
Joseph Ursic
NOTES

FINDING A REMEDY FOR ENVIRONMENTAL JUSTICE:

USING 42 U.S.C. § 1983 TO FILL IN A TITLE VI GAP

Certain land uses such as toxic waste landfills and incinerators can pose serious health hazards. Although no one should have to bear an inordinate amount of the risk they create, minorities sometimes suffer a disproportionate amount of the burden. Because of this inequity, minority communities around the country have pulled together over the last twenty-five years to counteract the problem under the banner of environmental justice. Environmental justice is the concept that all Americans should share equally the burdens of environmental hazards. As this Note will demonstrate, federal laws prohibit the discrimination which results from making siting decisions that have a disparate effect on minorities.

There are limits, however, to the number of causes of action a community that suffers from environmental injustice can bring, and recently the United States Supreme Court eliminated one action that many environmental justice advocates perceived as the most promising. This Note studies the impact of that decision, Alexander v. Sandoval,\(^1\) which concerned Title VI of the Civil Rights Act.\(^2\) In light of this decision, the Note considers whether another cause of action, brought under Title VI and 42 U.S.C. § 1983,\(^3\) can succeed.

Part I discusses the history of the environmental justice movement and the evidentiary studies that demonstrated the existence of the problem. Part II focuses on remedies that have proven inadequate for addressing environmental justice grievances, including the Sandoval decision, because they require a finding of intentional discrimination. Part III analyzes the viability of the latest potential disparate impact cause of action, a section 1983 claim to enforce regulations promulgated under Title VI. Finally, Part IV discusses alterna-

\(^1\) 532 U.S. 275 (2001).
tive environmental justice remedies that might have to be pursued more vigorously should the Supreme Court reject a section 1983 argument.

I. A BRIEF HISTORY OF THE ENVIRONMENTAL JUSTICE MOVEMENT

Environmental justice has received attention because poor and minority communities across the nation have united to form community-based grass-roots organizations to combat the unequal enforcement of environmental policies and the inequitable distribution of environmental hazards in their communities. In 1982, protesters in predominantly African-American Warren County, North Carolina, focused national attention on the relationship between pollution and minority communities for the first time. They opposed a decision by the state to site a landfill for the disposal of soil contaminated by highly toxic polychlorinated biphenyls (PCBs) in a community that was 84% African-American. The entire population in Warren County was 64% African-American, the highest percentage in the state. Although the campaign eventually failed, 400 people were arrested, which marked the first time anyone in the United States had been jailed for attempting to prevent a toxic waste landfill. More importantly, the protests prompted Walter E. Fauntroy, the District of Columbia's delegate to Congress and an active participant in the campaign, to request that the United States General Accounting Office (GAO) study the racial demographics of hazardous waste sites.

The 1983 GAO study examined the relationship between race and the siting of hazardous waste facilities in the Environmental Protection Agency's Region IV. Region IV consists of Alabama, Florida, Georgia, Mississippi, Kentucky, North Carolina, South Carolina, and Tennessee. The report found that African-Americans made up the majority of the population in three of the four communities where hazardous waste landfills were located. Although African-Americans comprised only 12% of the nation's population at the time, 42% to 92% of the populations of these three communities were African-American. Even the fourth landfill, which was located in a county with an overall population that was 38% African-American,
The GAO study's narrow geographic scope prompted the United Church of Christ to create a Commission for Racial Justice (CRJ), which conducted its own investigation of the correlation between the distribution of hazardous waste and race. This was the first study that documented the existence of commercial and uncontrolled hazardous waste sites in minority communities throughout the entire United States. The CRJ study found that the percentage of minorities residing in communities with a hazardous waste facility was twice that of those without a facility. Communities that had more than one facility or that had one of the five largest commercial waste landfills had minority populations more than three times the minority population of others. The most significant conclusion the CRJ drew from its study was that racial composition was the variable best able to predict the location of a commercial hazardous waste facility.

Despite the CRJ study, public debate about environmental justice issues did not flourish until the early 1990's. The Michigan Conference on Race and Incidence of Environmental Hazards in January 1990 was a significant moment in the history of the environmental justice movement. Scholars, social scientists, civil rights activists, and biological investigators all convened to discuss the inequitable distribution of environmental hazards in poor and minority communities, and representatives formally conveyed their concerns to the Environmental Protection Agency (EPA).

The EPA created the Environmental Equity Workgroup (EEW) in response to these concerns. The EEW evaluated the risks associated with the inequitable distribution of hazardous waste in minority communities and audited the EPA's own policies from an environmental equity perspective. Because of the limited data on the correlation between health effects and exposure to environmental hazards,
the EEW did not find a conclusive link between the two when it submitted its report in May 1992. However, it affirmed the noticeable difference in potential for exposure to environmental pollution because of race and socioeconomic status.\(^\text{17}\)

Also in 1992, the *National Law Journal* released a report on EPA Superfund\(^\text{18}\) actions that illustrated systematic differences between actions taken in white and minority communities.\(^\text{19}\) Based on an eight-month analysis, the *National Law Journal* found that fines and penalties under environmental laws were higher in white areas than in minority areas. The report also revealed a disparity in the rate at which Superfund sites were cleaned up.\(^\text{20}\) Minority communities sometimes had to wait four years longer than white communities for remediation of hazardous waste sites, and this imbalance often occurred whether the minority community was wealthy or poor.\(^\text{21}\) These studies demonstrate the disparate impact from environmental hazards that racial minorities often face.\(^\text{22}\)

In 1994, President Clinton became involved in the environmental justice movement with Executive Order 12,898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.\(^\text{23}\) The Order instructed federal agencies to make achieving environmental justice part of their mission. It required that each agency conduct all of its programs, policies, and activities substantially affecting health or the environment in a manner that ensures that minorities are not denied participation based on race, color, or national origin.\(^\text{24}\) The Order also directed the EPA to establish an Interagency Working Group on Environmental Justice. Responding to Executive Order, the EPA also published *Interim Guidance for Investigating Title VI Administrative Complaints Challeng-
ing Permits,” because it expected an increased number of Title VI complaints.

II. INADEQUATE REMEDIES

In response to the evidence of environmental injustice, civil rights and environmental organizations have pursued various judicial remedies to reduce the adverse and disproportionate impact experienced by minority communities. However, most avenues have failed to produce a consistently satisfactory result. This section discusses two tactics that have played a large role in environmental justice litigation, but have proven unsuccessful.

A. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” This guarantee applies to both state and local governments and imposes a general restraint on the governmental use of classifications, such as race or gender. When a racial classification is used, the courts apply a strict scrutiny standard of review and will uphold the classification only if it is the least dramatic way to promote a compelling governmental interest. However, strict scrutiny will be applied only where the government’s action is intentional. Absent intent, differential impact is only subject to the test of rationality. In 1976, the Supreme Court in Washington v. Davis explicitly required that the plaintiffs prove an intent to discriminate in order to establish an equal protection violation. The plaintiffs in Washington had failed a written test that measured whether they had the verbal ability and reading comprehension necessary to become police officers. African-American applicants had a failure rate four times that of white applicants, but the Court held this insufficient to prove discriminatory intent.

27 U.S. CONST. amend. XIV, § 1.
28 See Adickes v. S.H. Kress & Co., 398 U.S. 144, 173 (1970) (holding that a local law, or custom with the force of law, may offend the Fourteenth Amendment without having state-wide application).
29 See Korematsu v. United States, 323 U.S. 214, 216 (1944) (requiring restrictions based on race to be subjected to the most rigid scrutiny); see also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (finding racial distinctions inherently suspect and requiring the most exacting judicial examination).
30 Wisconsin v. City of New York, 517 U.S. 1, 18 n.8 (1996).
32 Id. at 233-34.
intent. The Court held that a disproportionate impact must be traced to an intent to discriminate on the basis of race.\textsuperscript{33}

The next year in \textit{Village of Arlington Heights v. Metropolitan Housing Development Corp.},\textsuperscript{34} the Supreme Court listed four elements to consider in determining whether circumstantial evidence such as a disproportionate impact was sufficient to prove discriminatory intent. A court should consider the historical background of the decision, the specific series of events preceding the action, whether there were any substantive or procedural departures from the ordinary decision-making process, and whether there were relevant statements in the legislative or administrative history by members of the decision-making body.\textsuperscript{35}

In a rare case, disparate impact may be sufficient to prove discriminatory intent. In \textit{Yick Wo v. Hopkins},\textsuperscript{36} the Supreme Court reversed a conviction under a municipal ordinance that was impartial on its face because the ordinance was enforced in a discriminatory fashion. The regulation in \textit{Yick Wo} required that all laundries housed in wooden buildings be licensed before operating. All applicants who were Chinese were denied, while all but one of the white applicants were approved.\textsuperscript{37} Similarly, in \textit{Gomillion v. Lightfoot},\textsuperscript{38} the Supreme Court held that an Alabama statute that changed city boundaries to remove all but four or five of 400 African-American voters while not removing a single white voter was clearly designed to exclude African-Americans and was discriminatory. Thus, sometimes a clear pattern, unexplainable on other grounds, emerges from the effect of the state action even when the government legislation appears neutral on its face. Such cases are rare, however, and absent a pattern as stark as that in \textit{Yick Wo} or \textit{Gomillion}, impact alone is not determinative of intent.\textsuperscript{39}

Four cases demonstrate the way courts have interpreted the equal protection doctrine in cases involving the citing of hazardous waste facilities in predominantly minority communities. In \textit{Bean v. Southwestern Waste Management Corp.},\textsuperscript{40} the plaintiffs sued to enjoin Texas from siting a solid waste disposal facility within 1700 feet of a predominantly African-American high school. They attempted to show a pattern of racial discrimination in the state agency’s placement of solid waste sites into minority communities and used statisti-

\begin{thebibliography}{9}
\bibitem{33} \textit{Id.} at 239-42.
\bibitem{34} 429 U.S. 252 (1977).
\bibitem{35} \textit{Id.} at 266-68.
\bibitem{36} 118 U.S. 356 (1886).
\bibitem{37} \textit{Id.} at 359.
\bibitem{38} 364 U.S. 339 (1960).
\bibitem{39} \textit{Village of Arlington Heights}, 429 U.S. at 266.
\bibitem{40} 482 F. Supp. 673 (S.D. Tex. 1979).
\end{thebibliography}
As circumstantial evidence. The court held that they had established a substantial threat of irreparable injury. However, it rejected the plaintiffs' claim because they lacked a substantial likelihood of success on the merits. It held that, although the siting decision appeared insensitive and illogical, the plaintiffs had not met their burden to prove a discriminatory purpose.\(^{41}\) The evidence adduced did not meet the magnitude required under Arlington Heights.

In East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning and Zoning Commission,\(^{42}\) the plaintiffs sought to reverse a local planning board decision to locate a landfill in a predominantly African-American community. The plaintiffs argued that the court should consider the county's history of locating undesirable land uses in predominantly African-American neighborhoods, but the court held that only the former decisions of that particular planning board were relevant. Because there was no prior evidence of discrimination by the board, there was insufficient evidence to support a finding of intentional discrimination based on a disparate impact theory.\(^{43}\) Fatal to the plaintiffs' claim was the fact that the only other similar landfill was located in a census tract that was predominantly white. The court also found that the consistent opposition of the landfill siting by local residents was adequate participation to ensure that a nondiscriminatory process had been followed.\(^{44}\)

Similar to East Bibb, in R.I.S.E., Inc. v. Kay,\(^{45}\) a biracial citizens group in Virginia challenged a county board decision to site a landfill in a predominantly African-American community. Although three other landfills were sited in neighborhoods that were over ninety-five percent African-American and the county had previously refused to site a landfill in a predominantly white neighborhood, the court denied relief because the plaintiff had not met the other parts of the discriminatory purpose equation under Arlington Heights.\(^{46}\) Careful examination of the administrative steps taken by the board revealed nothing unusual about the procedure used, and the board had responded to the concerns and suggestions of citizens by establishing a citizens' advisory group, among other things. The court held that the board's approval of the proposed landfill was based not on the racial composition of the neighborhoods in which the landfill is located but on the environmental suitability of the site.\(^{47}\) In concluding it stated: "[T]he Equal Protection Clause does not impose an affirmative duty

\(^{41}\) Id. at 677.
\(^{43}\) See id. at 886.
\(^{44}\) See id. at 885-86 (finding that the county had met its procedural requirements).
\(^{46}\) See id. at 1148-49.
\(^{47}\) Id. at 1150.
to equalize the impact of official decisions on different racial
groups." Finally, in *NAACP v. Gorsuch*, the court denied a request
for a preliminary injunction when a PCB disposal facility was sited in
a North Carolina county that had the highest percentage of minority
residents in the state. The court held that there was "not one shred
of evidence that race ha[d]... been a motivating factor."  

**B. Title VI**

Frustrated by the discriminatory intent standard under the Equal
Protection Clause, environmental justice advocates turned to Title VI
of the Civil Rights Act of 1964 to seek relief. Section 601 provides
that "[n]o person in the United States shall, on the ground of race,
color, or national origin, be excluded from participation in, be denied
the benefits of, or be subjected to discrimination under any program
or activity receiving Federal financial assistance." Section 602 au-
thorizes and directs federal agencies to issue rules and regulations to
implement this prohibition. Agencies may terminate funding or take
any other action authorized by law if a recipient of federal funds dis-

Pursuant to section 602 and soon after its passage, several fed-
eral agencies promulgated regulations that applied a disparate impact
test. In 1984, the EPA's Office of Civil Rights promulgated a simi-
lar regulation that prohibits any recipient of federal funds from using:

Criteria or methods of administering its program which have
the effect of subjecting individuals to discrimination because
of their race, color, national origin, or sex, or have the effect
of defeating or substantially impairing accomplishment of the
objectives of the program with respect to individuals of a par-
ticular race, color, national origin, or sex.  

The EPA's adoption of a disparate impact standard was important
because the Supreme Court held in *Guardians Ass'n v. Civil Service
Commission* that a plaintiff who brought a claim under section 601

48 Id.
49 Richard J. Lazarus, *Pursuing “Environmental Justice”: The Distributional Effects of
82-768-CIV-5 (E.D.N.C. Aug. 10, 1982)).
50 Id.
52 Id at § 2000d-1.
53 Id.
54 See Kenneth Owen, *Environmental Justice Enforcement Requires Reassessment Under
the Equal Protection Clause, Title VI of the Civil Rights Act, and Environmental Statutes*, 30
GOLDEN GATE U. L. REV. 379, 410 (2000) (stating that seven federal agencies quickly promul-
gated disparate impact regulations after Title VI was passed).
55 40 C.F.R. § 7.35(b) (2001).
had to prove intentional discrimination just as it would under the Equal Protection Clause. However, environmental justice groups had little success filing Title VI complaints with the EPA because the EPA has to find that the permitted activity has produced an adverse effect. Thus, environmental justice advocates began suggesting that suits be brought directly under section 602 against a recipient based on the EPA's regulation that prohibits a disparate impact.\footnote{57} Previous Supreme Court rulings suggested that there might be an implied right of action under section 602, and some federal circuit courts had held that such a cause of action was available.\footnote{58}

Despite hopes that a private right of action exists under section 602, in April 2001 the Supreme Court definitively ended any such possibility in \textit{Alexander v. Sandoval}\.\footnote{59} \textit{Sandoval} involved a decision by the Alabama Department of Public Safety (DPS) to administer state driver's license examinations solely in English because the Alabama Constitution had been amended to declare English as the state's official language. The DPS had received grants from the Department of Justice and the Department of Transportation and was thus subject to Title VI regulations.\footnote{60} Pursuant to section 602, the Justice Department had promulgated a regulation like the EPA's that forbade funding recipients from utilizing "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."\footnote{61} A non-English speaking driver's license applicant brought a class action suit against the Director of the Alabama DPS arguing that the English-only policy had a discriminatory effect based on her national origin.\footnote{62} The Court did not inquire whether the English-only policy actually had a discriminatory effect, but considered only whether a private right of action existed to enforce the regulations.

The Supreme Court made three assumptions. First, private individuals may sue under section 601 for both injunctive relief and damages. This was based on the Court's holding in \textit{Cannon v. University of Chicago}\footnote{63} that a private right of action exists under Title IX of the Education Amendments of 1972, which had been modeled on Title

\footnotesize{\textsuperscript{57} See Owen, \textit{supra} note 54, at 413.  \\
\textsuperscript{58} See, e.g., Villanueva v. Carere, 85 F.3d 481, 486-87 (10th Cir. 1996) (permitting plaintiff to bring disparate impact cause of action, but holding that there was no demonstrated adverse impact in the case); David K. v. Lane, 839 F.2d 1265, 1274 (7th Cir. 1988) (holding that a plaintiff may maintain a private cause of action to enforce regulations promulgated under Title VI and that evidence of discriminatory effect is sufficient to prevail).  \\
\textsuperscript{59} 532 U.S. 275 (2001).  \\
\textsuperscript{60} See \textit{id.} at 278.  \\
\textsuperscript{61} \textit{id.} at 279 (arguing that policy had discriminatory effect against Spanish-speaking citizens).  \\
\textsuperscript{62} 441 U.S. 677 (1979).}
VI. Second, section 601 prohibits only intentional discrimination, which was an essential part of its holding in Regents of the University of California v. Bakke and reflected a statement in Alexander v. Choate that "Title VI itself directly reach[es] only instances of intentional discrimination." Finally, the Court presumed that regulations promulgated by an agency pursuant to section 602 might validly proscribe activities that have a disparate impact on a racial group, even though such activities are permissible under section 601.

Despite the DOJ regulation, the Court held that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI. Justice Scalia’s majority opinion focused on the second part of the test set out in Cort v. Ash for finding an implied right of action. Under that test, the statute must first create a federal right in favor of the plaintiff. Second, there must be an indication of legislative intent, explicitly or implicitly, to create a private remedy. Third, the implied right of action must be consistent with the underlying purpose of the legislative scheme. Finally, the regulated area must not be one traditionally regulated by state law, such that it would be inappropriate to infer a cause of action based solely on federal law. Justice Scalia stated: "[T]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." Legislative intent on whether there is a private remedy is determinative because, without it, a cause of action does not exist. The Court then looked to the text and structure of Title VI to determine whether Congress intended a private right of action. First, it noted that, unlike section 601’s rights-creating language, section 602 refers only to federal agencies and does not mention private individuals at all. Because section 602 is phrased as a directive to federal agencies, it reveals no congressional intent to create a private right of action. "[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress."
The Court found no intent to create a private remedy in the methods provided to enforce regulations in section 602, either. Section 602 empowers agencies to enforce their regulations either by terminating funding to the particular program or "by any other means authorized by law." If an agency wants to cut funding, however, various procedures and restrictions apply. The Court reasoned that this did not lead to the conclusion that a private party should have easy access to enforce rights given by agency regulations. In fact, the elaborate restrictions on terminating funding tended to contradict a congressional intent to create a privately enforceable right. In short, there was no evidence anywhere in the text to suggest that Congress intended to create a private right of action under section 602.

Last, the Court rejected an argument that amendments to Title VI in the Rehabilitation Act of 1986 and the Civil Rights Restoration Act of 1987 had ratified the finding of an implied right of action to enforce disparate impact regulations. However, as the Court noted, these amendments covered only section 601 and did not alter the existing causes of action and corresponding remedies permissible under Title VI. Therefore, the Court held that neither as enacted nor amended does Title VI display Congress' intent to create a freestanding private right of action to enforce regulations promulgated under section 602, and thus no such right of action exists.


Although Sandoval involved a disparate impact claim brought under regulations promulgated by the Department of Justice, the Supreme Court's broad language reaches regulations promulgated by any federal agency pursuant to section 602. Thus, it eliminated the ability of a private litigant to enforce the EPA's Office of Civil Rights regulations directly under section 602. However, a private litigant may file a claim with the EPA itself if a violation occurs, and in the wake of Sandoval, environmental justice advocates have quickly adopted a new approach for privately enforcing EPA regulations by suing under 42 U.S.C. § 1983. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

76 See id. §2000d-2.
77 See Sandoval, 532 U.S. at 290.
78 Id. at 291-93.
79 Id. at 293.
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.  

Thus, if a litigant can prove all of the elements of a section 1983 claim, it is still possible to privately enforce regulations promulgated by an agency under section 602. The Supreme Court in *Sandoval* did not address whether a section 1983 claim can be brought to enforce agency regulations, but limited its holding to whether section 602 provided its own private right of action. In his dissent, though, Justice Stevens suggested that “[t]he litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference section 1983 to obtain relief.”

Justice Stevens also noted that the litigants in *Sandoval* retained the option of challenging Alabama’s English-only policy in a complaint that invokes section 1983.

A. The Validity of Section 602 Disparate Impact Regulations

The initial question, never directly addressed by the Supreme Court, is whether regulations promulgated by the EPA under section 602 that prohibit disparate impact discrimination are a valid exercise of an agency’s authority when section 601 prohibits only intentional discrimination. Although the Supreme Court has never directly addressed what forms of discrimination section 601 prohibits, essential to its holding in *Regents of the University of California v. Bakke* was the understanding that section 601 reaches only the same types of discrimination as the Equal Protection Clause. In *Bakke*, the Court held that a state medical school admissions program that reserved a certain number of positions in each class for disadvantaged minorities would be illegal under section 601. As discussed above, the Supreme Court held in *Washington v. Davis* that a violation of the Equal Protection Clause requires a finding of intentional discrimination; therefore, it follows necessarily that section 601 prohibits only intentional discrimination as well. Thus, regulations that prohibit disparate impact discrimination go beyond what is prohibited by section 601 directly.

No Supreme Court decision has squarely addressed whether disparate impact regulations are valid. In *Guardians Ass’n v. Civil Ser-
vice Commission," the Court held that minority members of New York City’s police department who challenged the city’s “last-hired, first-fired” policy were not entitled to compensatory relief under Title VI. In addition to addressing the central issue, three justices stated that, although section 601 reaches only intentional discrimination, agency regulations under section 602 which forbid disparate impact discrimination are valid exercises of agency discretion and are authorized by the statute. Another two justices would have held that section 601 reached disparate impact and not just intentional discrimination. It follows that they would have also upheld authoritative regulations promulgated under section 602 that prohibit disparate impact discrimination. Thus, five justices were of the opinion that agency regulations prohibiting disparate impact were valid. However, in a fragmented decision like Guardians, “the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds.” In Guardians, the narrowest ground for the holding was in the opinion of Justice White, who delivered the opinion of the Court, yet was one of the justices who would have upheld the validity of the regulation. Because he based his decision on the fact that the police officers sought monetary damages and not just injunctive relief, his opinion that the regulation was valid was not essential to the holding. Thus, despite the opinions of five justices, Guardians did not hold that disparate impact regulations are valid. In subsequent decisions, the Court has avoided addressing this issue directly, but based on the opinions of the five justices in Guardians, has always assumed that such regulations are valid.

Pursuant to section 602, federal agencies are directed to “effec-
tuate” the provisions of section 601. The agency must stay within the bounds of the power delegated to it by Congress. As the Supreme Court stated in *Ernst & Ernst v. Hochfelder*, “The rulemaking power granted to an administrative agency charged with the admin-
istration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Con-

---

87 463 U.S. 582 (1983).
88 *Id.* at 644 (Stevens, J., dissenting).
89 *See id.* at 593; *see also id.* at 624 (Marshall, J., dissenting).
gress as expressed by the statute." In *Ernst & Ernst*, the Court held invalid a change in the Securities and Exchange Commission's interpretation of Rule 10b-5, which imposed liability for negligence under a statute that spoke in terms of manipulation and deception. The Court held that, when a statute speaks so specifically in terms of manipulation and deception, and when its history does not reflect a more expansive intent, its scope cannot extend to negligence. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, the Court reiterated this rule that agency regulations may not be broader than the statutes under which they are promulgated. The Court cited its language from *Ernst & Ernst*, and held that a private plaintiff may not maintain an aiding and abetting suit under Rule 10b-5 because the statute authorizing the rule, section 10(b) of the Securities Exchange Act of 1934 does not prohibit a class of behavior broad enough to encompass those acts.

Confronted with a different section of the Securities Exchange Act in *United States v. O'Hagan*, however, the Supreme Court took a different approach. Unlike the regulation promulgated under section 10(b) at issue in *Ernst & Ernst* and *Central Bank of Denver*, which permitted the SEC to prescribe only manipulative or deceptive devices, in *O'Hagan*, the case involved a regulation promulgated under section 14(e). Section 14(e) grants the SEC authority to prescribe means reasonably designed to prevent fraudulent, deceptive, and manipulative practices. The SEC's Rule 14e-3(a) forbids trading on material nonpublic information if the trader knows or has reason to know the information has been acquired directly or indirectly from an inside source even if the trader owes no fiduciary duty to the company. The Court found that the rule was reasonably designed to carry out section 14(e). More importantly, it reasoned that because a prophylactic measure’s mission is to prevent, it typically encompasses more than the core activity prohibited. The Court added that section 14(e)'s rulemaking authority gives the SEC latitude to regulate nondeceptive activities even in the context of a term of art.

---

94 Id. at 213-14 (quoting Dixon v. United States, 381 U.S. 68, 74 (1965)).
95 Id. at 185.
97 *Ernst*, 425 U.S. at 214.
98 Id.
101 *Central Bank of Denver*, 511 U.S. at 177.
103 Id. at 667.
106 *O'Hagan*, 521 U.S. at 673.
like "manipulative." In conclusion, it held under section 14(e) that the SEC may prohibit acts not themselves fraudulent as long as the prohibition is reasonably designed to prevent fraudulent acts.  

Section 602 directs agencies to effectuate the provisions of section 601 by issuing rules, regulations, or orders of general applicability.  

As in O'Hagan, Title VI is a prophylactic measure, the goal of which is preventing discrimination. Section 602 directs agencies to take measures that will ensure that its goal of protecting all people from discrimination will be realized, but it does not provide a precise definition of what constitutes discrimination. Unlike the statute in Ernst & Ernst, section 601 does not speak in specific terms; instead, it leaves agencies broad discretion to determine what rules will best accomplish its goal. The test of whether the means employed by an agency is permissible, even though it may encompass more than the core activity prohibited, comes from Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.  

As in O'Hagan, agency promulgations should be given deference unless Congress unambiguously addressed the precise question and it is inconsistent with the agency's construction, or if the agency's choice was arbitrary or capricious. Although courts have held that section 601 prohibits only intentional discrimination, the statute itself does not make this clear. Accordingly, regulations promulgated under section 602 that prohibit disparate impact discrimination are valid because they are reasonably designed to effectuate the prevention of discrimination.

B. The Viability of a Section 1983 Action

Bringing an action under section 1983 avoids the requirement that Congress intended a remedy under section 602 because section 1983 provides the remedy for a violation of any right secured by "the Constitution or laws." The Supreme Court has provided guidance on what test governs an action brought under section 1983. First, the plaintiff must assert the violation of a federal right. Second, even when the plaintiff has asserted a federal right, the defendant may show that Congress specifically foreclosed a remedy under section 1983.

---

107 Id.
110 See id. at 844.
1983 by providing a comprehensive enforcement mechanism for protection of a federal right.\textsuperscript{113}

A plaintiff must not merely assert the violation of a federal law, but must assert the violation of a federal right to meet the first requirement.\textsuperscript{114} To determine whether a federal statute creates a federal right, the Court uses a three-part test most recently articulated in \textit{Blessing v. Freestone}.\textsuperscript{115} First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the states; thus, the provision giving rise to the right must be couched in mandatory rather than precatory terms.\textsuperscript{116}

This test differs from the four-factor test enunciated in \textit{Cort v. Ash}\textsuperscript{117} that establishes whether a statute creates an implied right of action. Unlike that test, the \textit{Blessing} test does not require the finding of a remedy under the statute because section 1983 provides the remedy itself.\textsuperscript{118} This remedy is presumed because Congress is presumed to legislate against the background of section 1983. Therefore, courts need only find the violation of a federal right, as in the first part of the \textit{Cort} test.\textsuperscript{119}

Before reaching the \textit{Blessing} test, a court must analyze the EPA regulations to determine whether they qualify as "laws" under section 1983. Section 7.30 of the EPA's implementing regulations provides: "No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin, [or sex]."\textsuperscript{120} Section 7.35 lists specific prohibitions. In addition to other specific prohibitions, Part A provides that no recipient shall directly or through other arrangements on the basis of race, color, national origin, or sex: deny a person any service or benefit of the program, provide a person any service or benefit different than that provided to others, or restrict any person in the enjoyment of a privilege enjoyed by others provided by the program.\textsuperscript{121} Recipients must also "take affirmative action to provide remedies to those who

\textsuperscript{113} See Blessing v. Freestone, 520 U.S. 329, 341 (1997) (holding that establishing an individual right only creates a rebuttable presumption that the right is enforceable under § 1983).
\textsuperscript{114} See \textit{id.} at 340.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.} at 340-41.
\textsuperscript{117} 422 U.S. 66 (1975). See \textit{supra} text accompanying notes 69-70.
\textsuperscript{119} See \textit{supra} text accompanying note 70.
\textsuperscript{120} 40 C.F.R. § 7.30 (1999).
\textsuperscript{121} 40 C.F.R. § 7.35(a)(1)-(6) (2001).
have been injured by the discrimination. Part B prohibits a recipient from using "criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex."

Although any rights created by these provisions do not appear explicitly in a statute, courts should still apply the Blessing test because the regulations have the same binding effect as a statute. The Supreme Court has held that federal regulations can have the force of law. In *Chrysler Corp. v. Brown*, the Court held that regulations have the force of law if they are substantive, meaning they function as legislative-type rules that affect individual rights and obligations, if Congress granted the agency the authority to promulgate such regulations, and if the regulations were promulgated in accordance with applicable procedural requirements. The *Chrysler* test is regularly applied to determine whether a particular regulation has the force and effect of law. Furthermore, scholars recognize that a valid legislative rule has the same binding effect as a statute. A legislative rule can impose distinct obligations on members of the public in addition to those imposed by statute, as long as the rule is within the scope of authority conferred upon the agency by Congress. Because they satisfy the three-part *Chrysler* test, the EPA regulations should be considered "laws" under section 1983. They were promulgated by the EPA pursuant to section 602 and are legislative rules under the Administrative Procedure Act. Section 7.35 creates obligations that directly affect individuals. Congress did not merely authorize agencies like the EPA to promulgate such regulations, but actually directed them to do so. Finally, there is no dispute that the regulations were adopted pursuant to applicable procedural requirements.

As discussed above, the EPA's implementing regulations are a valid exercise of its authority under section 602. Because they have the force of law as valid legislative rules, they should qualify as

---

123 40 C.F.R. § 7.35(b) (2001).
125 See, e.g., United States v. Mitchell, 39 F.3d 465, 470 (4th Cir. 1994) (applying the *Chrysler* test); United States v. Walter Dunlap & Sons, Inc., 800 F.2d 1232, 1238 (3d Cir. 1986) (holding that substantive regulations may have the force of law if they are authorized by Congress and promulgated by an agency to implement a statute); Nat'l Ass'n of Pharm. Mfrs. v. FDA, 637 F.2d 877, 889 (2d Cir. 1981) (applying the *Chrysler* test).
127 See id. § 6.3.
129 40 C.F.R. § 7.35(b) (2001) (providing that a recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex).
“laws” under section 1983. Therefore, a court must determine next whether they create an enforceable right under section 1983. The Supreme Court held in *Wright v. City of Roanoke Redevelopment and Housing Authority*\(^{131}\) that an agency may create rights within the meaning of section 1983. In that case, the plaintiff brought a section 1983 action charging that the Roanoke Redevelopment and Housing Authority overbilled him in violation of the Brooke Amendment to the Housing Act of 1937 and the implementing regulations of the Department of Housing and Urban Development (HUD).\(^{132}\) The Court held that the HUD regulations defining the term “reasonable” created a right enforceable under section 1983, that HUD’s view was entitled to deference as a valid interpretation of the statute, and that Congress in the course of amending the provision had not disagreed with this interpretation.\(^{133}\) The intent of the Brooke Amendment to benefit the plaintiff was undeniable, and the HUD regulations had the force of law. Furthermore, the rights created were sufficiently specific to qualify as enforceable under section 1983 and were not beyond the competence of the judiciary to enforce.\(^{134}\) Similarly, because section 602 directs agencies to effectuate section 601, which creates individual rights, an agency may create such rights as long as it is acting within the scope of its delegated authority and the rights created satisfy the *Blessing* test.\(^{135}\)

Federal circuit courts have disagreed as to what extent a regulation may create an enforceable right. The United States Court of Appeals for the Sixth Circuit held in *Loschiavo v. City of Dearborn*\(^{136}\) that a federal regulation itself may create an enforceable right if it meets the three-part *Blessing* test because a regulation has the force of law. At issue was whether a Federal Communications Commission regulation prohibiting enforcement of local zoning ordinances that unduly interfered with individual satellite antennas created a private right of action under section 1983. The underlying statute authorized individuals to receive unscrambled satellite programming for private viewing. Finding that local ordinances regularly interfered with the right to receive satellite signals for home viewing, the FCC preempted these with its regulation. The court held that, despite a city ordinance requiring approval from the zoning board of appeals before installing an antenna for private viewing, the Loschiavos were intended beneficiaries of the preemption regulation and were entitled to bring a sec-

\(^{131}\) 479 U.S. 418 (1987).
\(^{132}\) Id. at 419.
\(^{133}\) Id. at 430.
\(^{134}\) See id. at 431-32 (explaining that the regulations specifically set out guidelines that the housing authorities were to follow).
\(^{136}\) 33 F.3d 548 (6th Cir. 1994).
tion 1983 action to enforce their right to a satellite antenna for home viewing.\textsuperscript{137}

The United States Court of Appeals for the District of Columbia Circuit has held that federal regulations may create enforceable rights under section 1983 if the regulations satisfy the \textit{Chrysler} test. In \textit{Samuels v. District of Columbia},\textsuperscript{138} tenants of federally funded housing sued local public housing officials for violating the United States Housing Act and the grievance procedure regulations promulgated by the Department of Housing and Urban Development (HUD) pursuant to it. The court held that the plaintiffs’ allegation that the District’s public housing officials had violated the regulations by itself advanced a cognizable section 1983 claim.\textsuperscript{139} Because HUD’s grievance procedures were issued under a congressional directive to implement specific statutory norms and affected individual rights, they clearly had the full force and effect of law.\textsuperscript{140} The court also held that section 1983’s “and laws” clause included at least those federal regulations adopted pursuant to clear congressional mandate that have the full force and effect of law.\textsuperscript{141}

The United States Courts of Appeals for the Third, Fourth, and Eleventh Circuits have not read \textit{Wright} as broadly. In \textit{Smith v. Kirk},\textsuperscript{142} the Fourth Circuit held that an administrative regulation cannot create an enforceable section 1983 interest not already implicit in the statute. It noted that, although the Supreme Court had not addressed the issue, Justice O’Connor’s dissent in \textit{Wright} expressed doubt that administrative regulations alone could create such a right.\textsuperscript{143} In \textit{Smith}, the plaintiff’s application for a specially equipped van was denied because the North Carolina’s Division of Vocational Rehabilitation Services applied an economic needs test. Smith sued under section 1983 based on mandatory language in a Social Security Administration regulation that provided that selection should be without regard to the applicant’s need for financial assistance.\textsuperscript{144} Because the statute conferred only one benefit on an individual, which should be promptly referred to the agency administering the decision, and the regulation was not based on it, the court upheld dismissal of the case.

\textsuperscript{137} \textit{Id.} at 553.
\textsuperscript{138} 770 F.2d 184 (D.C. Cir. 1985).
\textsuperscript{139} \textit{Id.} at 199.
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} 821 F.2d 980 (4th Cir. 1987).
\textsuperscript{143} \textit{Id.} See \textit{Wright v. City of Roanoke Redevelopment and Hous. Auth.}, 479 U.S. 418, 438 (1987) (O’Connor, J., dissenting) (“I am concerned, however, that lurking behind the Court’s analysis may be the view that, once it has been found that a statute creates some enforceable right, \textit{any} regulation adopted within the purview of the statute creates rights enforceable in federal court, regardless of whether Congress or the promulgating agency ever contemplated such result.”).
\textsuperscript{144} \textit{Smith}, 821 F.2d at 984.
In *Harris v. James*, the Eleventh Circuit made a similar holding. In that case, a Medicaid recipient brought a section 1983 claim alleging that Alabama’s Medicaid plan was not in compliance with a federal regulation that required it to provide transportation for recipients to and from health care providers. This requirement was not provided for in the statute, but appeared only in the regulation. In the court’s view, the driving force behind the Supreme Court’s case law is a requirement that the courts find a congressional intent to create a particular federal right. A regulation may create an enforceable right if it further defines or fleshes out the content of an existing right, but it cannot create a new one. A regulation that goes beyond explicating the specific content of the statutory provision and imposes distinct obligations to further the broad underlying objectives of the statute is too far removed from congressional intent to constitute a federal right enforceable under section 1983. In *Harris*, the court held that the nexus between the transportation regulation and congressional intent was too tenuous to create an enforceable right. It distinguished *Wright* because the statute in that case had already created a right that the regulation merely defined.

Finally, the Third Circuit has recently specifically addressed whether the EPA regulations under consideration in this Note create an enforceable section 1983 right. In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, a community organization brought an action asserting that the state environmental agency’s decision to issue an air pollution permit for a cement processing facility would have a racially discriminatory impact. The plaintiff first attempted to bring its action directly under Title VI, but *Sandoval* expressly foreclosed this remedy soon after a preliminary injunction was issued. The district court permitted the action to remain in court, however, and left the injunction intact under a section 1983 theory. The district court held that a section 1983 action can be brought to enforce disparate impact regulations promulgated to enforce Title VI.

On appeal the Third Circuit reversed in a split decision that adopted an approach similar to the Fourth and Eleventh Circuits. It

---

145 127 F.3d 993 (11th Cir. 1997).
146 *Id.* at 1008 (finding a clear expression of the need that courts must find congressional intent to create a federal right in *Suter v. Artist*, 503 U.S. 347 (1992)).
147 See *id.* at 1009 (explaining that holding otherwise would be inconsistent with the requirement of intent).
148 *Id.* (noting difference between interpretive and substantive regulations).
150 *Id.* at 549 (holding that plaintiffs met all parts of the *Blessing* test and that a remedy was not foreclosed by statute or the regulations).
noted that the prohibition on disparate impact discrimination does not appear explicitly in Title VI, but rather is set forth in the EPA regulation. It also noted considerable tension between the section 602 regulations proscribing activities that have a disparate impact and section 601’s limitation to prohibition of intentional discrimination only, but presumed the regulations valid as the Court had in Sandoval. Next it concluded that the Supreme Court had never directly addressed whether a regulation can itself establish an enforceable right under section 1983. It noticed that, although three justices in Guardians had stated that regulations that have the force of law could create an enforceable section 1983 right, four justices in Wright expressed skepticism that they could in all instances.

The court distinguished Wright from the situation before it because the regulation in Wright merely defined a right that already appeared explicitly in the statute. The regulation in Wright defined what was meant by “reasonable.” However, the right sought to be enforced in South Camden, to be protected from disparate impact discrimination, does not appear explicitly in sections 601 or 602. Because section 601 has been held to protect against intentional discrimination only, regulations that go beyond this protection may not rely on Wright as permissible for merely defining the statute. The majority also distinguished its previous decisions on which the plaintiffs had relied by stating either that the right enforced in those cases stemmed directly from the statute or that the court had not actually addressed the specific question at hand; thus, those decisions were not binding.

In Powell v. Ridge, the Third Circuit had permitted a challenge under section 1983 to Pennsylvania’s public education funding practices on the ground that they had a racially discriminatory effect. However, because the court had found a private right of action as well, it presumed the intent requirement of the Blessing test satisfied and did not address whether a regulation in itself could create an enforceable right under section 1983.

After examining the split in circuit court opinions, the South Camden court rejected the Loschiavo approach because the Supreme Court in Sandoval had stated, “[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created,
but it may not create a right that Congress has not.”\textsuperscript{158} It determined that of paramount importance in Wright and Suter v. Artist M.\textsuperscript{159} was that Congress intended to create an enforceable right in the statute.

In Suter, the plaintiffs brought suit under section 1983 and the Adoption Assistance and Child Welfare Act. They relied on language in the Act that seemingly requires states to make reasonable efforts to place children in foster homes. To analyze the section 1983 claim, the Supreme Court asked: “Did Congress, in enacting the Adoption Act, unambiguously confer upon the child beneficiaries of the Act a right to enforce the requirement that the state make ‘reasonable efforts’ to prevent a child from being removed from his home . . . ?”\textsuperscript{160} The Court found that the Act only requires that the states have a plan that is “in effect.” Because the “reasonable efforts” language in the statute left the states with broad discretion in creating such a plan, the court found that this language could not form the basis of an enforceable section 1983 right.\textsuperscript{161}

The court in South Camden interpreted this as an indication that the primary consideration for a court in analyzing a section 1983 claim should be whether Congress intended to create the particular right sought to be enforced. Because section 602 is limited to effectuating rights created in section 601 and because section 601 prohibits only intentional discrimination, it held that there is no congressional intent under section 602 to permit individuals to enforce regulations that protect against disparate impact discrimination.\textsuperscript{162} Furthermore, as the Supreme Court noted in Sandoval, the focus of section 602 is twice removed from the individuals who will benefit from it. It focuses neither on the individuals protected nor the funding recipients, but on the agencies that will do the regulating.\textsuperscript{163} Therefore, section 602 reveals no congressional intent to create a private right of action. The court in South Camden interpreted this as establishing that there was no evidence of congressional intent to create any new rights under section 602.\textsuperscript{164} Even though the four-factor Cort test differs from the three-factor Blessing test, this analysis relies on the intent requirement common to both. In short, the court held that, although the EPA regulations are presumably valid, they are too far removed from

\textsuperscript{159} 503 U.S. 347, 357 (1992).
\textsuperscript{160} Id. at 357.
\textsuperscript{161} Id. at 363.
\textsuperscript{162} South Camden Citizens in Action v. N.J. Dep’t of Envtl. Prot., 274 F.3d 771, 788 (3d Cir. 2001).
\textsuperscript{163} See Sandoval, 532 U.S. at 289 (noting that the rights-creating language in section 601 does not appear in section 602); see also supra note 69 and accompanying text.
\textsuperscript{164} South Camden Citizens in Action, 274 F.3d at 789.
congressional intent to constitute a federal right enforceable under section 1983.165

The court in South Camden misinterpreted Sandoval and Suter, however. Although these cases looked for a “right of action” and a “right to enforce,” this was really a question of whether Congress intended to provide a remedy.166 Finding intent to create a remedy is an analysis of the second part of the Cort test, not the first part, which is the element of the two tests that the South Camden court says overlap. The first parts of the tests do not overlap because the first part of the Cort test, that the statute must create a federal right in favor of the plaintiff, does not require intent but the first part of the Blessing test does.167 In neither Cort nor Suter did the Supreme Court use the word “intent” when stating the test for whether a right was created in favor of the plaintiff, while it does explicitly ask whether Congress intended to create a remedy for the second part of the Cort test. Similarly, the Court in Sandoval looked only for intent to allow a private right of action, or intent to provide a remedy under the second part of the Cort test.168 Justice Scalia cautioned in Sandoval that courts are bound by holdings, not language.

Even if an intent component is read into the first part of the Cort test, this is a different question than that addressed in Sandoval. The Court in Sandoval looked for congressional intent to provide a remedy under the second part of the Cort test, not the creation of a right under the first part. Therefore, that the Court in Sandoval ended its search for congressional intent to create a private remedy with the text and structure of Title VI does not limit the scope of review a court should pursue when determining whether the first part of the Blessing test has been met. In addition to the text and structure of Title VI, its legislative history must be considered relevant. The Court considered legislative history to determine Congress’ intent to create enforceable rights in Wilder v. Virginia Hospital Ass’n,169 Suter v. Artist M.,170 and Pennhurst State School and Hospital v. Halderman.171

In Wilder, the Court considered whether 42 U.S.C. § 1396 creates an enforceable section 1983 right for health care providers to ensure that Medicaid rates are reasonable and adequate. In holding that

165 Id. at 791.
166 See Sandoval, 532 U.S. at 286 (stating that the judicial task in determining whether there is an implied right of action is whether Congress intended to create a remedy); Suter v. Artist M., 503 U.S. 347, 357 (1992) (focusing on whether the statute unambiguously conferred a right to enforce the requirement that the state make reasonable efforts to prevent a child from being removed from his home).
168 Sandoval, 532 U.S. at 288.
170 503 U.S. at 362.
it did, the Court noted that any doubt that Congress "intended to require [the states] to adopt [adequate and reasonable rates] is quickly dispelled by a review of the legislative history . . . ." In Pennhurst, the Court, in determining the scope and meaning of the Developmentally Disabled Assistance and Bill of Rights Act of 1975, stated that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." The Court looked first at the language of the Act and then at the legislative history, but concluded that the statute did not impose binding obligations on the state to provide appropriate treatment in the least restrictive environment.

Similarly, congressional history is relevant to the intent behind Title VI. In creating Title VI, Congress intended to prohibit discrimination against individuals on the basis of race, color, or national origin, and to benefit individuals who were being subjected to discrimination. Representative John Lindsay succinctly stated the intent of Title VI: "Everything in this proposed legislation has to do with providing a body of law which will surround and protect the individual . . . ." In Cannon v. University of Chicago, the Supreme Court stated that in enacting "Title IX, like its model Title VI, . . . Congress . . . wanted to provide individual citizens effective protection against [discriminatory] practices."

In enacting Title VI, Congress did not define discrimination in either section 601 or section 602. Instead, it left agencies to decide what kinds of provisions would most effectively prevent discrimination. Attorney General Robert Kennedy testified that specifics were not written into the legislation because there are so many different programs that, to write out what rules and regulations should be issued would be virtually impossible. Thus, Congress in section 602 "authorized and directed" this responsibility to federal agencies. Because Congress left it to federal agencies to determine what type of actions should be prohibited in order to protect minorities, regulations promulgated pursuant to section 602 that have the force of law and that define and prohibit discrimination are intended to benefit racial

172 Wilder, 496 U.S. at 515.
174 See id. at 22 (noting that nothing suggests Congress intended the Act to be anything other than a typical funding statute).
175 110 CONG. REC. 1540 (1964).
minorities and may create enforceable rights under section 1983. Agencies were given broad discretion under section 602, and valid regulations promulgated pursuant to it that have the full force and effect of law cannot be too far removed to confer actionable rights. Therefore, plaintiffs bringing a section 1983 action to enforce the EPA disparate impact regulations should meet the first part of the Blessing test, which requires that Congress intended that the provision benefit the plaintiff. \(^{179}\)

The Blessing test requires next that the asserted right not be so vague and amorphous that its enforcement would strain judicial competence. \(^{180}\) Sections 7.30 and 7.35 of the EPA's implementing regulations specifically prohibit actions that have an adverse and disparate impact. There is already a substantial body of law that demonstrates the capacity of the federal judiciary to analyze disparate impact claims. \(^{181}\) Federal courts have enforced rights created by Title VI disparate impact regulations in contexts as diverse as public education, housing, and transportation, and their ability to enforce specific rights created by the EPA's implementing regulations was demonstrated in New York City Environmental Justice Alliance v. Giuliani. \(^{182}\) In that case, plaintiffs sought to enjoin the City of New York under section 602 from selling or bulldozing 1100 community garden lots, an action they believed would have a discriminatory impact on African-American, Asian-American, and Hispanic residents. The court held that, although the plaintiffs would suffer irreparable harm, they failed to demonstrate a likelihood of success on the merits because they did not submit adequate proof of causation to establish a connection between the facially neutral city policy and its allegedly disproportionate and adverse impact on minorities. Even though the plaintiffs failed to establish their claim, the court had no difficulty in determining whether or not they had an enforceable action. \(^{183}\)

Analysis of a disparate impact suit has several components. First, the plaintiff bears the burden of establishing a prima facie case that a facially neutral practice has resulted in racial disparity. \(^{184}\) In response, the defendant must establish a substantial legitimate justification or a legitimate nondiscriminatory reason for the practice. Once the defendant meets that burden, the plaintiff must establish either


\(^{180}\) See id. at 340-41.


\(^{182}\) 214 F.3d 65 (2d Cir. 2000).

\(^{183}\) Id. at 71 (holding that the plaintiffs chose a measure that was inadequate to allow the court to ascribe significance to any alleged disparate impact of the city's actions).

\(^{184}\) See Ferguson, 186 F.3d at 480 (citing Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993)).
that the defendant overlooked an equally effective alternative with less discriminatory effects or that the proffered justification is only a pretext for racial discrimination. As New York City Environmental Justice Alliance demonstrates, courts are experienced at applying a disparate impact analysis. Therefore, private enforcement of EPA regulations under section 1983 will not strain judicial competency and the second part of the Blessing test will be satisfied.

Third, under Blessing the provisions giving rise to the rights must be couched in mandatory terms that impose binding obligations on the states. Section 601 states that no person shall be subject to discrimination by recipients of federal funding, while section 602 directs a federal agency to promulgate regulations that will protect private individuals from those who receive federal funds through that agency. Section 7.35 of the EPA’s implementing regulations states that recipients shall not administer their programs in a way that has the effect of subjecting individuals to discrimination. The right created is mandatory for two reasons. First, these sections use the word “shall,” which indicates a mandatory obligation. Second, Title VI falls under Congress’ spending power, and the Supreme Court has held that “legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.” The states receive funding from the federal government under the EPA; therefore, they qualify as recipients under the regulations. They are bound as in a contract to comply with these terms or risk losing federal financing. The siting of environmental hazards requires permits by state governmental bodies at the state, county, or local level. As recipients, the states must ensure that they do not approve the siting of a facility that would violate the EPA regulations. Because the regulations contain the mandatory word “shall” and the states obligate themselves to follow the regulations by receiving federal funds, regulations promulgated by the EPA under section 602 that require that recipients not contribute to disparate impact discrimination in making decisions on where to locate facilities impose binding obligations that satisfy the third element of the Blessing test.

Even if all elements of the Blessing test are met, if Congress has expressly or impliedly foreclosed a plaintiff’s ability to enforce the

---

185 See New York Urban League, 71 F.3d at 1036 (citing Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985)).
186 See Blessing, 520 U.S. at 341 (noting the third part of the test).
188 40 C.F.R. § 7.35(b) (2001).
regulations, then a section 1983 claim may not be brought. This is not a concern for environmental justice plaintiffs, however, because Title VI contains no provision expressly foreclosing a plaintiff’s ability to enforce regulations promulgated under it. Furthermore, a court will find that Congress impliedly foreclosed such a remedy only if the statute creates a comprehensive enforcement scheme that is incompatible with individual enforcement. In only two cases has the Supreme Court held that Congress had implicitly foreclosed individual action under section 1983.

In *Middlesex County Sewerage Authority v. National Sea Clammers Ass’n*, the Court focused on the unusually elaborate enforcement provisions of the Federal Water Pollution Control Act that placed at the disposal of the EPA a large number of enforcement options, including noncompliance orders, civil suits, and criminal penalties. Several provisions of the Act specifically authorized individuals to initiate enforcement actions. Thus, the Court found it hard to believe that Congress intended to preserve section 1983 as a right of action.

In *Smith v. Robinson*, the review scheme in the Education of the Handicapped Act permitted aggrieved individuals to invoke carefully tailored local administrative procedures followed by federal judicial review. The Court reasoned that Congress could not possibly have wanted a plaintiff to skip these procedures and go straight to court under section 1983, since it would render the detailed procedural protections superfluous.

Unlike the statutory schemes in *Robinson*, Title VI does not have elaborate enforcement procedures, but instead includes a general provision for the termination of funding and defers to agencies to articulate standards for compliance. Section 602, as held in *Sandoval*, also creates no private right of action to enforce the regulations as the statute did in *Sea Clammers*. Furthermore, the EPA regulations do not exhibit an intent to foreclose individuals from pursuing remedies

---

190 See Blessing, 520 U.S. at 341 (noting that dismissal is proper if Congress foreclosed a remedy under § 1983).
192 453 U.S. 1.
193 See id. at 20 (noting that the FWPCA and MPRS do provide comprehension enforcement mechanisms).
194 468 U.S. 992.
195 Id. at 1011 (noting Congress’ efforts to place primary responsibility to accommodate the needs of each child with local and state educational agencies).
196 42 U.S.C. § 2000d-1 (2000) (stating that agencies with the power to extend federal financial assistance to programs are directed to issue regulations consistent with the objectives of the statute).
197 See Alexander v. Sandoval, 532 U.S. 275, 290 (2001) (holding that there is no private right of action under section 602).
for violations under section 1983, but instead recognize and specifically address the possibility that individuals will seek judicial relief to preserve their right to be free of discrimination caused by a disparate impact. Therefore, a private right of action to enforce rights created by the EPA’s implementing regulations has not been explicitly or implicitly foreclosed by either Congress or the EPA and a private action may be brought under section 1983.

Because the Third Circuit held in South Camden that Congress did not intend for section 602 violations to be enforceable under section 1983, it did not reach the question of whether Congress had foreclosed a remedy. However, the district court in that case held that Congress did not foreclose a remedy, stating: “[T]he limited generalized enforcement power of the EPA to enforce Title VI and the implementing regulations promulgated thereunder is 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 Section 1983.”

IV. ALTERNATIVES REMEDIES

If the Supreme Court were to hold either that the EPA regulations prohibiting a disparate impact are invalid or that they do not create an enforceable section 1983 right, then civil rights plaintiffs would have to continue their pursuit for a viable legal remedy. This section will briefly discuss the theory and potential of three of these alternatives: the Takings Clause of the Fifth Amendment, lawsuits against the EPA, and state-based remedies.

A. The Takings Clause

Part of the reason environmental hazards are situated in predominantly minority areas is that these social groups are less able to bear the expense of campaigning against them. For the same reasons, these groups cannot relocate after a siting decision has been made. Thus, they are forced to live with the risks. A successful takings claim would require that the government pay local residents for its siting decision. This would give residents the choice whether to stay

---

200 U.S. CONST. amend. V.
and would provide them with the financial resources to move.\textsuperscript{202} Alternatively, governments would be more willing to negotiate with residents to buy them out and create "buffer zones" around the environmental hazard, a technique that has proven successful in the past.\textsuperscript{203}

William Treanor argues that the original understanding of the Takings Clause protects property against physical seizures, but not against regulations that affect value.\textsuperscript{204} Because the sitings of environmental hazards involve physical threats to tangible property, they are closer in nature to physical seizures. Treanor also argues that heightened protection should be afforded to the property interests of those persons not historically protected from government decisions, specifically, minorities and those others who have been singled out by the nature of the decision.\textsuperscript{205}

The Supreme Court has extended protection under the Takings Clause to both physical seizures and to regulations affecting value, but it has extended the protection to regulations on a much more limited basis.\textsuperscript{206} Arguably, the siting of a local environmental hazard has characteristics of both. Siting will not only lower the value of nearby property, but it may also render affected property uninhabitable by contaminating the air, soil, and water.\textsuperscript{207} If a piece of land is zoned for solely residential purposes, then this might deprive the property of its only economically viable use.\textsuperscript{208} Alternatively, a plaintiff may allege that a siting constitutes a constructive physical taking of property. This approach is safer because physical invasions of property require compensation for even minor interference, and the public benefit achieved by the project does not matter. At least one court has held that a permanent, physical occupation is a government action, so it is of such a unique character that it is a physical taking without regard to other factors that a court may ordinarily examine.\textsuperscript{209}

There is support that continuous invasions of airspace superjacent to property which directly and immediately interfere with the enjoyment and use of the land constitute a taking within the meaning of the Fifth Amendment because it is equivalent to a direct invasion of the plain-

\textsuperscript{202} Id. at 222 (permitting residents to "vote with their feet" when a hazardous waste facility is sited nearby).
\textsuperscript{203} Id. at 221 (describing efforts by Dow Chemical in Louisiana to minimize the effect of its new chemical production plant).
\textsuperscript{205} Id. at 875 (asserting that these groups are not well-positioned to secure redress at the state or national level).
\textsuperscript{206} See Geiger, supra note 201, at 231.
\textsuperscript{207} See id. at 232.
\textsuperscript{208} See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that a regulatory action may constitute a taking if it deprives the land of all economic worth).
tiff's land. Environmental justice plaintiffs may use such an argument to obtain compensation for pollution that comes onto their property, and this would provide them with the resources to relocate.

This theory is not without its concerns and limitations; only one environmental justice case has actually been decided on its merits. First, in environmental justice cases that have pursued a takings claim in the past, ripeness has proven a major obstacle. Before succeeding in federal court, a plaintiff must show that there has been a final, reviewable decision regarding the application of the government regulation to the plaintiff's property and must first utilize state procedures for obtaining compensation. The other step has been the major stumbling point in previous cases; however, even the first part may prove difficult because a court could hold that there has not been a taking until the facility at issue is fully operational.

Second, although invasions of the air, soil, and water may constitute a constructive physical taking, inconsequential damage may not be compensable under federal provisions. Thus, environmental justice plaintiffs should consider bringing their takings claims in state courts, which have demonstrated a greater willingness to compensate individuals burdened by environmental hazards. Some state constitutions provide a broader range of property protections than the United States Constitution. The success of such an action depends heavily on the particular state constitution and the strength of the plaintiff's evidence of adverse effects. Therefore, although a takings claim may succeed under the right circumstances, it will not provide a complete remedy for the disparate impact of environmental hazard siting decisions.

B. Suing EPA to Force It to Bring an Action

Another potential remedy that has been unsuccessful in the past, but which may have to be reexamined, is judicial review of the EPA's enforcement of Title VI. By suing the EPA, environmental justice

210 See Causby v. United States, 328 U.S. 256 (1946) (holding that continuous invasions of airspace interfered with use of land for chicken farm).
211 See Smith v. City of Brenham, 865 F.2d 662 (6th Cir. 1989).
214 See Batten v. United States, 306 F.2d 580, 583 (10th Cir. 1962).
215 See Geiger, supra note 201, at 240.
216 See, e.g., CAL. CONST., art. I, § 19 (providing that private property may only be taken or damaged for public use when just compensation has first been paid to the owner).
plaintiffs can force the EPA to either terminate funding to racially
discriminatory recipients or ensure that those recipients comply.\textsuperscript{217} This alternative will only be available if the Supreme Court holds that the EPA's effects regulations are a valid exercise of its power under section 602. Courts have been reluctant to permit suits against an enforcing agency, however, because the Supreme Court held in Cannon v. University of Chicago\textsuperscript{218} that Title VI does not encompass actions against the funding agency. Since Cannon, courts have focused on the relief sought by the plaintiff and have been more willing to permit judicial review of individual siting decisions than those that would require a remedy of continuous across-the-board federal court supervision of agency action.\textsuperscript{219}

Plaintiffs may also challenge an EPA decision under the Administrative Procedure Act (APA). The APA permits suits against a federal agency for failing to enforce its regulations only when no other adequate remedy is available and when the decision is not committed to agency discretion.\textsuperscript{220} Decisions by the EPA to take no action are also presumed to be immune from review.\textsuperscript{221} However, a plaintiff may challenge an agency's administration of its own Title VI enforcement procedures. In Adams v. Richardson,\textsuperscript{222} the plaintiffs successfully enjoined the Department of Health, Education, and Welfare to enforce its earlier determination that several recipient states were operating racially discriminatory systems of higher education.\textsuperscript{223} Thus, if the EPA determines that a recipient is in violation of Title VI, a plaintiff may challenge its refusal to take action. Because the EPA may be reluctant to investigate potential violators and make determinations of noncompliance, this alternative is also not a complete solution.\textsuperscript{224}

\textbf{C. State-Based Remedies}

Besides seeking relief in federal court, an environmental justice plaintiff may also be able to obtain relief in state court by advancing a cause of action under state statutory or common law. Although statu-
tory requirements differ from state to state, a developer usually must apply to a state regulatory agency or siting board for a permit or license.\(^{225}\) In many instances the procedural requirements are not strictly followed and a plaintiff may challenge the decision. For example, in *El Pueblo Para el Aire y Agua Limpio v. County of Kings*, \(^{226}\) an organization of Latino farm workers brought suit against the state to enjoin the construction of a toxic waste incinerator. The plaintiffs accused one of the defendants, Chemical Waste Management, Inc., of making a pattern of singling out poor and minority communities as incinerator sites.\(^{227}\) They obtained a partial victory when the state court ruled that the environmental review documents that had been prepared were inadequate under California's Environmental Quality Act and that failing to provide a Spanish translation of its analysis violated the Act's public participation requirement.\(^{228}\) Because state statutes are generally geared toward ensuring public involvement and many require an agency or siting board to assess the potential negative effect upon the host community, these procedural requirements may continue to provide good opportunities for challenging siting decisions.\(^{229}\)

Finally, plaintiffs may challenge a citing decision as a nuisance under state common law. To obtain injunctive relief, a plaintiff must show that a tort has been committed, that no adequate remedy at law is available, and that the balancing of social equities favors granting an injunction.\(^{230}\) An obstacle to a nuisance challenge is that such claims have historically been directed at existing rather than proposed land uses. Plaintiffs must show that the proposed use will cause imminent irreparable injury.\(^{231}\)

However, in *Village of Wilsonville v. SCA Services, Inc.*, \(^{232}\) the plaintiff village relied on an anticipatory nuisance theory and successfully enjoined the operation of a hazardous waste disposal facility. The site in question was located above an abandoned coal mine whose waste was stored in trenches surrounded by clay. The village claimed that eventually the waste would migrate into groundwater and that the toxic substances would mix together and create noxious


\(^{229}\) See Wright, supra note 225, at 1744.

\(^{230}\) See id. at 1745.

\(^{231}\) Id.

odors or even ignite. Finding that the proposed waste dump was both an existing and prospective nuisance, the trial court ordered the removal of all toxic waste and contaminated soil buried there. In addition, some courts have relaxed the causation element of nuisance claims from a showing of imminent irreparable injury to one of probable risk, which will make bringing an action against an anticipatory nuisance easier. Therefore, if a section 1983 claim is not upheld, environmental justice plaintiffs should continue pursuing alternative remedies under both state statutory and common law.

CONCLUSION

It is difficult to definitively say whether the Supreme Court would hold that a private litigant may bring a section 1983 claim on the basis of disparate impact discrimination against a recipient of federal funds under the EPA's implementing regulations promulgated pursuant to section 602. Several inquiries have to be made. First, it must be determined whether the EPA's regulations are a valid exercise of the power delegated to it. As demonstrated, five justices in Guardians indicated that such a regulation is valid even though section 601 protects against intentional discrimination only. Second, whether regulations created by an agency pursuant to a congressional directive are "laws" under section 1983. Because the EPA's regulations were directed by section 602 and have the force of law, that they should qualify as enforceable laws under section 1983 must be shown. Third, if the regulations are laws, the court must decide whether they create enforceable rights and whether the rights they create are mandatory and capable of being enforced by the judiciary. The Supreme Court's discussion of congressional intent in Sandoval is not controlling because it was examining whether Congress intended a remedy, not an enforceable section 1983 right. The legislative history indicates that Congress intended to grant broad power to agencies to prevent discrimination; therefore, regulations promulgated pursuant to section 602 that have the force and effect of law are capable of creating enforceable rights. Finally, whether an action may proceed because Congress did not intend to foreclose the possibility of a section 1983 claim needs to be examined. The regulations do not explicitly foreclose a section 1983 action nor create an enforcement structure so comprehensive as to imply that a section 1983 remedy is foreclosed. Therefore, even though the Supreme Court held that there was no implied cause of action available under section 602, environ-

233 Id. at 558.
234 Id. at 553.
mental justice plaintiffs may proceed in court under section 1983 to enforce EPA regulations without first having to file a complaint with the EPA itself first.

JOSEPH URSIC

I would like to thank my parents and family for all of their support throughout my time in law school. I would also like to thank Professor Jonathan H. Adler for his useful feedback. Finally, I would especially like to thank Professor Jonathan L. Entin for pointing me to this topic and for all of his assistance in helping me carry this Note through to completion.