, 132 F.3d at 929-33. The court first examined the applicable Supreme Court decisions. *Id.* at 929-31. Reviewing *Guardians Association*, the court noted that the opinion "did not explicitly address whether a private right of action exists under discriminatory effect regulations promulgated under section 602." *Id.* at 929. As a result, although the court determined that there was "implicit approval by five Justices of the existence of a private right of action," it did not want to rely solely on the *Guardians Association* decision. *Id.* at 930. Finding no assistance in Supreme Court precedent, the court reviewed its own holdings and came to a similar conclusion, stating that "our own precedent does not resolve the matter." *Id.* at 933.

78. *Id.* at 933-36.

79. *Id.* at 937. In reaching the conclusion that a cause of action existed, the Third Circuit applied a three-prong test established in its precedent. *Id.* at 933 (citing *Polaroid Corp. v. Disney*, 862 F.2d 987, 994 (3d Cir. 1988)(quoting *Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 947 (3d Cir. 1985)). The prongs of the test include: (1) a determination that the "agency rule is properly within the scope of the enabling statute," (2) an assessment that the "statute under which the rule was promulgated properly permits the implication of a private right of action," and (3) a conclusion that "implying a private right of action will further the purpose of the enabling statute." *Id.* The court addressed each prong and determined that the requirements of the Third Circuit test had been met. *Id.* at 933-36 (applying the three-prong test), 937 (concluding that all three prongs had been met).

80. *Powell*, 189 F.3d at 397-99 (discussing the court's prior ruling and agreeing that its previous analysis was correct).

81. *Id.* at 399 ("Our conclusion is in keeping with the decisions of the other courts of appeals that have addressed this issue."); *Chester Residents*, 132 F.3d at 927 ("We agree with the overwhelming number of courts of appeals that have indicated, with varying degrees of analysis, that a private right of action exists under section 602 of Title VI and its implementing regulations.")

82. 839 F.2d 1265 (7th Cir. 1988).

83. *Id.* at 1266-67. The court described the level of gang activity within the prison at issue in the case as rising to the level of "crisis stage." *Id.* at 1268. The gang activity involved "extortion, possession of contraband, intimidation, and physical and sexual abuse." *Id.* The plaintiffs in the case "argued the administration predominantly favored black and hispanic gang members by adopting a policy of least resistance to gang activity." *Id.* The white inmates who were unwilling to associate with the gangs were most often placed in protective custody. *Id.* The court noted that an "inordinately high number of white inmates in protective custody is directly related to the predominately black gang activity" at the prison. *Id.* at 1267 (footnote omitted). While in protective custody, the

the prison policy violated the Department of Justice's Title VI regulations.⁸⁴ Relying on the Court's holding in *Cannon*, the court held that a private cause of action existed to enforce the Title VI regulations.⁸⁵

The United States Court of Appeals for the Eleventh Circuit, in the lower court *Sandoval* decision, also explicitly held that a private cause of action exists.⁸⁶ The court relied on its own precedent in reaching this conclusion.⁸⁷ Furthermore, the court noted that its holding was supported by Supreme Court precedent and the decisions of other circuit courts.⁸⁸

2. Other Courts Implicitly Acknowledged the Cause of Action

In addition to courts, that have explicitly stated that a cause of action exists, many courts have implicitly reached the same conclusion by ruling on the merits of disparate impact claims brought using the Title VI implementing regulations.⁸⁹ The United States Courts of Appeals for the First Circuit,⁹⁰ Second Circuit,⁹¹ Fourth Circuit,⁹² Fifth Circuit,⁹³ Sixth

white inmates were generally "entitled to most of the privileges to which an inmate in the general population is entitled although an inmate in protective custody is usually confined more hours per day, has less opportunity to obtain certain prison jobs, and receives privileges at different times than the general population." *Id.*

84. *Id.* at 1268. The inmates argued that the Title VI regulations applied here because the prison received federal funding to produce prison forecasting models. *Id.* at 1274. Furthermore, the inmates contended that while the funds were limited to that particular project, the entire prison system benefited, and the regulations applied to all programs including the protective custody system. *Id.* The Department of Justice regulation at issue was 28 C.F.R. § 42.104. *Id.* This is the same regulation that was involved in the *Sandoval* decision. See *Alexander v. Sandoval*, 532 U.S. 275, 278 (2001).

85. *David K.*, 839 F.2d at 1274 (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979)). While the court acknowledged the existence of a cause of action, it held in this case that the regulation was not implicated. *Id.* at 1275. The court found that the federal funding received by the prison was not for the general benefit of the entire system, but for a particular project. *Id.* Therefore, the prison system, as a whole, had not subjected itself to the requirements of the Title VI implementing regulations. *Id.*

86. *Sandoval v. Hagan*, 197 F.3d 484, 501-07 (11th Cir. 1999).

87. *Id.* at 502-03. The court noted that it had "repeatedly recognized an implied private cause of action under Title VI to enforce the disparate impact regulations promulgated pursuant to Section 602." *Id.* The court pointed to three specific instances when it had done so. *Id.* at 502-03 (citing *Georgia State Conference of Branches of NAACP*, 775 F.2d 1403, 1407-1408 (11th Cir. 1985); *Elston v. Talledega County Bd. of Educ.*, 997 F.2d 1394, 1406-1407 (11th Cir. 1993) and *Burton v. Belle Glade*, 178 F.3d 1175, 1202-1203 (11th Cir. 1999)).

88. *Id.* at 502 ("Moreover, our circuit precedent is reinforced both by Supreme Court case law and the uniform position taken by our sister circuits.").

89. *Sandoval*, 532 U.S. at 295 n.1 (Stevens, J., dissenting).

90. *Latinos Unidos De Chelsea v. Sec'y of Hous. & Urban Dev.*, 799 F.2d 774 (1st Cir. 1986). Plaintiffs, *Latinos Unidos De Chelsea*, filed a suit alleging that the city of Chelsea and the Department of Housing and Urban Development had "deprived

Chelsea's minority population of equal opportunities in employment, housing and government contracts made available through several federally funded programs." *Id.* at 775. The suit was brought under several causes of action, including Title VI and its implementing regulations. *Id.* at 783.

The district court granted the defendant's motion for summary judgment on the Title VI claims finding that the plaintiffs had not presented sufficient evidence to sustain either a claim of intentional discrimination or disparate impact. *Id.* at 782. The First Circuit reviewed each of the Title VI claims individually. *Id.* at 783-91. Addressing the employment portion of the Title VI claim, the court concluded that "the numbers here do not add up to a prima facie case of intentional discrimination, and note that the plaintiffs do not challenge any specific employment practice as causing a discriminatory impact." *Id.* at 787. With respect to the housing claim, the court reached a similar decision, finding that the "plaintiffs make no claim that Chelsea used discriminatory 'criteria or methods of administration' in awarding benefits." *Id.* at 789-90 (quoting 24 C.F.R. § 1.4(b)(2)(i)). The third and final Title VI claim related to the selection methods for city contract awards. *Id.* at 790. The court noted here that the plaintiffs "failed to establish a prima facie case of discrimination in the award of contracts" because they "provide[d] no information as to whether there is, in fact, a disparity between the number of minority businesses in Chelsea and the involvement of such businesses in city contracts." *Id.* Therefore, ruling on the merits of the case, the First Circuit upheld a District Court finding of insufficient evidence to support a claim of disparate impact. *Id.* at 783.

91. *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031 (2d Cir. 1995). This case involved a claim under Title VI and the Department of Transportation's implementing regulations. *Id.* at 1033. The plaintiffs alleged that the state of New York and New York City's Metropolitan Transit Authority had distributed funding in a manner that caused a disparate impact on minority city commuters who "pay a higher share of the cost of operating [the city subway] than commuter line passengers, who are predominantly white, pay to support the commuter rail system." *Id.*

The district court issued a preliminary injunction in favor of the plaintiffs, finding that there was sufficient evidence to support the likelihood of the plaintiff's success. *Id.* at 1035. Reviewing the evidence, the Second Circuit reversed the lower court. *Id.* at 1040. The court held that the plaintiffs had not made a prima facie showing of disparate impact and found that the grounds leading to the district court's conclusion were insufficient. *Id.* at 1038. The court also noted that the issuance of an injunction was an inappropriate remedy in this instance. *Id.* at 1039-40.

92. *Ferguson v. Charleston*, 186 F.3d 469 (4th Cir. 1999). A hospital policy of testing pregnant women for cocaine use was challenged by patients of the hospital. *Id.* at 473. The patients alleged, among other constitutional claims including violation of privacy, that the testing policy had a disparate impact based on race in violation of Title VI and its implementing regulations. *Id.* The district court held that the plaintiffs failed to show a disparate impact. *Id.* at 480.

The Fourth Circuit found that evidence of a disparate impact existed in the hospital's policy of testing exclusively for cocaine and not other drugs. *Id.* at 481 (explaining statistics showing that only sixty-eight percent of those pregnant women testing positive for any drug were African-American whereas ninety percent of pregnant women testing positive for cocaine use were African-American and concluding that the statistical disparity proved a disparate impact). However, the hospital presented legitimate reasons to test only for cocaine, including the excessive cost of testing for every drug and the particular need to address cocaine use in pregnant women. *Id.* at 481. The patients were unable to successfully demonstrate the existence of an alternative, non-discriminatory manner in which to achieve the recognized legitimate goal of the hospital and therefore failed to make an effective Title VI claim. *Id.* at 482.

Circuit,⁹⁴ Ninth Circuit,⁹⁵ and Tenth Circuit⁹⁶ have each made an implicit assumption that the cause of action exists.

3. *Only One Court Questioned the Existence of a Cause of Action*

While no lower court has ruled that a cause of action to enforce the Title VI regulations does not exist,⁹⁷ in *New York City Environmental*

93. *Castaneda v. Pickard*, 781 F.2d 456 (5th Cir. 1986). The plaintiffs in this case, Mexican-American children and their parents, alleged that their school system discriminated by grouping children by abilities which resulted in segregation, by failing to hire and promote Mexican-American teachers, and by not providing sufficient bilingual education. *Id.* at 458-59. The suit was brought under several claims, including Title VI. *Id.* at 458. The district court found, in regard to the claim of discrimination in hiring Mexican-American teachers, that while the plaintiffs established a prima facie case for discrimination, the defendant had successfully rebutted the issue. *Id.* at 466.

On appeal, the Fifth Circuit noted that the district court's examination of the discrimination claim included both an assessment of intentional discrimination and disparate impact. *Id.* at 465 n.11. The court reasoned that, because the plaintiffs had not pointed to a specific practice that had a disparate impact, the district court was not clearly erroneous in finding no disparate impact discrimination. *Id.* Accordingly, the Fifth Circuit affirmed the lower court's decision in favor of the defendants. *Id.* at 472.

94. *Buchanan v. Boliver*, 99 F.3d 1352 (6th Cir. 1996). The Sixth Circuit reviewed a decision involving the detention and discipline of a child caught throwing a rock at his assistant principal's car. *Id.* at 1354. The mother of the boy, the plaintiff, argued that the detention of her son amounted to an exclusion from a federally assisted program, his school activities, in violation of Title VI and its implementing regulations. *Id.* at 1356.

The Title VI claim failed here because the plaintiff failed to show that the school had indeed received federal assistance and was therefore subject to Title VI. *Id.* Also, the plaintiff used the Title VI claim against the incorrect party. *Id.* ("Plaintiff's claim also failed because she asserts her claim against [the youth services officer] and [the police officer] and not against the school, the entity allegedly receiving the financial assistance.")

95. *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1986). This case involved a challenge to the use of intelligence testing to classify children as educable mentally retarded and to place them in special classes. *Id.* at 972. The parents brought suit using, among other claims, the disparate impact regulations promulgated pursuant to Title VI. *Id.* at 981. The district court held that the testing did have a discriminatory effect in violation of the Title VI regulations. *Id.* at 982-83. The Ninth Circuit affirmed the finding of a disparate impact. *Id.* ("Appellees clearly demonstrated the discriminatory impact of the challenged tests. It is undisputed that black children as a whole scored ten points lower than white children on the tests, and that the percentage of black children in [educable mentally retarded] classes was much higher than for whites.")

96. *Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996). In this case, Hispanic parents challenged the closure of their children's school to open a charter school. *Id.* at 483. The case involved several claims, including an argument that the closure of the school had a disparate impact on minority children in violation of Title VI and its implementing regulations. *Id.* at 486. Finding no evidence of discriminatory effect, the district court found for the school system on the Title VI claim. *Id.* The Tenth Circuit noted that the parents in this case did not present any statistical evidence to show a disparate impact. *Id.* at 487. Therefore, the court affirmed the lower court's ruling on the disparate impact claim. *Id.*

97. *Alexander v. Sandoval*, 532 U.S. 275, 295 n.1 (2001) (Stevens, J., dissenting).

Justice Alliance, the Second Circuit stated that the question remains open.⁹⁸ The merits of the case did not require the court to reach the question,⁹⁹ but the court noted the difficulty that a litigant may have in establishing the existence of a cause of action.¹⁰⁰

II. *ALEXANDER V. SANDOVAL*: THE COURT REVIEWS ITS PREVIOUS TREATMENT OF A CAUSE OF ACTION

The Supreme Court granted certiorari in September 2000¹⁰¹ to review whether a private cause of action exists to enforce the disparate impact regulations.¹⁰² In *Sandoval v. Hagan*, the Eleventh Circuit held that a cause of action did exist.¹⁰³ In reaching this conclusion, the court not only relied on its own precedent,¹⁰⁴ but it also relied on relevant Supreme Court statements and holdings of other Circuits.¹⁰⁵

The Supreme Court reversed the Eleventh Circuit's holding.¹⁰⁶ The Court reviewed prior case law and determined that no such cause of action had been recognized previously.¹⁰⁷ Therefore, the Court made a

98. *N.Y. City Evtl. Justice Alliance v. Giuliani*, 214 F.3d 65 (2d Cir. 2000). In this case, an environmental group alleged that the sale or destruction of city property, which served as a community garden, would have a disparate impact in violation of the Environmental Protection Agency's regulations promulgated under Title VI. *Id.* at 67.

99. *Id.* at 72-73 (noting that as the finding of the court was one of insufficient evidence to support the claim of disparate impact, it did not have to reach the issue of whether a cause of action exists).

100. *Id.* at 73. The court explained:

[T]he Supreme Court, in determining whether there is a private right of action under a statute, has viewed the predominant issue to be whether Congress intended to create or deny one. The person seeking a private remedy bears the burden of demonstrating that Congress intended to make one available. While it may be difficult for a plaintiff to establish that Congress intended to create a private right of action under § 602 of Title VI, this is an issue that we need not and do not reach.

Id. (citations omitted).

101. *Alexander v. Sandoval*, 530 U.S. 1305 (2000).

102. *Sandoval*, 532 U.S. at 278.

103. *Sandoval v. Hagan*, 197 F.3d 484, 502 (11th Cir. 1999).

104. *Id.* (recognizing that the court had three times previously held that a private cause of action existed).

105. *Id.* (stating that the court's holding is "reinforced both by Supreme Court case law and the uniform position taken by our sister circuits").

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

107. *Id.* at 284 (stating that neither the cases discussed in the opinion nor any other cases had previously held that a private cause of action exists).

determination based on the language of Title VI itself¹⁰⁸ and concluded that no cause of action exists.¹⁰⁹

A. The Majority Opinion: Considering Precedent, Finding No Guidance, and Thus Conducting a Statutory Assessment

1. Three Assumptions Made by the Majority Limit Its Opinion

The Court set forth three assumptions to more clearly define the issues before the Court.¹¹⁰ The first and second assumptions focused on section 601 of Title VI.¹¹¹ The Court reiterated its previous position that a private right of action exists to enforce the intentional discrimination prohibition contained in section 601.¹¹² Upon reviewing the case law regarding section 601, the Court stated that it was “beyond dispute that private individuals may sue to enforce § 601.”¹¹³ The Court also recognized its own precedent that section 601 prohibits only intentional discrimination.¹¹⁴

The third assumption focused on the validity of the disparate impact regulations promulgated under section 602 of Title VI.¹¹⁵ Justice Scalia made clear his interpretation that “no opinion of this Court has held” that the regulations are valid.¹¹⁶ Regardless, the Court noted that this was not an issue in *Sandoval* because the parties had not challenged the validity of the regulations.¹¹⁷

108. *Id.* at 285.

109. *Id.* at 293.

110. *Id.* at 278-82 (recognizing that while the Court has dealt with Title VI many times there are still aspects of the Title VI jurisprudence that are unclear).

111. *Id.* at 280.

112. *Id.* (explaining the reasoning the Court used to reach the conclusion that a cause of action exists to enforce section 601 of Title VI).

113. *Id.* (explaining that the Court has recognized a cause of action to enforce section 601 and Congress has since ratified this conclusion by statute).

114. *Id.* (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

115. *Id.* at 281-82.

116. *Id.* Justice Scalia noted the tensions between a finding that the regulations are valid with other Court statements. *Id.*

117. *Id.* The validity of the regulations may become an issue in later cases as the Court has exposed some predisposition to considering the issue. See David G. Savage, *Supreme Court Scales Back Part of '64 Civil Rights Act Law*, L.A. TIMES, Apr. 25, 2001, at A1 (quoting Richard Samp, counsel at Washington Legal Foundation, as noting that even though the opinion left the regulations intact, “the opinion offers a clear invitation to challenge the [regulations] in the future” (alteration in original)); John McQuaid, *Experts Are Divided on Future of Environmental Justice Cases*, TIMES-PICAYUNE, July 12, 2001, at A4 (noting the opinion of Sheila Foster, professor at Rutgers University School of Law, that a challenge to the validity of the regulations is possible).

2. *The Court Considered Its Precedent and Rejected the Contention That the Issue Had Been Decided Previously*

The respondents in *Sandoval*, the class of persons affected by the English-only policy, contended that the Court had already decided the issue in its previous statements.¹¹⁸ The Court squarely rejected this argument.¹¹⁹ The Court made clear that the statements upon which the respondents relied were not specific holdings and therefore were not binding on the Court's consideration of the *Sandoval*.¹²⁰

With that in mind, the Court considered each of the major cases cited by the respondents and concluded that the specific holdings in the cases were inconclusive regarding the existence of the cause of action.¹²¹ When reviewing *Cannon*, the Court explained that the case "was decided on the assumption" that intentional discrimination was present.¹²² Justice Scalia concluded that the *Cannon* Court had no reason to reach the disparate impact regulations issue.¹²³

Justice Scalia found that the same was true of the majority of Justices in *Guardians Association*.¹²⁴ The majority explained that the Court in *Guardians Association* addressed only the issue of remedies available under Title VI.¹²⁵ As the Court further illustrated, in *Guardians Association*, the Court addressed the issue of the disparate impact regulations¹²⁶ with only two Justices reaching a conclusion regarding a private right of action to enforce the regulations.¹²⁷ Because only two Justices reached the issue in *Guardians Association*, Justice Scalia found

118. *Sandoval*, 532 U.S. at 282 (citing Respondents' Brief at 13).

119. *Id.*

120. *Id.* ("But in any event, this Court is bound by holdings, not language.").

121. *Id.* at 282-86.

122. *Id.* at 282.

123. *Id.* ("[The Court] held that Title IX created a private right of action to enforce its ban on intentional discrimination, but had no occasion to consider whether the right reached regulations barring disparate-impact discrimination.") (footnote omitted).

124. *Id.* at 282-84.

125. *Id.* at 282-83 ("[T]he Court held that private individuals could not recover compensatory damages under Title VI except for intentional discrimination.").

126. *Id.* at 283 (noting that "[f]ive Justices [in *Guardians Association*] voted to uphold the disparate impact regulations").

127. *Id.* Of those five Justices to reach consideration of the regulations, three of the Justices reserved decision on the cause of action issue. *Id.* As Justice Scalia pointed out, most notably, Justice Stevens reserved the issue. *Id.* at 284 n.3 (quoting *Guardians Ass'n v. Civil Serv. Comm'n of City of N.Y.*, 463 U.S. 582, 645 n.18 (1983) (Stevens, J., dissenting)). Justice Stevens contended that the quotation from *Guardians Association* used by the majority was taken out of context. *Id.* at 300 n.6 (Stevens, J., dissenting).

that the case did not conclusively determine whether a cause of action exists.¹²⁸

For different reasons, Justice Scalia rejected the argument that *Lau* settled the issue.¹²⁹ The *Lau* decision rested on an interpretation of Title VI that the Court no longer accepts.¹³⁰ Justice Scalia explained that the *Lau* Court began with the premise that section 601 of Title VI prohibited both intentional and disparate impact discrimination.¹³¹ Accordingly, the *Lau* Court relied only on section 601¹³² and did not address the existence of a cause of action to enforce the regulations.¹³³ Thus, in Justice Scalia's view, the Court previously left open the issue of whether a cause of action to enforce Title VI regulations exists.¹³⁴

3. Having Rejected Previous Court Statements as Inapplicable, the Majority Decided the Issue

The Court began by setting forth the framework to determine whether a cause of action exists.¹³⁵ The Court noted that Congress is vested with the power to create private causes of action,¹³⁶ and it is the Court's job to interpret the laws to determine whether Congress intended that a private cause of action exist.¹³⁷ The Court considered congressional intent as the key factor¹³⁸ and the statute's language and structure as the sole sources by which to determine such intent.¹³⁹

128. *Id.* at 284.

129. *Id.* at 285.

130. *Id.* *Lau* was based on the assumption that section 601 of Title VI prohibited both intentional and disparate impact discrimination. *Id.* (citing *Lau v. Nichols*, 414 U.S. 563, 566 (1974)). Such an interpretation has since been dismissed by the Court. *Id.* at 280-81 (discussing the case law leading to the conclusion that Section 601 prohibits only intentional discrimination).

131. *Id.* at 285 (citing *Lau*, 414 U.S. at 566).

132. *Id.*

133. *Id.* (citing *Lau*, 414 U.S. at 567) (noting that the Court's view in *Lau* was that the regulations served only as support for Section 601 of Title VI).

134. *Id.* ("We must face now the question avoided by *Lau*.").

135. *Id.* at 286 ("Implicit in our discussion thus far has been a particular understanding of the genesis of private causes of action.").

136. *Id.* (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)).

137. *Id.* (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979)).

138. *Id.* at 287-88. Respondents argued that, because the law was passed earlier, an earlier mode of interpretation should be used. *Id.* The court refused to do so saying, "[h]aving sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink." *Id.* at 287-88.

139. *Id.* at 288 ("We therefore begin (and find we can end) our search for Congress's intent with the text and structure of Title VI.").

The Court's examination of section 602 of Title VI revealed that, in the majority's opinion, there was no clear congressional intent to create a private cause of action to enforce the regulations.¹⁴⁰ Rather, the Court viewed the language of section 602 as merely authorizing the executive agencies to promulgate regulations to support section 601.¹⁴¹ The Court further concluded that the administrative procedures to address noncompliance established within section 602 indicate that Congress did not intend to create a private cause of action.¹⁴² Absent a finding of congressional intent to create a cause of action, the Court concluded that no such cause of action exists.¹⁴³

B. The Dissent: Arguing That the Issue Was Previously Decided and Questioning the Court's Statutory Interpretation

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, vehemently dissented from the Court's majority opinion by pointing to several interrelated flaws in the Court's reasoning.¹⁴⁴ First, the dissent alleged that the Court misconstrued previous Court statements regarding Title VI.¹⁴⁵ Second, the dissent found that the majority's broad reading of *Guardians Association* may leave untouched the possibility of using an alternative cause of action to enforce the regulations against state

140. *Id.* at 290.

141. *Id.* at 289 (quoting *Univ. Research Ass'n, Inc. v. Coudu*, 450 U.S. 754, 772 (1981)) (“[Section] 602 is ‘phrased as a directive to federal agencies engaged in the distribution of public funds.’”).

142. *Id.* at 290 (“[The administrative procedures for noncompliance] tend to contradict a congressional intent to create privately enforceable rights through § 602 itself.”).

143. *Id.* at 293. The Court also addressed contentions that the regulations themselves create the cause of action, but rejected that argument, explaining that if Congress did not have the intent to create a cause of action, the regulations cannot create one. *Id.* at 290. In colorful language to illustrate its point, the Court said, “[a]gencies may play the sorcerer’s apprentice, but not the sorcerer himself.” *Id.* at 291. In addition, the Court addressed amendments, deciding that they do not change the status of Title VI to create a cause of action. *Id.*

144. *Id.* at 292-95 (Stevens, J., dissenting). In a somewhat uncommon move, Justice Stevens chose to read a portion of his dissenting opinion from the bench to voice his extreme disagreement with the Court's majority. Linda Greenhouse, *Court Curbs Bias Suits Over U.S. Grants*, CHI. TRIB., Apr. 25, 2001, at 18 (“Stevens read portions of his dissent from the bench, a step justices take only rarely to call attention to developments they regard as particularly wrongheaded.”); Joan Biskupic, *English-Only Policies Don't Allow Suits*, USA TODAY, Apr. 25, 2001, at 3A (“[Justice] Stevens took the unusual step of reading parts of his fiery dissent from the bench.”). See also Savage, *supra* note 117; Charles Lane, *Justices Limit Bias Suits Under Civil Rights Act*, WASH. POST, Apr. 25, 2001, at A1.

145. *Sandoval*, 532 U.S. at 294-95 (Stevens, J., dissenting).

actors.¹⁴⁶ Finally, even if the Court were faced with a situation where it had to interpret section 602, the dissent questioned the majority's method of analysis.¹⁴⁷

In characterizing the majority's opinion, 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."¹⁴⁸ Acknowledging that the Court had not previously held that a cause of action exists,¹⁴⁹ the dissent nonetheless argued that prior opinions of the Court,¹⁵⁰ as well as opinions of numerous lower courts relying on those statements by the Court to conclude that a cause of action exists,¹⁵¹ should be considered carefully.¹⁵² Justice Stevens contended that the majority in this case failed to adequately consider such precedent.¹⁵³ According to Justice Stevens, if the majority had carefully considered the prior case law, it would have concluded that the issue had been decided previously.¹⁵⁴

More specifically, the dissent questioned the majority's analysis of *Cannon*.¹⁵⁵ In Justice Stevens' view, the majority attempted to limit the Court's statements in *Cannon* in a manner inconsistent with the language of *Cannon* itself.¹⁵⁶ The dissent's reading of *Cannon* indicated that the language of the Court clearly referred to all types of prohibited discrimination, rather than just intentional discrimination as the majority presented.¹⁵⁷ By limiting its interpretation of the case, Justice Stevens

146. *Id.* at 298-300 (Stevens, J., dissenting).

147. *Id.* at 301-05 (Stevens, J., dissenting).

148. *Id.* at 294 (Stevens, J., dissenting).

149. *Id.* at 295 (Stevens, J., dissenting).

150. *Id.* at 294 (Stevens, J., dissenting) (discussing *Lau v. Nichols*, 414 U.S. 563 (1974); *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); and *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983)).

151. *Id.* (listing examples of lower courts that have held that a cause of action to enforce the regulations exists).

152. *Id.* at 295 (Stevens, J., dissenting) (arguing that the previous cases of the Court should be reviewed with care).

153. *Id.*

154. *Id.* ("Reviewing these opinions with the care they deserve, I reach the same conclusion as the Courts of Appeals: This Court has already considered the question presented today and concluded that a private right of action exists.").

155. *See id.* at 297 (Stevens, J., dissenting).

156. *Id.* The majority limited the holding in *Cannon* to intentional discrimination. *See id.* at 282 (Stevens, J., dissenting).

157. *Id.* at 296-97 (Stevens, J., dissenting) (quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 703 (1979)) ("[I]t could hardly have been more clear as to the scope of its

argued that the majority's decision in *Sandoval* was in considerable tension with prior Court reasoning.¹⁵⁸ Given past statements on the issue by both the Court¹⁵⁹ and Congress,¹⁶⁰ the dissent would have affirmed the lower court's decision in *Sandoval* as a matter of *stare decisis*.¹⁶¹

Furthermore, the dissent argued that the majority's opinion left the possibility open, at least against public offenders, because an alternative cause of action against state actors may exist using 42 U.S.C. § 1983.¹⁶² In the dissent's view, the majority's interpretation of *Guardians Association* made this case "something of a sport."¹⁶³ According to the dissent's reading, the majority denied the Court's statements in *Guardians Association* precedential weight because, in that case, the Court had differing views on the proper mechanism, 42 U.S.C. § 1983 or a direct action under Title VI, by which private parties could seek relief.¹⁶⁴ In response, the dissent made clear that in the future, litigants need only use 42 U.S.C. § 1983 to bring suit against state actors given that the majority did not foreclose that possibility.¹⁶⁵

Finally, the dissent strongly disagreed with the majority's approach to interpreting Title VI in order to determine whether a cause of action exists.¹⁶⁶ While the dissent found the confusion over Title VI

holding: A private right of action exists for 'victims of *the* prohibited discrimination' Not some of the prohibited discrimination, but all of it.').

158. *Id.* at 297 n.4 (Stevens, J., dissenting).

159. *Id.* at 301 (Stevens, J., dissenting).

160. *Id.* at 302 n.9 (Stevens, J., dissenting).

161. *Id.* at 302 (Stevens, J., dissenting).

162. *Id.* at 299-300 (Stevens, J., dissenting). Providing a cause of action to enforce constitutional and other rights, 42 U.S.C. § 1983 reads in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, 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 an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

163. *Sandoval*, 532 U.S. at 300 (Stevens, J., dissenting).

164. *Id.* at 299-300 (Stevens, J., dissenting).

165. *Id.* at 300 (Stevens, J., dissenting). Justice Stevens pointed out that, in theory, even the parties in this case on remand could use 42 U.S.C. § 1983 to continue the litigation. *Id.* See also *infra* notes 210-224 and accompanying text (explaining the test for determining if 42 U.S.C. § 1983 could be used to enforce Title VI's implementing regulations).

166. *Sandoval*, 532 U.S. at 301 (Stevens, J., dissenting).

understandable,¹⁶⁷ Justice Stevens did not excuse the majority's interpretation.¹⁶⁸ Rather, he stated that the majority's view "does violence to both the text and the structure of Title VI."¹⁶⁹ According to the dissent, sections 601 and 602 of Title VI clearly serve the same purpose of prohibiting discrimination.¹⁷⁰ Justice Stevens disagreed with the majority's view that the two sections of Title VI are separate entities.¹⁷¹ Furthermore, the dissent argued that the majority's misunderstanding of Title VI was rooted in a view of statutory interpretation that is predisposed against finding congressional intent for implied causes of action.¹⁷²

III. THE TREMENDOUS REPERCUSSIONS OF *SANDOVAL* ON CIVIL RIGHTS ENFORCEMENT EFFORTS

In *Sandoval*, the Court ignored its own precedent and undertook an examination of Title VI that was inadequate at best.¹⁷³ In so doing, the Court concluded that a cause of action, which had been useful in the civil rights enforcement movement, no longer existed.¹⁷⁴ What was once an important tool for civil rights enforcement disappeared, leaving the civil rights community to wonder what to do.¹⁷⁵ While the Court's blow certainly stung, civil rights enforcement can continue via creative solutions to the problems created by the *Sandoval* decision.¹⁷⁶

167. *Id.* at 303 (Stevens, J., dissenting) ("To some extent, confusion as to the relationship between the provisions is understandable, as Title VI is a deceptively simple statute.").

168. *Id.*

169. *Id.* at 304 (Stevens, J., dissenting).

170. *Id.*

171. *Id.* at 304-05 (Stevens, J., dissenting) ("The majority's statutory analysis does violence to both the text and structure of Title VI.").

172. *Id.* at 311 (Stevens, J., dissenting) ("[I]t is the majority's approach that blinds itself to congressional intent."); *id.* at 313 (Stevens, J., dissenting) ("Similarly, if the majority is genuinely committed to deciphering congressional intent, its unwillingness to even consider evidence as to the context in which Congress legislated is perplexing.").

173. See *infra* notes 177-198 and accompanying text.

174. *Sandoval*, 532 U.S. at 293 (holding that no cause of action exists to enforce the disparate impact regulations); see also Lane, *supra* note 144 (explaining the previous usefulness of the cause of action and calling it a "potent legal weapon").

175. See Lane, *supra* note 144; Savage, *supra* note 117.

176. See Carolyn Magnuson, "Disparate-Impact" Suits May Survive After High Court Ruling on Civil Rights Act, TRIAL, July 1, 2001, at 17 (noting that "[a]s a result of the decision, some lawyers say, the future of civil rights litigation may rest more on 42 U.S.C. [section] 1983" (alteration in original)); *id.* (quoting Adele Kimmel of the Trial Lawyers for Public Justice as saying, "I don't think every door has been closed.").

A. *The Court Severely Neglected Its Stare Decisis Responsibility and Conducted a Narrowly Focused Review of Title VI*

1. *The Majority Decided an Issue That Had Previously Been Decided*

The majority and dissent agreed that the Court had never specifically ruled that a cause of action existed, but the agreement ended there.¹⁷⁷ The majority took a narrow approach in reviewing the Court's previous statements on the issue¹⁷⁸ while the dissent gave more deference to the Court's precedent.¹⁷⁹ While the case law related to the existence of a cause of action was somewhat unclear,¹⁸⁰ the dissent's approach provided a more appropriate treatment than that of the majority.¹⁸¹

In reviewing previous case law relating to the existence of a cause of action to enforce the regulations under Title VI, the majority took a very limited view of the usefulness of the Court's prior statements by focusing solely on the holdings of the cases.¹⁸² Writing for the majority, Justice Scalia stated, "[T]his Court is bound by holdings, not language."¹⁸³ Justice Scalia's approach, therefore, led the Court to ignore statements

177. *Sandoval*, 532 U.S. at 284 (majority opinion), 295 (Stevens, J., dissenting).

178. *Id.* at 282 (focusing solely on the holdings of the cases).

179. *Id.* at 294 (Stevens, J., dissenting) (arguing that the Court should look to cases for guidance).

180. *See supra* notes 42-70 and accompanying text.

181. *Sandoval*, 532 U.S. at 295 (Stevens, J., dissenting). The dissent noted that to the extent the majority examined the prior cases, it offered a "muddled account." *Id.* In so doing, the majority "obscur[ed] the conflict between those opinions and today's decision." *Id.*

182. *Id.* at 282. This is clearly evidenced by the majority's view that the cases are only relevant for their holdings, as opposed to their general guidance on the issues. *Id.* It has been said that "[i]t is a commonplace that holdings carry greater precedential weight than dicta, 'which may be followed if sufficiently persuasive but which are not controlling.'" Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000 (1994) (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935)). Or, in the words of Chief Justice Marshall, "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit." *Id.* (quoting *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821)). That being said, however, the key issue then becomes how to distinguish between the holding of a case and dicta, which defines the scope of precedent. *See id.* at 2003-04 (noting that "no universal agreement exists as to how to measure the scope of judicial holdings" and as a result, no settled principles apply to differentiate between holdings and dicta); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 372-83 (1988) (addressing the factors that judges can consider in determining the scope of applicable precedent).

183. *Sandoval*, 532 U.S. at 282.

that would otherwise result in the conclusion that the issue had been decided previously.¹⁸⁴

In his dissenting opinion, Justice Stevens stated that “the failure of our cases to state this conclusion explicitly does not absolve the Court of the responsibility to canvass our prior opinions for guidance.”¹⁸⁵ While acknowledging that the Court’s dicta is not binding in the same manner as a holding, the dissent’s approach valued previous statements of the Court for their potential to lead the Court to a conclusion.¹⁸⁶ Had the majority followed this more rational approach, the outcome may not have been different,¹⁸⁷ but at least the reasoning of the Court would have stood on firmer ground.¹⁸⁸

184. See Dorf, *supra* note 182, at 2004-05. The stance one takes in defining the holding versus dicta and the scope of precedent can undoubtedly affect the outcome of the issue to be decided. *Id.* As Dorf explains:

The failure to define the terms holding and dictum with any precision has serious consequences. It enables courts to avoid the normal requirements of stare decisis. . . . These principles of stare decisis, if taken seriously, will often mean that a judge who wishes to decide a case for one party will be constrained to rule for the other party. This constraint will routinely operate on the judge, unless she can find some way to render the earlier decision irrelevant. One way to do this is to label the controlling principle from the earlier case dictum. Since dicta need not be followed, the controlling legal question becomes one of first impression, and the judge is free to rule as she likes. Because the term dictum has no fixed meaning, the ploy often goes unnoticed.

Id. (footnote omitted); see also, Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1416 (2000)(observing that the manner in which one determines holding versus dicta “plays a crucial role in limiting the scope of the lawmaking power of the Supreme Court”). Such tactics have led to a cynical theory among legal scholars that the importance of precedent in the judicial decisionmaking process is waning and that “judges’ decisions essentially are political and are influenced by many of the same considerations as those of other governmental actors.” Maltz, *supra* note 182, at 367. While this may be true in some instances, a basic tenet still exists that “judges should feel strongly constrained by prior case law.” *Id.* If a judge follows this basic principle of jurisprudence, “stare decisis does in fact have a profound influence on judicial decision making.” *Id.* Justice Stevens’ dissent made this clear by noting that he would have decided the issue as a matter of *stare decisis*. *Sandoval*, 532 U.S. at 287 (Stevens, J., dissenting).

185. *Sandoval*, 532 U.S. at 295 (Stevens, J., dissenting).

186. See *id.* Justice Stevens noted that the fact that a case’s holding may not be directly on point does not mean that it has no value as guidance. *Id.* The dissent advocates a careful consideration of previous Court statements. *Id.*

187. See *supra* notes 42-70 and accompanying text. The case law is murky so the interpretation of the Court may have resulted in a similar finding.

188. *Sandoval*, 532 U.S. at 295 (Stevens, J., dissenting). Acknowledging the guidance value that previous Court rulings provide, as Justice Stevens advocated, would have lent more credibility to the majority’s final decision. *Id.*

2. *The Majority Does an Injustice to the Purpose of Title VI*

The majority's independent statutory analysis was best described by Justice Stevens' dissent: "The majority's statutory analysis does violence to both the text and the structure of Title VI."¹⁸⁹ Ignoring the guidance of prior statements made by the Court, the majority endeavored to conduct an independent assessment of Title VI to determine if a cause of action exists.¹⁹⁰ The majority touted the importance of congressional intent in this determination,¹⁹¹ yet it relied solely on the language and structure of the statute.¹⁹² Four Justices disagreed with this approach.¹⁹³ A careful consideration of the legislative history of Title VI would have enlightened the majority's assessment of the statute in a manner that simply reviewing the language of the statute could not.¹⁹⁴

189. *Id.* at 304 (Stevens, J., dissenting).

190. *Id.* at 285.

191. *Id.*

192. *Id.* at 287. It is certainly no secret that Justice Scalia falls within the textualist school of thought when it comes to statutory interpretation. See Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581 (1990) (describing the idea that remedial statutes should be interpreted liberally as "among the prime examples of lego-babble"); see also Morell E. Mullins, Sr., *Coming to Terms with Strict and Liberal Construction*, 64 ALB. L. REV. 9, 17 (2000) (noting that Justice Scalia is "[a] major detractor of liberal construction" who believes that "courts use liberal construction to reach the results they want to reach"); Theo I. Ogune, *Judges and Statutory Construction: Judicial Zombism or Contextual Activism?*, 30 U. BALT. L.F. 4, 19 (2001) (describing Justice Scalia's preference for the textualist view by saying that "[h]is vigor in projecting a textualist approach to interpretation is premised on his dissatisfaction with both the purposivist and intentionalist methods"). The textualist approach "denounces the use of legislative history" and is based on a belief that the intent and purpose of a statute can be determined within the language of the law as opposed to legislative history. *Id.* at 18.

193. *Sandoval*, 532 U.S. at 313 (Stevens, J., dissenting). In contrast to textualism, purposivism and intentionalism rely on the use of legislative history to provide context to the meaning of a particular statute. Ogune, *supra* note 192, at 14-18. In regard to Title VI, Justice Stevens noted the "lengthy, consistent, and impassioned legislative history" that should have been considered here. *Sandoval*, 532 U.S. at 306 (Stevens, J., dissenting). In particular, he pointed to the comments of Senator Humphrey, who during the debates prior to the passage stated that "[s]imple justice requires that all 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." *Id.* at 306 n.12 (citing 110 CONG. REC. 6543 (1964)(statement of Sen. Humphrey)). Justice Stevens also noted that the legislative history of Title VI reveals the congressional intent that agencies, pursuant to section 602, would promulgate regulations that define the scope of section 601. *Id.* at 310 n.19 (citing *Civil Rights – The Presidents Program, 1963: Hearings Before the Senate Committee of the Judiciary*, 88th Cong. 399-400 (1963)(statement of Robert F. Kennedy, Attorney General) and *Civil Rights: Hearings Before the House Committee on the Judiciary*, 88th Cong., 2740 (1963)(statement of Robert F. Kennedy, Attorney General)).

194. See Ogune, *supra* note 192, at 25-31 (discussing the flaws with Justice Scalia's textualist approach to statutory interpretation). The textual approach taken by Justice

Furthermore, the majority's contorted explanation of the structure of Title VI and the relationship between sections 601 and 602 could not be farther from the true meaning of the statute.¹⁹⁵ The majority's view of the structure of Title VI is one of degrees of removal with section 602 being several degrees away from the true purpose of prohibiting discrimination.¹⁹⁶ Justice Stevens, however, correctly pointed out that sections 601 and 602 are not removed from each other, but rather work in concert.¹⁹⁷ The majority misinterpreted the structure of the statute in finding that the relationship between sections 601 and 602 did not indicate congressional intent to create a cause of action.¹⁹⁸

B. Without a Cause of Action To Enforce the Disparate Impact Regulations, the Civil Rights Enforcement Movement Faces a New Challenge

As Justice Stevens pointed out in the *Sandoval* dissent, suits to enforce the disparate impact regulations under Title VI have been fairly common.¹⁹⁹ Such suits were particularly useful in situations where it was difficult to prove the intentional discrimination required to bring suit under section 601.²⁰⁰ Without a cause of action to enforce the disparate impact regulations, only a limited number of situations can now be addressed through the use of Title VI.²⁰¹ This is a concern in the areas of education and environmental justice, which rely heavily on Title VI and the disparate impact regulations for protection from discrimination.²⁰²

In the education context, Title VI has been used to challenge practices that may not present a situation of intentional discrimination but where a disproportionate effect on minorities is obvious, such as in school

Scalia has been criticized as "confin[ing] a statute to a narrow-minded universe" and "ignor[ing] how important context is." *Id.* at 26.

195. See *Sandoval*, 532 U.S. at 303 (Stevens, J., dissenting) (finding no support for the majority's incongruous reading of sections 601 and 602).

196. *Id.* at 289.

197. *Id.* at 303 (Stevens, J., dissenting).

198. *Id.* at 289 (majority opinion), 304 (Stevens, J., dissenting).

199. *Id.* at 295 n.1 (Stevens, J., dissenting).

200. See Lane, *supra* note 144 (referring to suits using the disparate impact regulations as "a potent legal weapon that minorities have used to challenge policies ranging from the National Collegiate Athletic Association's test score requirements for student athletes to state environmental permits for industrial development near African American neighborhoods").

201. Savage, *supra* note 117 (finding that the Court's ruling limits the ability of plaintiffs to sue in situations of discriminatory effect).

202. See *id.* ("The ruling also deals a blow to the so-called environmental justice movement.").

testing.²⁰³ Without a cause of action to challenge disparate impact discrimination in education, protecting students from such instances of discrimination becomes much more difficult.²⁰⁴

Of additional concern in the education context is the effect that *Sandoval* may have on Title IX, which prohibits gender-based discrimination.²⁰⁵ Because Title IX was patterned after Title VI, the *Sandoval* decision could potentially be applied to similar situations under Title IX.²⁰⁶

The emerging field of environmental justice is also affected by the disappearance of a cause of action to enforce the disparate impact regulations.²⁰⁷ This movement challenges the placement and permitting of environmentally dangerous facilities in minority areas and relies almost exclusively on the use of the disparate impact regulations promulgated by the Environmental Protection Agency under Title VI.²⁰⁸ The judicial withdrawal of a cause of action to enforce those regulations severely restricts the efforts of the environmental justice movement.²⁰⁹

203. See, e.g., *Larry P. v. Riles*, 793 F.2d 969, 972 (9th Cir. 1984); see also Lane, *supra* note 144 (remarking that Title VI and its implementing regulations were the basis for a challenge to the National Collegiate Athletic Association's policy of requiring minimum standardized test scores for participation in college athletics).

204. Marcelle Richards & Kiyoshi Tomano, *Supreme Court Decision Could Protect UC from Indirect Discrimination Suits*, U-WIRE, Apr. 26, 2001 ("[*Sandoval*] will make it more difficult for students to advocate for change when faced with policies that have unjustified discrimination," said Richard Cohen, attorney for Southern Poverty Law Center.').

205. *Id.* ("Title IX, a sister statute to Title VI that prohibits gender-based discrimination, may be subject to examination under the same arguments that were used in this case."); Savage, *supra* note 117 ("Tuesday's ruling also cast some doubt on the future effectiveness of Title IX, the parallel federal law that forbids sex discrimination by schools and colleges."); see also Bob Becker, *Alabama Case Could Impact Michigan Lawsuit Over Girls Sports*, GRAND RAPIDS PRESS, June 22, 2001, at C1 ("The Supreme Court pretty much sent Title IX down the drain," conceded Ann Arbor attorney Jean Ledwith King, one of the nation's foremost Title IX attorneys.').

206. See, e.g., Becker, *supra* note 205 (explaining that *Sandoval* could affect a then-pending Michigan case involving a claim of discriminatory scheduling of women's athletics under Title IX).

207. Savage, *supra* note 117 (observing that *Sandoval* could impact the area of environmental justice).

208. See Margaret Kriz, *Coloring Justice Green*, 33 NAT'L J. 2419, 2419-20 (2001) (explaining generally the issue of environmental justice and the recent legal trends in the area).

209. See McQuaid, *supra* note 117 (*Sandoval* "took away the right to sue governments for violating [EPA] regulations, leaving the decisions up to federal agencies, which have been reluctant to rule on environmental cases.').

3. Alternatives Could Exist To Lessen the Blow of the Sandoval Decision

While a direct cause of action to enforce the disparate impact regulations under Title VI no longer exists, alternative options may be available to address the needs of those affected by impact discrimination.²¹⁰

a. Using 42 U.S.C. § 1983 To Enforce the Disparate Impact Regulations Against State Actors

Justice Stevens, dissenting in *Sandoval*, suggested that the use of section 1983 is still available to bring suits against state actors.²¹¹ Likewise, section 1983 may still allow private enforcement of disparate impact regulations.²¹²

In order to bring a suit pursuant to section 1983, a plaintiff must satisfy a three-part test to establish that a federal right has been granted.²¹³ First, it must be determined that Congress intended the plaintiff to benefit from the statute.²¹⁴ Second, the right must be clear enough to allow for adequate judicial review.²¹⁵ Finally, there must be an unambiguous obligation imposed on the states to protect the right.²¹⁶ The rights created by section 602 of Title VI and the implementing

210. See *infra* notes 211-235 and accompanying text.

211. *Alexander v. Sandoval*, 532 U.S. 275, 300 (Stevens, J., dissenting).

212. See Magnuson, *supra* note 176, at 17.

213. *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997). Satisfying the requirements of the three-prong test to use section 1983 is a less onerous task than establishing an implied cause of action because the level of congressional intent that must be shown is less. Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 KAN. L. REV. 321, 353-60 (2001). In acknowledging implied causes of action, "[t]he Supreme Court has increasingly emphasized that it will not recognize an implied right of action unless there is significant evidence that Congress intended to allow such suit." *Id.* at 353-54. Separation of powers issues between Congress and the Court are an important factor in the Court's stance on implied rights of action. *Id.* at 354. Conversely, such separation of powers issues are less striking in suits pursuant to section 1983. *Id.* at 357. To raise a valid claim under section 1983, a plaintiff must only satisfy the three-prong test; then a presumption arises that the suit is permissible. *Id.* at 358. This presumption can only be rebutted by showing that Congress specifically intended to disallow the use of section 1983 for a particular statutory right or that a viable alternative forum is available to provide a remedy and that forum is incompatible with enforcement under section 1983. *Id.* at 334. The Court has noted that such a rebuttal can be proven in only extraordinary circumstances. *Id.* (citing *Livadas v. Bradshaw*, 512 U.S. 107, 133 (1994)). Therefore, it is undoubtedly "easier for courts to recognize a remedy under § 1983 than to imply a private right of action because § 1983 explicitly authorizes a private right of action." *Id.* at 357.

214. *Blessing*, 520 U.S. at 340.

215. *Id.*

216. *Id.* at 341.

regulations arguably satisfy the requirements to bring a claim using section 1983.²¹⁷

Such a strategy was tested almost immediately following the *Sandoval* decision in the case of *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*.²¹⁸ The case involved the state

217. Mank, *supra* note 213, at 360-80. Mank reviewed the structure of Title VI and its implementing regulations using the three-prong test to assess whether using section 1983 would be appropriate and concluded:

[U]nder the three-part test for enforcing statutory rights through § 1983, there is a strong basis for concluding that Title VI and its section 602 regulations create a “right” against disparate impact discrimination for the benefit of individuals affected by the activities of federal fund recipients and that this right is enforceable pursuant to § 1983.

Id. at 325.

As a threshold issue, in defining which rights are enforceable using section 1983, there is great debate over whether agency regulations themselves create enforceable rights. *See id.* at 339-53. Statements by the Court as to whether regulations can create rights are unclear. *Id.* at 342 (citing *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987)) (“However, there is considerable uncertainty about whether and to what extent *Wright* established the principle that a regulation may have the force of law and serve as the primary basis for a private cause of action under § 1983.”). This has created a split in the circuits on the issue. *See id.* at 339. Regardless, it can be argued that in the case of Title VI, the combination of section 602 allowing for the regulations and the regulations themselves creates an enforceable right. *See id.* at 366-67. This conclusion obviously assumes that the Court will not invalidate the regulations at some future date, which, in light of Justice Scalia’s statements in *Sandoval*, may not be the case. *See supra* notes 115-117 and accompanying text.

Assuming the three-prong test could be satisfied, the opposing party has the opportunity to rebut the presumption by showing that the “underlying statute’s remedial scheme is so comprehensive that a § 1983 action would interfere with that remedial scheme.” Mank, *supra* note 213, at 367. Mank argues that while Title VI and its implementing regulations provide for administrative complaints, the administrative process is not comprehensive enough to preclude an action using section 1983. *Id.* at 370. The Court has said that the presence of an administrative process does not in and of itself preclude the use of section 1983. *Id.* (citing *Blessing*, 520 U.S. at 347). In the case of Title VI’s administrative process, the rights of individuals are not specifically protected since the available remedy is the revocation of federal funding from an offending party. *Id.* at 370-71. Therefore, Mank argues that preclusion of an action using section 1983 by the administrative procedures of Title VI is not possible and that “only a private cause of action can vindicate the statute’s second purpose, protecting individuals from discrimination by recipients of federal funds.” *Id.* at 370.

218. 145 F. Supp. 2d 446 (D.N.J. 2001)(opinion regarding the preliminary injunction); *S. Camden Citizens in Action v. N.J. Dep’t of Env’t. Prot.*, 145 F. Supp. 2d 505 (D.N.J. 2001) (supplemental opinion regarding the use of section 1983); *see also* Magnuson, *supra* note 176 (detailing the *South Camden Citizens* case and referring to it as “the first major federal decision after *Sandoval*”); Kriz, *supra* note 208, at 2419-21 (providing background on the South Camden community and the procedural history of the case); Harvey M. Sheldon, *The Impact of Recent Decisions on Challenges to Environmental Permits*, 16 ENVTL. COMPLIANCE & LITIG. STRATEGY 1, 2-4 (2001) (explaining the legal arguments involved and the potential impact of the *South Camden Citizens* case); *Supreme Court Puts*

of New Jersey's decision to permit a cement plant to operate in a minority neighborhood.²¹⁹ The plaintiffs originally brought their claim under Title VI to enforce the Environmental Protection Agency's disparate impact regulations.²²⁰ While the court was deliberating on the issuance of a preliminary injunction, *Sandoval* was handed down.²²¹ The judge allowed the parties to submit new briefs regarding the use of section 1983 as an alternative cause of action,²²² and the case was allowed to move forward.²²³ While the use of section 1983 is far from a settled principle in this context, *South Camden Citizens* leaves the possibility of a section 1983 action open.²²⁴

Skids on EJ Litigation, 14 CAL. ENVTL. INSIDER 1, 3 (2001) (discussing the impact of *Sandoval* on the then-pending *South Camden Citizens* case); Lorraine Woellert, *Dumping on the Poor?*, BUS. WK., Nov. 19, 2001, at 120-21 (providing a business perspective on the issues involved in *South Camden Citizens*); Marcia Coyle, *Backyard Blues*, NAT'L L.J., Oct. 15, 2001, at A10 (detailing the factual situation with regards to pollution of the South Camden community involved).

219. *South Camden Citizens*, 145 F. Supp. 2d at 450-51 (opinion regarding preliminary injunction).

220. *South Camden Citizens*, 145 F. Supp. 2d at 508-09 (supplemental opinion).

221. See *id.*; see also *Supreme Court Puts Skid on EJ Litigation*, *supra* note 218 (referring to the original *South Camden Citizens* decision and concluding that the *Sandoval* decision "overturns Judge Orlofsky's decision, which was based solely on Title VI").

222. See Magnuson, *supra* note 176 ("Less than a half hour after the [*Sandoval*] decision was released, lawyers in the New Jersey case were on a conference call to the district court, which ordered both sides to file briefs."); Bruce Rubenstein, *Environmental Justice Victory Is Short-Lived: 3d Circuit Will Hear Expedited Appeal*, 11 CORP. LEGAL TIMES 58 (2001) ("The afternoon the [*Sandoval*] decision came down, Judge Orlofsky convened a telephone conference call. . . . The parties were asked to brief two issues: [whether intentional discrimination existed to use section 601] and whether the disparate impact regulations promulgated to enforce Title VI can be enforced through a section 1983 action.").

223. *South Camden Citizens*, 145 F. Supp. 2d at 509 (supplemental opinion) (concluding that "the Supreme Court's decision in *Sandoval* does not preclude Plaintiffs from pursuing their claim for disparate impact discrimination, in violation of EPA's implementing regulations to Title VI, under 42 U.S.C. § 1983"). In reaching this conclusion, Judge Orlofsky determined that the EPA regulations implementing Title VI met the three-prong *Blessing* test used to assess whether section 1983 can be used. *Id.* at 535-542 (examining each of the three determining factors separately and concluding that each is met). The court further addressed the rebuttal issues that arise when the three-prong test is met. *Id.* at 542-47 (determining that Congress did not expressly preclude the use of section 1983 and that the administrative enforcement mechanisms in place for Title VI are "insufficient to meet the high threshold the Supreme Court has established for regulations which may be deemed so comprehensive that they demonstrate a Congressional intent to foreclose recourse to § 1983").

224. The case is currently on appeal to the United States Court of Appeals for the Third Circuit, which heard oral arguments in late September 2001, and the issue may ultimately be decided by the Supreme Court. See Shannon P. Duffy, "Environmental Racism" Ruling Could Have Far-Reaching Impact, 166 N.J. L.J., Oct. 1, 2001, at 11

b. Complaints Using the Administrative Process Established in the Title VI Implementing Regulations

The regulations adopted by the executive agencies to implement and enforce Title VI include a detailed administrative process designed to evaluate compliance.²²⁵ The complaint procedures for a victim of impact discrimination are actually fairly simple.²²⁶ However, there are serious drawbacks to using the administrative process to initiate complaints.²²⁷ In particular, once the complaint is made, the victim of the impact discrimination is practically excluded from the investigation process of the executive agency, and the remedies available are limited to the revocation of federal funding to the offending party.²²⁸ Even with these

(detailing the oral arguments and explaining the importance of the decision); *see also* Rubenstein, *supra* note 222, at 58 (“Both sides agree the upcoming 3rd Circuit decision will be a landmark.”); Coyle, *supra* note 218 (noting that the Third Circuit will hear arguments on Sept. 25, 2001); Woellert, *supra* note 218, at 121 (“Each side vows to appeal to the U.S. Supreme Court if it loses.”); Magnuson, *supra* note 176, at 17 (noting the filing of a notice to appeal to the Third Circuit).

225. *See, e.g.*, 40 C.F.R. §§ 7.120-7.130 (2001) (Envtl. Prot. Agency regulations). The Environmental Protection Agency’s regulations are typical of the administrative enforcement procedures and provide 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.” 40 C.F.R. § 7.120(a)(2001). *See also* 7 C.F.R. §§ 15.6, 15.8-15.10 (2001); 15 C.F.R. §§ 8.8-8.13 (2001); 28 C.F.R. §§ 42.107-42.110 (2001); 32 C.F.R. §§ 195.8-195.11 (2001); 34 C.F.R. §§ 100.6-100.10 (2001).

226. Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. & LITIG. 309, 314-15 (1994). At the Environmental Protection Agency, the administrative complaint process begins by writing a letter of complaint to the Office of Civil Rights. *Id.* Once the letter is sent, the “EPA does the rest.” *Id.* To be accepted by the EPA, the complaint must allege specific acts of discrimination and must show that the alleged offender receives federal assistance from the EPA. *Id.* at 315. The complaint must also be filed within a time period of 180 days from the incident or it may allege a continuing pattern of discrimination. *Id.* If the EPA accepts the complaint, the agency conducts an investigation, gathers information, illicit a response from the alleged offender, and conducts visits to the site of the alleged discrimination. *Id.* at 317. If disparate impact discrimination is found, the EPA has four options to resolve the problem: informal negotiations, revocation of the offender’s federal funding, referral of the case to the Department of Justice, or no action at all, which may risk a lawsuit. *Id.* at 317-18.

227. *Id.* at 321-25.

228. *Id.* Other drawbacks to the use of the administrative complaint process include the following: the lack of time limits imposed on the agencies to respond to complaints; the risk that future litigation could be affected because the filing of an administrative complaint does not toll any statute of limitations applicable to filing a federal court action; the possibility that information from the agency regarding the claim may be limited at best; and the fact that complainant’s attorney’s fees usually are not provided in the case of an administrative resolution. *Id.* at 321-24. Of more specific concern in the case of the Environmental Protection Agency is a severe backlog of complaints and a lack of resources with which to address the backlog because of a congressional rider placed on

serious drawbacks, the administrative complaint process may prove to be valuable as an alternative to the cause of action taken away by the Court's decision in *Sandoval*.²²⁹

c. *Congressional Action Could Restore the Cause of Action*

The arguable absence of congressional intent to create a cause of action led the Court to its ruling in *Sandoval*.²³⁰ Congressional action that clarifies Congress' intent to create a cause of action would effectively overrule the finding of the Court.²³¹ Such an approach is certainly not revolutionary.²³² In fact, congressional action to overrule

appropriations for the efforts. See Kriz, *supra* note 208, at 2419-21 (explaining the political climate leading to the use of an appropriations rider). With the appropriations rider lifted, there is hope that the backlog of cases can be addressed. *Id.* However, the anticipated increase in the use of the administrative complaint process in the wake of *Sandoval* could intensify the problem even further. *Id.*

229. See Cole, *supra* note 226, at 319-22. There are benefits to using the administrative complaint process. *Id.* First, the informal nature of the complaint process allows for the submission of a complaint with only minimal documentation to meet the initial burden of showing a discriminatory practice by a recipient of federal funding. *Id.* at 319. Second, because the agency is responsible for the investigation and proceedings, community groups wishing to file a complaint often do not need an attorney. *Id.* As a result, from the perspective of the complainant, the process is relatively inexpensive and costs "nothing but postage to file." *Id.* Finally, to a certain extent, community groups can rely on the agency to conduct the investigation with expertise rather than risk the outcome of the case hoping for the assignment of a favorable judge. *Id.*

230. Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

231. See generally Abner J. Mikva & Jeff Bleich, *Symposium: Civil Rights Legislation in the 1990s: When Congress Overrules the Court*, 79 CAL. L. REV. 729 (1991); Abner J. Mikva, *Speech: Wayne Morse Forum, October 15, 1997: The Primacy of Congress*, 77 OR. L. REV. 1019 (1998). When the intent of Congress is unclear, there is a chance that the Court could interpret statutes in a manner inconsistent with original congressional intent. Mikva & Bleich, *supra*, at 730-31; Mikva, *supra*, at 1025. Conversely, in the case of an unclear statement by the Court, Congress may act to "fill in the interstices of the Court's opinion to prevent improper interpretation or to undo what it believes to be an imprudent precedent." Mikva & Bleich, *supra*, at 731. This does not necessarily indicate friction between the two branches, but rather the functioning of the checks and balances system established within the federal system. *Id.* Stated more precisely:

Judicial review and congressional overruling are, in the normal course of events, constructive measures to correct the inevitable goofs both branches commit. Members of Congress and Supreme Court Justices . . . are fallible, and sometimes they state propositions more broadly than they had intended. In these circumstances, the natural process of checks and balances provides a quick injection to cure the malady: Congress passes a law to state what it means more precisely.

Id.

232. Mikva & Bleich, *supra* note 231, at 729-30 ("Congressional overruling of a Supreme Court decision is not a particularly exceptional event. It occurs from time to time when one branch sincerely misunderstands the meaning of, or fails to anticipate, a proper exercise of the other branch's power."); see also William N. Eskridge, Jr.,

the Court's holdings in the civil rights arena was a somewhat regular occurrence in the late 1980s when Congress overruled seven Supreme Court interpretations of civil rights laws between 1982 and 1988.²³³ There are obvious political considerations that must be addressed before congressional action could be taken to overrule the Court's holding in *Sandoval*.²³⁴ Given these political realities, congressional action is clearly not a short-term solution for victims of disparate impact discrimination. Considering the historical precedent, however, congressional action should be considered as a possible solution to the problems created by the *Sandoval* decision.²³⁵

Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331, 337-39 (1991) (detailing a study of congressional overrulings of Court decisions and saying that "Congress frequently overrides or modifies statutory decisions by lower federal courts as well as those by the Supreme Court").

233. Mikva & Bleich, *supra* note 231, at 738. Congress acted to overrule several Supreme Court decisions that narrowly interpreted statutes related to voting rights, education, the rights of handicapped persons, and age discrimination. *Id.* at 740-41 (citing *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Smith v. Robinson*, 468 U.S. 992 (1984); *Grove City Coll. v. Bell*, 465 U.S. 555 (1984); *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986)); see also William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 623-38 (1991) (describing each legislative override of a Court decision between 1972 and 1990). Congress also overruled the Court in the Civil Rights Act of 1990. See generally Drew S. Days, III, *Civil Rights at the Crossroads*, 1 TEMP. POL. & CIV. RTS. L. REV. 29, 35 (1992); Eskridge, *supra*, at 638-41. Prior to the introduction of the bill, the Court issued decisions narrowly interpreting Title VII of the Civil Rights Act of 1964. Days, *supra*, at 33-35. In response, Congress drafted legislation to expand affirmative action programs. *Id.* at 35 ("[The Civil Rights Act of 1990] sought not only to address the Supreme Court's narrow readings of the Reconstruction Era and 1964 Civil Rights Acts, but also to strengthen protections for racial minorities and women against employment discrimination."), Eskridge, *supra*, at 638 ("The bill's language and content indicated Congress' wholehearted rejection of the Court's decisions."). The legislation passed both houses of Congress but was vetoed by the President, and Congress failed to override the veto. Days, *supra*, at 35. A compromised version of the bill was later passed and signed by the President. *Id.* at 35-36.

234. Mikva & Bleich, *supra* note 231, at 744-49. When Congress acts to overrule the Court, it can create animosity between the two branches and disrupt the ability of either branch to function effectively. *Id.* at 746-49 ("[T]he accelerated pace of overrulings may reflect a dangerous view on the part of Congress that even proper pronouncements of the Court are entitled to less respect."). Also, the use of legislative lobbying to urge Congress to overrule the Court may be an issue to consider. *Id.* at 747 (observing the effect of lobbying on congressional action not only to overrule the Court on civil rights issues, but actually to strengthen rights); see also Eskridge, *supra* note 233, at 359-68 (discussing the role of interest groups in the process of congressional overruling of the Court).

235. See *A Blow to Civil Rights*, BUFFALO NEWS, Apr. 29, 2001, at H2. The article reads:

In decreeing that no private right to a lawsuit exists because Congress didn't specifically create one, the [J]ustices invite Congress to rectify that oversight. . . . [C]ongressional corrections are the obvious answer. Lawmakers can hide behind

IV. CONCLUSION

The case law related to the existence of a cause of action to enforce the Title VI disparate impact regulations is admittedly unclear. In *Sandoval*, the Court essentially ignored the case law altogether by dismissing previous statements of the Court. In doing so, the Court failed to fairly review the issues at hand. The Court's Title VI analysis was inadequate because the Court took an extremely narrow view of the statute and concluded that no cause of action exists. The dissenting opinion provided a more rational approach to both the prior case law and statutory interpretation, which led to an opposite conclusion from that of the majority. The *Sandoval* decision had a broad, negative impact on civil rights enforcement. With the use of section 1983 and other potential alternatives, however, civil rights enforcement is able to continue despite the loss of an important weapon.

ADDENDUM

Subsequent to the writing of this Note, the Third Circuit issued a decision in the *South Camden Citizens in Action* case discussed above.²³⁶ The Third Circuit held that "a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute."²³⁷ The decision was appealed, and the Supreme Court denied the petition for certiorari.²³⁸

the letter of the law — or they can write new ones to rescue a system that has been working.

Id.; see also Kriz, *supra* note 208, at 2421 ("An increasing number of civil rights and environmental activists are arguing for new legislation to overturn the April Supreme Court [*Sandoval*] decision. . . . [C]ivil rights groups would be best served by a 'statutory fix' that gives minority groups more access to the courts.").

236. *South Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 274 F.3d 771 (2001); see also *supra* notes 218-224 and accompanying text.

237. *South Camden Citizens in Action*, 274 F.3d at 790.

238. *South Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 122 S. Ct. 2621 (2002) (mem.).

