Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs

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I. INTRODUCTION

On February 11, 1994, President Clinton promulgated Executive Order 12,898 requiring all federal agencies to promote environmental justice "[t]o the greatest extent practicable and permitted by law." However, Section 6-609 of the Order limits the ability of citizens to enforce its provisions by specifically stating that it is not intended to create a right of judicial review against the United States. Additionally, the presidential directive issued simultaneously with Executive Order 12,898 requires that federal agencies providing funding to programs affecting human health or the environment ensure that their grant recipients comply with the anti-discrimination provisions in Title VI of the Civil Rights Act of 1964. However, the directive is not judicially enforceable and does not enlarge existing Title VI rights.

Title VI contains two separate sections that provide different enforcement mechanisms. Under Section 601 of Title VI, private citizens may file a private law suit challenging the discriminatory actions of any recipient of federal funds. However, there is a high
standard of proof under Section 601 of Title VI because a plaintiff must demonstrate that the recipient has consciously discriminated against minority groups.  

Alternatively, the Supreme Court has concluded that agencies may promulgate regulations, pursuant to Section 602 of Title VI, that prohibit practices creating unjustified discriminatory effects. The EPA's regulations establish procedures to investigate citizen complaints alleging that a recipient has made decisions having discriminatory effects.

However, it is unclear whether these agency regulations, based on Section 602 of Title VI, create a private right of action allowing plaintiffs to sue in federal courts. In 1996, in Chester Residents Concerned for Quality Living v. Seif, the District Court for the Eastern District of Pennsylvania refused to recognize a private right of action under Title VI's Section 602 regulations. Subsequently, the Third Circuit reversed that decision and held that a private

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42 U.S.C. § 2000d; see also infra notes 55-66 and accompanying text.


9. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

42 U.S.C. § 2000d-1; see also infra notes 55-74 and accompanying text.


12. See generally infra notes 192-293 and accompanying text.

right of action may exist under these regulations. The court utilized a three-factor test to determine the existence of a private right of action under Section 602: first, whether the agency rule is properly within the scope of the enabling statute; second, whether the enabling statute intended to create a private right of action; and third, whether the implication of a private right of action under the regulation will further the purpose of the enabling statute. The EPA's regulations clearly meet the first test. Also, there are strong arguments that a private right of action advances Title VI's purposes, thus satisfying the third factor. However, the Third Circuit's argument concerning the second factor, congressional intent, is open to criticism in light of recent Supreme Court decisions regarding the amount of evidence necessary to demonstrate intent to create a private right of action.

On June 8, 1998, the Supreme Court, in Seif v. Chester Residents Concerned for Quality Living, granted Pennsylvania's petition for a writ of certiorari to review the Third Circuit's holding that private rights of action exist under section 602. However, on August 17, 1998, the Court dismissed the case as moot and vacated the Third Circuit's decision.

On June 3, 1998, in Sandoval v. Hagan, the District Court for the Middle District of Alabama agreed with the Third Circuit regarding the existence of a private right of action under Section 602. Although it was decided before the Supreme Court vacated Chester, the Sandoval court would likely have reached the same result even after the vacatur of the Third Circuit's decision. Sandoval remains good law.

15. See infra notes 219-293 and accompanying text.
16. See infra notes 255-270 and accompanying text.
19. See No. 97-1620, 119 S. Ct. 22 (1998); infra notes 300-303 and accompanying text.
21. Id. at 1251-64 (M.D. Ala. 1998).
22. See infra notes 304-315 and accompanying text.
Section II of this article will argue that minority populations are disproportionately affected by pollution. Section III explains why environmental justice plaintiffs have generally been unable to prove intentional discrimination in suits under the Equal Protection Clause. Section IV provides an introduction to Title VI and agency regulations promulgated pursuant to that statute. Section V examines the differences between administrative complaints and litigation of Title VI cases. Section VI discusses the Supreme Court's treatment of implied private rights of action. Section VII examines the District Court and Third Circuit decisions in Chester. Section VIII discusses why the Supreme Court granted certiorari in Chester, found the case was moot, and vacated the Third Circuit's decision. Section IX examines the Sandoval decision. Section X infers congressional intent to establish a private right of action based on Section 602's purposes.

The Supreme Court seems likely to decide this vital issue. This article will apply the Chester three-factor test to find a private right of action implied in the administrative regulations promulgated by various agencies to implement Section 602 of Title VI. This article also proposes that it would be inconsistent to apply today's more stringent standard for inferring congressional intent in deciding whether a private right exists under Section 602. Such inconsistency arises as a result of the Supreme Court's application of a more lenient standard in recognizing a private right of action under Section 601.

II. SERIOUS ENVIRONMENTAL INEQUITIES EXIST

There is substantial evidence of racial disparities in environmental risks between racial minorities and whites. For instance, urban African-American children under the age of five have substantially higher lead levels in their blood than white children of similar age groups living in the same cities. Yet, there


is much controversy regarding whether waste storage facilities are disproportionately located in poor or minority areas.\textsuperscript{25} Other difficult questions concern whether the EPA and state agencies enforce environmental laws equally in white and minority areas.\textsuperscript{26}

Environmental inequities result from both omissions in environmental laws and from affirmative actions that, consciously or unconsciously, worsen existing inequalities.\textsuperscript{27} One major omission results from environmental laws that typically regulate only one medium (i.e., air, water or land) at a time and, as a result, ignore the cumulative or synergistic multimedia impacts of pollution.\textsuperscript{28} These cumulative impacts may be especially concentrated in low income and minority areas. The effects may be particularly harmful to members of minority groups who may be especially sensitive to the impacts of certain harmful pollutants.\textsuperscript{29}

Several studies conducted between 1983 and 1994 by government or private investigators found that various types of hazardous waste treatment or disposal facilities, solid waste repositories, pollution producing factories or other environmentally harmful facilities are located in communities that include, on average, a higher percentage of racial minorities and low-income persons than non-host communities.\textsuperscript{30} A number of

\begin{footnotesize}
\begin{enumerate}
\item See generally FOREMAN, supra note 24, at 18-27 (summarizing conflicting studies about whether hazardous waste sites are disproportionately located in minority population areas and arguing there is only weak evidence of disproportionate siting or exposure); infra notes 30-36 and accompanying text.
\item See Marianne Lavelle & Marcia Coyle, Unequal Protection: The Racial Divide in Environmental Law, Nat'l L.J., Sept. 21, 1992, at S2; Richard J. Lazarus, Essay, Fairness in Environmental Law, 27 ENVTL. L. 705, 713-714 (1997) [hereinafter Lazarus, Fairness]; Mank, Environmental Justice, supra note 5, at 337-39 (1995) (summarizing studies of discriminatory enforcement); but see FOREMAN, supra note 24, at 23-27 (arguing studies showing disproportionate enforcement of environmental laws harming minority groups are seriously flawed); John A. Hird, Environmental Policy and Equity: The Case of Superfund, 12 J. POLY ANALYSIS & MGMT. 323, 337 (1999) (finding no relationship between pace at which sites are cleaned up and host county's socioeconomic characteristics); Thomas Lambert & Christopher Boerner, Environmental Inequity: Economic Causes, Economic Solutions, 14 YALE J. ON REG. 195, 199-200 n.16 (1997) (questioning National Law Journal study's definition of minority areas and failure to explore alternative explanations besides discrimination for disparities in fines such as forcing polluter to use corrective action to eliminate pollution rather than payment of fine).
\item See Lazarus, Fairness, supra note 26, at 712.
\item See Lazarus, Fairness, supra note 26, at 712-13; Bradford C. Mank, The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization, 25 ECOLOGY L.Q. 1, 7-9 (1998) [hereinafter Mank, Project XL].
\item See Lazarus, Fairness, supra note 26, at 712-13; Mank, Project XL, supra note 28, at 29-30.
\item See 2 ENVTL. EQUITY WORKGROUP, U.S. ENVIRONMENTAL PROTECTION AGENCY, Pub. No. EPA 230-R-92-008A, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES,
recent studies have conurred with these findings.31

SUPPORTING DOCUMENT 15 (1992) [hereinafter EPA ENVIRONMENTAL EQUITY SUPPORTING DOCUMENT] (concluding "available information suggests that racial minorities may have a greater potential for exposure to some pollutants because they tend to live in urban areas, are more likely to live near a waste site, or exhibit a greater tendency to rely on subsistence fishing for dietary protein."); Benjamin A. Goldman & Laura Fitton, Toxic Wastes and Race Revisited (1994) (using zip code areas, finding that the location of hazardous waste facilities reflects a national pattern of racial inequality that has gotten worse during the past decade); United Church of Christ Comm'N for Racial Justice, Toxic Wastes and Race in the United States XIII (1987) (using zip code areas to define minority and nonminority areas, concluding that "[a]lthough socioeconomic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant."); U.S. Gen. Accounting Office, GAO/RCED-85-168, Siting of Hazardous Waste Landfills and Their Correlations with Racial and Economic Status of Surrounding Communities 1 (1985) (examining the racial and socioeconomic characteristics of the communities surrounding four offsite hazardous waste landfills located in the eight southeastern states that make up EPA's region IV and finding that "[b]lacks make up the majority of the population in three of the four communities where the landfills are located."); Robert D. Bullard, Solid Waste Sites and the Black Houston Community, 53 Soc. Inquiry 273, 279-88 (1983) (finding that although African-Americans made up only 28% of the Houston population in 1980, six of Houston's eight incinerators and mini-incinerators and fifteen of seventeen landfills were located in predominately African-American neighborhoods); Mank, Environmental Justice, supra note 5, at 334-41 (summarizing studies finding racial minorities and low-income persons live disproportionately near pollution); but see Foreman, supra note 24, at 18-27 (summarizing conflicting studies about whether hazardous waste sites are disproportionately located in minority population areas and arguing there is only weak evidence of disproportionate siting or exposure); Andy B. Anderson et al., Environmental Equity: Evaluating TSDF Siting Over the Past Two Decades, WASTE AGE, July 1994, at 83 (reporting analysis based on 1990 census data and not finding significant evidence that minorities disproportionately live near hazardous waste facilities); Douglas L. Anderton et al., Environmental Equity: The Demographics of Dumping, 31 Demography 229 (1994) (reporting analysis based on 1980 census data, not finding significant evidence that minorities disproportionately live near hazardous waste facilities)

31. See Vicki Been & Francis Gupta, Coming to the Nuisance or Going to the Barrios: A Longitudinal Analysis of Environmental Justice Claims, 24 Ecology L.Q. 1 (1997) 9, 19-27, 33-34 (using 1990 census data, examining 544 communities that hosted active commercial hazardous waste treatment storage and disposal facilities and finding no substantial evidence that commercial hazardous waste facilities that began operating between 1970 and 1990 were sited in areas that were disproportionately African American or with high concentrations of poor, but did find evidence that Hispanics were disproportionately more likely to live near such facilities); J. Tom Boer et al., Is There Environmental Racism? The Demographics of Hazardous Waste in Los Angeles County, 78 Soc. Sci. Q. 793 (1997) (finding working class communities of color in industrial areas of Los Angeles are most affected by hazardous waste treatment storage and disposal facilities); Evan J. Ringquist, Equity and the Distribution of Environmental Risk: The Case of TRI Facilities, 78 Soc. Sci. Q. 811 (1997) (finding Toxic Release Inventory facilities and pollutants are concentrated in residential ZIP codes with large minority populations); but see Foreman, supra note 24, at 18-27 (summarizing conflicting studies about whether hazardous waste sites are disproportionately located in minority population areas and arguing there is only weak evidence of disproportionate siting or exposure); Lambert & Boerner, supra note 26, at 203-04 (using data from 1970, 1980 and 1990 censuses, and finding no statistical relationship between active hazardous and solid waste storage facilities and incinerators and minority residents in St. Louis, but some
There are different explanations for such disproportionate siting patterns. One theory is that any disproportionality results from minorities or low-income groups "moving to the nuisance" after the fall of land values, rather than these communities being targeted by developers. This "moving to the nuisance" hypothesis is a good defense to a disparate impact suit because a facility developer could not reasonably be liable for environmental racism if minorities voluntarily moved to an area near an existing facility.

Although a study of one metropolitan area found evidence that "white flight" from areas housing hazardous and solid waste disposal facilities and incinerators resulted in an increasing proportion of minorities near such facilities, a study of national housing patterns failed to find evidence that minorities or poor people tended to move toward existing facilities. Based on the limited evidence available, it appears that the "moving to the nuisance" problem occurs in a relatively small percentage of cases and, accordingly, does not undermine the general need to redress siting and permitting practices that cause discriminatory effects.

Proponents of environmental justice have sought legal avenues to challenge allegedly discriminatory actions by government officials, particularly those by state or local decision-makers.


33. See Fisher, supra note 8, at 294-96.

34. Lambert & Boerner, supra note 26, at 205 (using data from 1970, 1980 and 1990 censuses, this study examined housing patterns around hazardous and solid waste disposal facilities and incinerators in St. Louis and found evidence that whites tended to move away from such facilities at a faster rate than minorities, and that "white flight" led to an increasing proportion of minorities near such facilities).

35. See Been & Gupta, supra note 31, at 9, 27-30, 34 (using 1990 census data and examining 544 communities that hosted active commercial hazardous waste treatment storage and disposal facilities, the study found little evidence the siting of a facility was followed by substantial changes in a neighborhood's socioeconomic status or racial or ethnic composition).

36. See Fisher, supra note 8, at 294-96.
III. EQUAL PROTECTION SUITS FAIL BECAUSE OF THE INTENTIONAL DISCRIMINATION REQUIREMENT

In Arlington Heights v. Metropolitan Housing Development Corporation and Washington v. Davis, the Supreme Court held that, to prove a violation of the Equal Protection Clause, a plaintiff must demonstrate that government officials intentionally discriminated against them. While a plaintiff may use statistical evidence of disparate impacts to establish an inference of discriminatory intent, courts usually require the plaintiff to introduce at least some circumstantial evidence that the defendant intended to discriminate against an identifiable minority group. Without this circumstantial evidence of conscious discrimination, courts usually refuse to find intentional discrimination even where there are gross disparities between whites and minority groups.

37. 429 U.S. 252 (1977). Arlington Heights established a five-part test for conducting an equal protection analysis: (1) "[t]he impact of the official action—whether it bears more heavily on one race than another;" (2) the historical background of the decision; (3) the series of events prior to the decision, which could reveal the decisionmaker's purpose; (4) any departures, substantive or procedural, from the normal decisionmaking process; and (5) the legislative and administrative history of the decision. 429 U.S. 252, at 266-68. The Court later added the foreseeability of the adverse consequences as another factor to consider. See Rachel D. Godsil, Note, Remedy in Environmental Racism, 90 Mich. L. Rev. 394, 410 (1991) (citing Personnel Admr of Mass. v. Feeney, 442 U.S. 256, 279 n.25 (1979)).


39. Commentators have cited four major reasons for not adopting a discriminatory impact standard: (1) the impact standard would be too costly for the government; (2) under an "impact" standard, "innocent" people would bear the cost of remediating the harm and that a volitional element is essential to find a person guilty of discrimination; (3) the impact test is inconsistent with traditional equal protection doctrine, since the judicial decisionmaker would need to explicitly consider race; and (4) it would be inappropriate for the judiciary to remedy the impact of otherwise neutral government action at the expense of other legitimate social interests. See Hills v. Gautreaux, 425 U.S. 284, 293-94 (1976); Milliken v. Bradley (Milliken II), 418 U.S. 717, 738, 744-45 (1974); James F. Blumstein, Defining and Proving Race Discrimination: Perspectives on the Purposes vs. Results Approach from the Voting Rights Act, 69 Va. L. Rev. 633, 643-45 (1983); but see Charles R. Lawrence, III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 320-21 (1987) (criticizing Hills and Milliken II).

40. See Arlington Heights, 429 U.S. 252, 266 (where a "clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face," a court may find "invidious" racial discrimination using that pattern as circumstantial evidence of intent.); Colopy, supra note 11, at 146 n.88.

41. See Feeney, 442 U.S. 256, 279; Colopy, supra note 11, at 147 n.92.

Courts have failed to find evidence of intentional discrimination because siting boards and developers can almost always offer at least some race-neutral justification for a site. In addition, plaintiffs in equal protection cases often have been unable to provide "statistically significant" evidence of disparate impact because too few facilities exist in a particular geographical area to establish statistical significance. Thus, lawsuits alleging that government permitting officials or siting decision-makers have violated the Equal Protection Clause by engaging in discrimination have generally been unsuccessful because plaintiffs are unable to prove intentional discrimination.

Critics of the intentional discrimination standard argue that requiring plaintiffs to prove that an individual "bad" actor had a race conscious impetus approach prevents courts from addressing structural, indirect or vestigial effects of racism. These scholars often believe that courts have looked too narrowly at what constitutes racism. For instance, a court might examine only whether the agency responsible for the permit decision had a history of discrimination, but fail to address evidence regarding the history of state and municipal-wide discrimination.

It is clearly very difficult for an environmental justice plaintiff to prove that government decision-makers consciously discriminate against minority groups in violation of the Constitution's Equal Protection Clause. Some state constitutions or statutes may allow

43. See generally Colopy, supra note 11, at 145-51.
44. See Colopy, supra note 11, at 150.
46. See Lawrence, supra note 39, at 318-19 (arguing that antidiscrimination law is based upon a model of discrimination that is focused on individual actors through a "perpetrator" perspective); Omar Saleem, Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions, 19 COLUM. J. ENVTL. L. 211, 225-28 (1994) ("In essence, courts narrowly construe the Equal Protection Clause to the detriment of groups that unfairly bear the brunt of environmental hazards under the guise of economic apportionment").
47. See Lazarus, supra note 5, at 831-33 (discussing several cases).
plaintiffs to prove discrimination based solely on evidence of discriminatory effects, but state courts are only now beginning to address such issues.  

IV. TITLE VI PROHIBITS FUNDING RECIPIENTS FROM CREATING UNJUSTIFIED DISPARATE IMPACTS

Because plaintiffs have been unsuccessful thus far in winning environmental discrimination claims under the Equal Protection Clause, advocates have turned the focus to Title VI of the Civil Rights Act because it allows claims based on proof of unjustified disparate impacts. In fact, a major goal of Title VI and the EPA's Section 602 regulations is to prevent recipients of federal funds from engaging in practices that cause disparate impacts.

A. Section 602 Allows Disparate Impact Regulations

1. Section 602

Pursuant to Title VI, federal agencies may not provide funding to grant applicants that discriminate on the basis of race. Section 602 of the statute requires every federal agency to issue regulations that delineate the manner in which the agency will resolve this issue of whether grant applicants or recipients are pursuing policies that have discriminatory impacts. It also mandates that federal agencies establish a framework for investigating and assessing complaints of racial discrimination filed with the agency.


51. See *infra* notes 54, 56, 67-73, 78-83 and accompanying text.


Since Congress enacted Title VI in 1964, the government has consistently interpreted Section 602 to allow federal agencies to deny funding to applicants that engage in practices having discriminatory effects.\(^\text{54}\)

2. Section 602 Disparate Impact Regulations Are Valid

Under Section 601 of Title VI, the Supreme Court has required plaintiffs to prove a recipient intentionally discriminated. However, it has also held that an agency may promulgate implementing regulations pursuant to Section 602 that prohibit recipients from engaging in practices causing disparate impact discrimination. The confusing and unconvincing distinction between these two sections continues to cause difficulties for Title VI plaintiffs.

a. Supreme Court Cases

In 1974, in *Lau v. Nichols*\(^\text{55}\), the Supreme Court held that a plaintiff could prove a violation of the Department of Health, Education and Welfare's (HEW) Section 602 regulations relying solely on evidence of disparate impact because "[d]iscrimination is barred which has that effect even though no purposeful design is present."\(^\text{56}\) However, in 1978, in *Regents of California v. Bakke*\(^\text{57}\), the Supreme Court raised questions about *Lau*'s "effects standard." The Court suggested that proof of intentional discrimination was necessary to establish a violation of the various civil rights statutes, including Title VI.\(^\text{58}\)

In 1983, in *Guardians Ass'n v. Civil Service Commission*\(^\text{59}\), a divided Supreme Court issued a complex multipart opinion that

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\(^{54}\) Guardians Ass'n v. Civil Service Comm'n, 463 U.S. 582, 618 (1983) (Marshall, J.) (recipients may not use "criteria or methods of administration which have the effect of subjecting individuals to discrimination," quoting 45 C.F.R. § 80.3(b)(2) (1964); Guardians, 463 U.S. 582, at 592 n.13 (White, J.) (observing "every Cabinet department and about forty agencies adopted Title VI regulations prohibiting disparate-impact discrimination."); see Sidney D. Watson, *Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn't Be So Easy*, 58 FORDHAM L. REV. 999, 947-48 (1990) (noting presidential task force in 1964 assisted federal agencies in promulgating comparable disparate impact regulations under Title VI).


\(^{58}\) See Bakke, 438 U.S. 265, at 318-19; see also Colopy, supra note 11, at 158.

\(^{59}\) 463 U.S. 582 (1983).
demanded proof of intentional discrimination under Section 601 of Title VI, but also held that agency implementing regulations under Section 602 may prohibit disparate impact discrimination.\(^{60}\) In *Guardians*, a class of black and Hispanic police officers filed suit alleging that several written examinations used by the New York City Police Department, to make entry-level hiring decisions and to determine lay offs among officers with equal seniority, had a discriminatory impact on minority candidates and officers.\(^{61}\) Relying on the Department of Labor’s Title VI regulations, which prohibited grantees from operating programs that had racially discriminatory effects,\(^{62}\) the District Court for the Southern District of New York held that proof of discriminatory effect was sufficient to establish a violation of Title VI and awarded the plaintiffs compensatory relief.\(^{63}\) However, the Second Circuit reversed the district court’s decision, holding that Title VI required proof of discriminatory intent and thus deemed it improper to award compensatory relief based on allegations of disparate impacts.\(^{64}\)

In *Guardians*, seven members of the Supreme Court agreed that proof of discriminatory intent is required by the statute in Section 601.\(^{65}\) Justices White and Marshall each argued in dissent that showing disparate impacts was sufficient to prove a violation under Section 601.\(^{66}\) In addition, five members of the Court (Justices White, Marshall, Stevens, Brennan and Blackmun) concluded that Section 602 of Title VI permits federal agencies to promulgate regulations that prohibit disparate impact discrimination.\(^{67}\) Justice

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60. Id. at 584 n.2.
61. See *Guardians*, 463 U.S. 582, at 584.
62. See 29 C.F.R. § 31.3(c)(1).
64. See *Guardians*, 463 U.S. 582, at 582; id. 633 F.2d 232, 270 (2d Cir. 1980) (Kelleher, J., concurring); id. at 274 (Coffrin, J., concurring).
65. See *Guardians*, 463 U.S. 582, at 610-11 (Powell, J., concurring in judgment, joined by Burger, C.J. & Rehnquist, J.); id. at 615 (O'Connor, J. concurring in judgment); id. at 642-45 (Stevens, dissenting, joined by Brennan & Blackmun, JJ.); Colopy, *supra* note 11, at 159.
66. See id. 463 U.S. 582, at 584 & n.2, 589-93 (White, J.); id. at 615, 623 (Marshall, J., dissenting).
67. “The threshold issue before the Court is whether the private plaintiffs in this case need to prove discriminatory intent to establish a violation of Title VI . . . and administrative implementing regulations promulgated thereunder. I conclude, as do four other Justices, in separate opinions, the Court of Appeals erred in requiring proof of discriminatory intent.” *Guardians*, 463 U.S. 582, at 584 (White, J., delivering judgment of the Court) (citations and footnotes omitted); see *Guardians*, 463 U.S. 582, at 584 & n.2 (White, J., delivering judgment of the Court); id. at 642-45 (Stevens, J., joined by Brennan & Blackmun, JJ.); id at 623 (Marshall, J.); Lazarus, *supra* note 5, at 895; Colopy, *supra* note 11, at 159.
Stevens, joined by Justices Brennan and Blackmun, concluded that intentional discrimination is a necessary element under Section 601 of Title VI, but that regulations promulgated pursuant to Section 602 may only require a disparate impact standard. Justices White and Marshall would have allowed disparate impact suits under either Sections 601 or 602.

In 1985, in *Alexander v. Choate*, the Supreme Court addressed the issue of whether a showing of disparate impacts constituted a prima facie case under Section 504 of the Rehabilitation Act of 1973. Because Section 504 of the Rehabilitation Act was modeled on Title VI and contains nearly identical language to both Titles VI and IX, *Alexander* interpreted Section 504 in light of Title VI and Title IX case law. *Alexander* unanimously interpreted *Guardians* to authorize agencies to issue Title VI regulations that defined impermissible disparate impacts discrimination: "The [Guardians] Court held that actions having an unjustifiable, disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." The *Alexander* Court explained that Congress had "delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted significant social problems, and were readily enough remedial, to warrant altering the practices of the federal grantees that had produced these impacts."

b. Analysis

The Guardian Court’s distinction between Sections 601 and 602 is unconvincing. There is no evidence that Congress intended to require different standards of proof under these two sections. Unfortunately, in 1964, the original enacting Congress did not address the standard of proof under Title VI. However, Congress

68. See id. at 641-45 (Stevens, Brennan & Blackmun, JJ., dissenting).
69. See id. 463 U.S. 582, at 584 & n.2, 589-99 (White, J.); id. at 615, 623 (Marshall, J., dissenting).
71. See id. at 290-91; Rehabilitation Act of 1973 § 504, 87 Stat. 394, 29 U.S.C. § 794
72. See Alexander, 469 U.S. 287, at 295 (explaining that section 504 was originally proposed as an amendment to Title VI); see also United States Dep’t of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 600 (1986) (section 504 and its regulations were modeled after Title VI); Colopy, supra note 11, at 156-57 n.140; but see Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 632-35 n.13 (1984) (recognizing differences between Title VI and Section 504).
73. Id. at 293.
74. Alexander, 469 U.S. 287, at 293-94.
has clearly acquiesced to federal agencies promulgating disparate impact regulations pursuant to Section 602. If it had interpreted the statute in the absence of existing disparate impact regulations, the Court might have required proof of intentional discrimination under both sections. Because many agencies had promulgated and relied upon disparate impact regulations for nineteen years before the Court decided Guardians, some members of the Court were unwilling to impose the same restrictive interpretation of Section 601 onto Section 602, which would have essentially invalidated those regulations. Hence, the Court adopted the dubious and unconvincing distinction between Sections 601 and 602.

The Court should interpret Section 601 to allow suits based upon disproportionate effects. Litigation involving the Equal Protection Clause's intent requirement has demonstrated that it is too difficult for plaintiffs to prove that a government official has consciously discriminated. Furthermore, Title VI's dual purposes of preventing recipient discrimination and protecting individual rights would be better served by a disparate impact standard. However, it is more likely that the Court will continue to follow Guardians' unconvincing distinction between Sections 601 and 602.

B. EPA's Title VI Regulations

Title VI prohibits any discrimination by federal fund recipients, even if the discrimination occurs in a separate program or subprogram of the recipient that does not receive such assistance. The EPA currently provides federal funding to at least one program in virtually all state or regional siting or permitting agencies. Hence, Title VI clearly applies to these agencies.

75. See generally infra notes 237-242 and accompanying text.
76. See generally supra notes 67-68 and accompanying text.
77. See generally infra notes 282-286, 317-320 and accompanying text.
78. However, Title VI does not apply to federal programs that pay benefits directly to individual beneficiaries. See Soberal-Perez v. Heckler, 717 F.2d 36, 38-39 (2d Cir. 1983); Colopy, supra note 11, at 154.
79. See U.S. EPA, Amicus Curiae Brief at 5, Chester Residents Concerned for Quality Living v. Seif, (3d Cir. ) (No. 97-1125) [hereinafter EPA Amicus Brief]; Lazarus, supra note 5, at 835-36 (citing U.S. EPA, A PRELIMINARY ANALYSIS OF THE PUBLIC COSTS OF ENVIRONMENTAL PROTECTION: 1981-2000, at 9 (1988)) (reporting in 1986 the federal government provided 46% of the funding for state air pollution programs, 33% of the funding for state water pollution programs, and 40% of the funding for state hazardous waste programs); Colopy, supra note 11, at 154-55.
However, some local environmental programs receive no federal funding. Thus, these programs are exempt from Title VI's jurisdiction.

1. EPA's Disparate Impact Regulations

The EPA's Section 602 regulations have consistently prohibited a recipient from engaging in actions having discriminatory effects. The EPA's current regulations reiterate its historic policy of forbidding recipients from creating disparate impacts: "A recipient [of federal funds] shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin." Furthermore, EPA regulations mandate that state recipients maintain Title VI compliance programs addressing both discrimination by the state and any beneficiaries of state-administered funds.

2. EPA's Early Failure to Enforce Title VI

Despite these Title VI regulations, the EPA avoided enforcing Title VI from the early 1970s until 1993. Initially, the EPA maintained that the agency had only limited responsibility to enforce Title VI because its central task is regulating pollution rather than addressing broader discriminatory practices such as housing discrimination by state or local recipients. The agency also avoided enforcing the statute because terminating grants to an allegedly discriminating recipient under Title VI would undermine the EPA's basic goal of providing financial assistance to state and local agencies for the purpose of reducing pollution. Moreover,

80. See Colopy, supra note 11, at 173.
81. See 38 Fed. Reg. 17,968, 17,969 (1973) (providing a recipient may not "directly or indirectly, utilize criteria or methods of administration which have or may have the effect of subjecting a person to discrimination because of race, color, or national origin."); EPA Amicus Brief, supra note 79, at 5.
83. See 28 C.F.R. § 42.410.
84. See Fisher, supra note 8, at 313-14; Lazarus, supra note 5, at 836-38 (discussing EPA's decision to de-emphasize its civil rights responsibilities under Title VI); Saleem, supra note 46, at 228 (arguing that EPA's stance that its decisionmaking was exempt from Title VI "lacks support from any internal policy or legal precedent."); Colopy, supra note 11, at 180-88 (discussing history of EPA's enforcement of its Title VI regulations).
85. See Fisher, supra note 8, at 313-14; Lazarus, supra note 5, at 836-38; Colopy, supra note 11, at 181-82.
86. See Fisher, supra note 8, at 313-14; Lazarus, supra note 5, at 836-38; Colopy, supra note
recipients might refuse to stop discriminating even if the agency
terminated its funding.87 Furthermore, the funding termination
sanction might adversely affect minority groups rather than help
them.88

3. The Clinton Administration Uses Title VI to Promote
Environmental Justice, But Problems Remain

A change occurred in 1993 when the newly elected Clinton
Administration announced that the EPA would finally begin to
meet its Title VI responsibilities by enforcing its long-standing
regulations against recipients that engage in discrimination.89 In
1994, the EPA created an Office of Civil Rights to handle Title VI
issues.90 Between September 1993 and August 1998, approximately
fifty-eight environmental justice complaints were filed with the
agency.91 The overwhelming majority of these complaints
challenged state or local permit decisions.92

Both environmental justice advocates and opponents continually
complain of the agency’s slow and secretive process in conducting
investigations.93 Advocates are especially distrustful because that
the agency has never found a recipient in violation of the statute.94
While the EPA has dismissed a number of claims lacking sufficient
evidence,95 the agency has failed to resolve at least fifteen pending

87. See Fisher, supra note 8, at 313-14; Lazarus, supra note 5, at 836-38; Colopy, supra note
11, at 181-82.
88. See Fisher, supra note 8, at 313-14; Lazarus, supra note 5, at 836-38; Colopy, supra note
11, at 181-82.
89. See Fisher, supra note 8, at 314-15.
90. See Natalie M. Hammer, Title VI as a Means of Achieving Environmental Justice, 16 N. Ill.
91. Prepared Testimony of Anne Goode, Director of Civil Rights, U.S. EPA, Before The
Oversight and Investigations Subcommittee of the House of Representatives Commerce
92. Prepared Testimony of Anne Goode, Director of Civil Rights, U.S. EPA, Before The
Oversight and Investigations Subcommittee of the House of Representatives Commerce
93. See Domike & Ray, supra note 3, at Cl; David Mastio, EPA Keeps Key Documents Secret:
94. See Domike & Ray, supra note 3, at Cl; David Mastio, Murky Rules Stall EPA Race Policy:
After 5 years, $50 million, Agency Hasn’t Solved One Claim of Civil Rights Violations, Detroit News,
95. See FOREMAN, supra note 24, at 57 (reporting that of first thirty Title VI complaints
filed with EPA, agency rejected twelve and one was withdrawn because of insufficient
evidence).
Title VI complaints. The Office of Civil Rights' limited staff and significant staff turnover has slowed its investigations. Furthermore, strong internal disagreements within the agency about how to define civil rights violations has hampered the resolution of complaints. In March 1998, the EPA created a new advisory committee to advise the agency on ways to improve the monitoring of Title VI compliance.

Additionally, there has been much controversy about the amount of evidence needed to prove discrimination. In February 1998, the EPA issued an “Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits.” Numerous state officials, local officials, and industry spokespersons have argued that the interim guidance is unclear about which types of siting decisions constitute discrimination pursuant to Title VI. As a result, this lack of clarity makes it too difficult to site new projects in minority areas because developers and government decision-makers are uncertain about which projects are acceptable. Some critics have asked the agency to rescind the interim guidance. In response to these criticisms, the EPA has asked its Title VI advisory committee and the agency’s independent Science Advisory Board to make recommendations regarding improving the interim guidance. It has also promised to issue a revised, final guidance in the spring of 1999.

96. See Mastio, Murky Rules Stall EPA Race Policy, supra note 93, at A1.
97. See FOREMAN, supra note 24, at 57-58 (reporting lack of staff hinders EPA's investigation of Title VI complaints); Domike & Ray, supra note 3, at C1 (same); Mastio, Murky Rules Stall EPA Race Policy, supra note 93, at A1 (reporting rapid staff turnover thwarts EPA's investigation of Title VI complaints).
102. See FOREMAN, supra note 24, at 59; Cushman, supra note 101, at 1; Goode, supra note 91; Mastio, EPA Keeps Key Documents Secret, supra note 93, at A1; Paige, supra note 101, at 12.
103. See Goode, supra note 91; Paige, supra note 101, at 12.
During October 1998, President Clinton signed an appropriations bill that included a rider sponsored by Republican members of Congress that places a moratorium on the EPA accepting new Title VI complaints until the agency issues a final guidance on Title VI. The legislation does not affect fifteen ongoing investigations. Opponents of the Interim Guidance argue that the moratorium is a warning to the EPA to adopt a more flexible approach to efforts to site facilities in minority or low-income communities. However, environmental justice advocates contend that the moratorium will have little practical impact because the EPA did not have the resources to investigate new cases and was going to delay considering new cases until it issues its final Title VI policy.

V. IS IT BETTER FOR ENVIRONMENTAL JUSTICE ADVOCATES TO FILE AN ADMINISTRATIVE COMPLAINT OR A LAWSUIT?

A. Administrative Complaints Under Title VI

Under the EPA’s Title VI regulations, complainants have limited rights. Therefore, environmental justice advocates often prefer to sue in federal court.

1. Filing an Administrative Complaint

It is relatively simple to file a Title VI complaint with the EPA. A complainant must file a statement alleging that a federal funds recipient engages in discriminatory practices. The complaint must be filed within 180 days of the alleged discriminatory action. However, complainants can request waiver of this time limit for good cause. Within twenty days of receiving a complaint, the


107. See Skrzycki, supra note 106, at F1; Walsh, supra note 106, at A8.

108. See Skrzycki, supra note 106, at F1; Walsh, supra note 106, at A8.

109. See Skrzycki, supra note 106, at F1; Walsh, supra note 106, at A8.


111. See 40 C.F.R. § 7.120(b)(2); Cole, supra note 110, at 315-16. So far the EPA has not
EPA will conduct a preliminary investigation to determine whether the complaint states a valid claim of discrimination and is within the agency's jurisdiction. If the complaint is found to be invalid or is deemed outside of the EPA's jurisdiction, the agency will reject the complaint or refer it to another agency with appropriate jurisdiction. Alternatively, if the EPA accepts the complaint for investigation, the agency usually seeks an informal settlement. If informal negotiations between the parties fail, the EPA then conducts a formal investigation of the allegations.

Recipients have far greater procedural rights than complainants. If the EPA formally concludes that a recipient has violated the statute or the agency's Section 602 regulations, the recipient may within thirty days request an opportunity for a hearing before an administrative law judge (ALJ) to contest the finding. Subsequent to the ALJ's findings, the recipient may appeal the decision to the EPA Administrator. The Administrator has the authority to refuse, postpone or discontinue agency funding to the "particular program, or part thereof, in which such noncompliance has been found." However, before the agency can punish the recipient, the Administrator must make a full report about such a decision to the congressional committees with legislative authority over the affected program and give Congress thirty days to respond. If the EPA decides to terminate funding, a recipient may seek judicial review of the decision. Before revoking funding, a federal agency usually encourages a recipient to negotiate a settlement in which the recipient promises that it will

been receptive to waiver requests. See Cole, supra note 110, at 315 n.18. A complaint alleging a continuing violation is timely if the last incident occurred within 180 days. See id.

112. See 40 C.F.R. § 7.120(d)(1).

113. See 40 C.F.R. § 7.120(d)(1).

114. See 40 C.F.R. § 7.120(d)(1); Cole, supra note 110, at 316-17; Domike & Ray, supra note 3, at Cl.

115. See 40 C.F.R. § 7.120(d)(2); Cole, supra note 110, at 316-17; Domike & Ray, supra note 3, at Cl.

116. See 40 C.F.R. § 7.115(a) (authorizing EPA's Office of Civil Rights to conduct compliance reviews, including the request of information and on-site reviews); Domike & Ray, supra note 3, at Cl.

117. See 40 C.F.R. § 7.130(b)(1)-(3); Cole, supra note 110, at 317-18; Colopy, supra note 11, at 129, 155.

118. See 40 C.F.R. § 7.130(b)(1)-(3); Cole, supra note 110, at 317-18; Colopy, supra note 11, at 129, 155.

119. See 40 C.F.R. § 7.130(b)(3)(iii); 42 U.S.C. § 2000d-1; Cole, supra note 110, at 317-18; Colopy, supra note 11, at 129, 155.

eliminate its discriminatory practices. 121

If the Office of Civil Rights finds insufficient evidence that the recipient violated the statute, the agency will notify both the recipient and complainant of its dismissal of the complaint. 122 In this event, the complainant’s right to appeal is extremely limited. 123

2. Advantages and Disadvantages of Title VI Administrative Complaints

The Complainant faces several disadvantages in pursuing a Title VI administrative complaint. 124 Most importantly, a complainant has no right to participate in the agency’s investigation, aside from providing specific information at the request of the agency. 125 Another problem lies in the lack of a time limitation constraining the EPA’s response to the complainant. 126 In at least four cases, the EPA has reopened completed investigations to search for additional information about the type of pollution involved and the demographic composition of the surrounding population. 127

Furthermore, even if the EPA finds that a federal funds recipient has engaged in discrimination, the agency has only a limited ability to punish a discriminating recipient and can provide no direct compensation to the complainant. The primary remedy that the agency may impose against a discriminatory recipient is
termination of the recipient's funding.\textsuperscript{128} However, despite evidence of discriminatory practices by a recipient, the EPA may be reluctant to withdraw funding for important pollution control programs that provide benefits to the public and even perhaps to some members of the complaining minority group.\textsuperscript{129} Finally, the agency cannot provide any direct relief or attorneys fees to the complainant.\textsuperscript{130} However, despite these disadvantages associated with filing an administrative complaint, a complainant may use the EPA's investigation of a complaint as a means to organize political opposition to a project.\textsuperscript{131} It is likely that a recipient, usually in coordination with a private permit applicant, will agree to cancel or relocate a project that the EPA concludes will cause discriminatory effects because it is usually less expensive to settle with the agency than to challenge findings of discrimination.\textsuperscript{132} Also, if the EPA finds evidence of discrimination by a recipient, the agency would likely negotiate a settlement in which the recipient promises not to discriminate in the future.\textsuperscript{133}

B. Advantages and Disadvantages of Private Lawsuits

A litigant in federal court has greater rights than an administrative complainant. As previously mentioned, the complainant has no formal role in the agency's administrative investigation,\textsuperscript{134} and has limited judicial review rights.\textsuperscript{135} Conversely,

\textsuperscript{128} See 40 C.F.R. § 7.130; Fisher, supra note 8, at 316; Colopy, supra note 11, at 178-80.

\textsuperscript{129} See supra notes 84-88 and accompanying text.

\textsuperscript{130} See 40 C.F.R. § 7.130(a); Hammer, supra note 90, at 711.

\textsuperscript{131} See generally FOREMAN, supra note 24, at 34-68 (observing advocates often use complaints about environmental justice issues to mobilize community opposition to a project); Sheila Foster, Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement, 86 CALIF. L. REV. 775 (1998) (same).

\textsuperscript{132} It is often less expensive to relocate a project than even to contest a Title VI complaint. For instance, after environmental justice advocates filed a Title VI complaint and EPA began a lengthy investigation, the Shintech company decided not to build a proposed plastics plant in heavily minority Convent, Louisiana, but instead to construct a smaller factory in nearby Plaquemine. See Mark Schleifstein, Shintech Taking Its Plant Upriver, New Orleans Time-Picayune, Sept. 18, 1998, at A1; Traci Watson, La. Town Successful in Stopping Plastics Plant, USA TODAY, Sept. 18, 1998, at 7A.

\textsuperscript{133} See supra notes 115, 121 and accompanying text.

\textsuperscript{134} See Cole, supra note 110, at 323; Colopy, supra note 11, at 167; supra note 125 and accompanying text.

\textsuperscript{135} See Cannon v. University of Chicago, 441 U.S. 677, 715 (1979) (suggesting that Title VI generally does not allow private suits against the federal government); Fisher, supra note 8, at 317 n.158 (APA precludes suits challenging dismissal of Title VI complaint both
a lawsuit allows a plaintiff to use discovery procedures to direct her own investigation, to tender witnesses or evidence, and to cross-examine a defendant's witnesses. Additionally, a court may award prospective equitable relief to a plaintiff who establishes a case of disparate impacts and retroactive relief to a plaintiff who proves intentional discrimination. Moreover, prevailing Title VI plaintiffs are also entitled to reasonable attorney's fees. Additionally, a plaintiff who loses in district court may appeal that decision to a federal appellate court.

Furthermore, a lawsuit may provide the advantage of mobilizing political opposition in the affected community. This may result in the recipient or a permit applicant canceling the project. There are also disadvantages involved in filing a suit rather than a complaint. The primary disadvantage of a private right of action is the high cost of hiring a lawyer to investigate the issues, initiate discovery requests against opponents, and conduct a trial. Furthermore, a private litigant may fail to obtain the specific injunctive remedies and attorneys fees sought by the complaint. Alternatively, filing an administrative complaint is less expensive than pursuing a Title VI suit in federal court. An administrative complainant does not have to hire a lawyer, and a complainant can rely on the EPA to conduct an investigation. Yet the advantages of filing a private right of action seem to far outweigh the disadvantages.

because the complainant can file a private suit under Title VI and traditional deference accorded to executive agencies in deciding whether to prosecute a case); Colopy, supra note 11, at 167-71 (same); see also Cole, supra note 110, at 323; supra note 123 and accompanying text.

136. See Colopy, supra note 11, at 167.
137. See Colopy, supra note 11, at 167.
139. See Cole, supra note 110, at 323.
140. See Block, supra note 125, at 12.
141. See Block, supra note 125, at 12.
143. See generally Block, infra note 125, at 8-12.
VI. TITLE VI AND IMPLIED RIGHTS OF ACTION

In Guardians, the Supreme Court clearly established that Section 601 of Title VI creates a private right of action. A more difficult issue, left unresolved by the Court, is whether there is an implied private right of action under the administrative regulations promulgated by various federal agencies to implement Section 602 of Title VI.

A. The Judicial Development of Private Rights of Action

Courts freely recognize private rights of action based on statutory standards in two types of suits. First, the common law doctrine of negligence per se allows plaintiffs to use a statutory standard to define the level of reasonable care owed by the defendant. However, the statute does not create a new right of action, but merely sets the boundaries for the common law duty of reasonable care. Second, legislatures may expressly authorize persons claiming to be injured by violations of regulatory statutes to bring suit directly against the alleged violator.

A much more controversial issue is whether a regulatory statute that does not expressly create a private right of action may do so implicitly. Some courts refuse to create a private right of action unless there is clear evidence that the legislature intended to allow this type of suit. Courts reason that they should refrain from usurping the legislative function of defining the appropriate remedies for violations of regulatory statutes and that courts should not interfere with the ability of executive agencies to decide how to enforce a statute within the agency's jurisdiction. Other courts will imply a private right of action if it will advance a statute's goals and if it is compatible with the statute's structure, explicit judicial remedies and administrative scheme.

From 1916 through the early 1960s, the Supreme Court rarely

144. See infra notes 65-66, 68-69 and accompanying text.
145. See RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 327 (2d ed. 1992)
148. See PIERCE ET AL., supra note 145, at 929-30; Stewart & Sunstein, supra note 147, at 1199 (summarizing "formalist" case against inferring private rights of action); infra notes 182-190 and accompanying text.
149. See infra notes 151-154 and accompanying text.
implied a private right of action from a regulatory statute. The exceptions to this practice, of not implying private suits, were cases dealing primarily with suits by transportation workers against their employers. However, in *J.I. Case Co. v. Borak,* the Supreme Court liberalized its stance regarding implied private rights of action and held that Section 27 of the Securities Exchange Act of 1934 (SEC Act) created an implied right of action for alleged violations of Section 14(a). The Court allowed the private right of action because these types of suits would further the statute's purposes. The Court took into consideration that the Securities and Exchange Commission (SEC) favored creating a private right of action because the Commission lacked the resources to either review in appropriate detail all of the thousands of proxy statements issued by corporations each year or to bring enforcement actions against all companies that arguably violated section 14(a). Following *Borak,* some cases between 1964 and 1975 implied a private right of action from regulatory statutes. Nonetheless, courts generally remained cautious about inferring that such rights exist.

In *Cort v. Ash,* the Supreme Court refused to imply a private cause of action under a federal statute prohibiting corporations

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152. *Id.* at 431.

153. *Id.* at 432.


156. 422 U.S. 66 (1975).
from making contributions or expenditures in connection with presidential elections.\footnote{157. See id. at 68-69.} However, more importantly for future decisions, however, \textit{Cort} adopted a four factor test for deciding whether a private remedy is implicit in a statute: (1) is the plaintiff part of a class that the statute intends to provide special status to or benefits?; (2) is there implicit or explicit evidence that Congress intended to create or deny the proposed private right of action?; (3) is such a private right of action consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?; and (4) is the cause of action one traditionally relegated to state law and, thus, in an area where a federal cause of action would intrude on important state concerns?\footnote{158. See \textit{id.} at 78; \textit{Stabile, supra} note 147, at 867 n.38.} The Court may have intended \textit{Cort}'s four-part balancing test to reduce the number of cases in which courts inferred private causes of action, but the reverse occurred. In the four years after \textit{Cort}, twenty appellate decisions implied private actions from federal statutes.\footnote{159. See generally \textit{Cannon}, 441 U.S. 677, 741-42 (Powell, J., dissenting).}

B. \textit{Cannon v. University of Chicago}: Recognizing a Private Right of Action Under Titles IX and VI

In \textit{Cannon v. University of Chicago},\footnote{160. 441 U.S. 677 (1979).} the Supreme Court followed the lower courts' lead in using \textit{Cort}'s approach to infer private remedies more liberally. Justice Scalia, a critic of judicially created implied rights of action, later observed that \textit{Cannon} "exemplified" an "expansive rights-creating approach" to inferring private rights of action from regulatory statutes.\footnote{161. \textit{Franklin v. Gwinnett County Pub. Sch.}, 503 U.S. 60, 77 (1992) (Scalia, J., concurring).} The Court inferred a private right of action for individuals to bring suit in federal courts against educational institutions receiving federal funds under section 901(a) of Title IX of the 1972 Education Act Amendments.\footnote{162. 441 U.S. 677, 680 (1979).} The plaintiff sued the defendant for violation of Title IX, which prohibits discrimination in educational institutions that receive federal funds.\footnote{163. 20 U.S.C. §§ 1681-82.} Although the federal funding agency in \textit{Cannon}, HEW, had established administrative procedures enabling individuals to file a complaint of discrimination and authorizing
the agency to terminate funding to a recipient found guilty of discrimination, the Court established a private remedy, in part because HEW clearly supported the creation of a private right of action in light of its limited enforcement resources. After examining Title IX's statutory language, its legislative history, its subject matter and its underlying purposes, the Court found that all four Court factors favored the implication of a private right of action.

Because Congress patterned Title IX after Title VI, including the use of virtually identical statutory language and the same procedures for terminating funding, the Supreme Court in Cannon relied on prior interpretation of Title VI's language, legislative history, and regulations as major indications of Congress' intent to create a private right of action in Title IX. Hence, courts and commentators understand Cannon to create a private right of action under both statutes. Justice Stevens' majority opinion first observed: "The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." He then noted that "[i]n 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy." The Court stated that it was appropriate to assume that Congress was aware of the numerous lower federal court decisions interpreting Title VI as creating a private right of action when it enacted Title IX, and hence, that the legislature assumed that Title IX likewise created a private right of action. In Guardians, Justice White observed, "it was the unmistakable thrust of the Cannon Court's opinion that the congressional view was correct as to the availability of private

164. See Cannon, 441 U.S. 677, 708 nn.41-42.
166. See Cannon, 441 U.S. 677, 694-703; Neighborhood Action Coalition v. City of Canton, 882 F.2d 1012, 1015 (6th Cir. 1989); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 317 (10th Cir. 1987), cert. den., 484 U.S. 849 (1987); Chowdbury v. Reading Hosp. & Medical Ctr., 677 F.2d 317, 319 n.2 (3d Cir. 1982) ("[C]ourts have consistently held the [Title IX] language of Cannon to be applicable in discussions of Title VI."); 118 Congo Rec. 5807 (1972) (remarks of Sen. Bayh); Colopy, supra note 11, at 156-57 nn.140-41.
actions to enforce Title VI." Accordingly, although Cannon did not explicitly hold that there was an implied right of action under Title VI, commentators and courts read Cannon as virtually inferring such a right under Title VI and Title IX.

In Cannon, the Supreme Court observed that Title VI "sought to accomplish two related, but nevertheless somewhat different, objectives." First, Congress sought to prevent the use of federal resources to support discriminatory practices; and, second, Congress wanted to protect individual citizens against discriminatory actions. Private litigation is not essential in serving the first purpose because potential plaintiffs may instead file an administrative complaint with the federal funding agency against the recipient. However, if a recipient has been issued a one-time grant, the normal administrative deterrent of fund termination may not be effective in addressing the government's interest in punishing discriminatory recipients because the recipient may deplete all the awarded funds before the agency is able to terminate funding. Accordingly, in one-grant cases, a private remedy could serve both to punish the violator and to deter other one-time grant recipients from engaging in discriminatory practices.

Cannon provided additional reasons for inferring a private right of action under Title IX that are also applicable to Title VI. The Court found that Congress intended the statute to not only avoid the use of federal funds to support discriminatory programs, but


171. See Cannon, 441 U.S. 677, 694-703; Neighborhood Action Coalition v. City of Canton, 882 F.2d 1012, 1015 (6th Cir. 1989); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 317 (10th Cir. 1987), cert. den., 484 U.S. 849 (1987); Chowdbury v. Reading Hosp. & Medical Ctr., 677 F.2d 317, 319 n.2 (3d Cir. 1982) ("[C]ourts have consistently held the [Title IX] language of Cannon to be applicable in discussions of Title VI."); 118 Cong. Rec. 5807 (1972) (remarks of Sen. Bayh); Colopy, supra note 11, at 156-57 n.140-41. Because Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, was also modeled on Title VI and contains nearly identical language to both Titles VI and IX, most courts interpret Title VI in light of Title IX and Section 504's caselaw. See United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 600 (1986) (section 504 and its regulations were modeled after Title VI; Alexander v. Choate, 469 U.S. 287, 295 (1985) (section 504 was originally proposed as an amendment to Title VI); Colopy, supra note 11, at 156-57 n.140; but see Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 632-33 n.13 (1984) (recognizing differences between Title VI and Section 504).


175. See Cannon, 441 U.S. 677, 704 n.37.
also to "provide individual citizens effective protection against these practices." The Court concluded that only private remedies could secure the statute's interest in protecting individuals. The Court observed that a complainant could not participate in the administrative process. Moreover, the administrative process provided no assurance that a finding of violation would result in relief for the complainant. Thus, the Court's reasoning implied that there should be a private cause of action under both Title VI and Title IX because both failed to provide direct remedies for complainants and allowed the funding agency only the indirect remedy of recipient fund termination. Accordingly, the Court concluded that a private remedy was consistent with the underlying purposes of the legislative scheme and would not interfere with the agency's administrative enforcement process.

Cannon did not address the issue of whether there was also a private right of action under Title VI or Title IX's administrative regulations. Because Cannon was decided four years before the distinction created in Guardians between the discriminatory intent burden of proof pursuant to Section 601 of Title VI and the discriminatory effect burden of proof in Title VI's Section 602 administrative regulations, it probably did not seem important to the Court in Cannon to discuss whether there was also a private right of action under Title VI or Title IX's administrative regulations. Normally, if a private right of action existed under Section 601, then it would make little difference whether there is also a right to sue under agency regulations issued pursuant to Section 602. However, Guardians' complex, hybrid and unconvincing distinction between the burden of proof of Section 601 and Section 602 makes the issue of whether there is also a private right of action under Section 602 one of great importance.

177. See Cannon, 441 U.S. at 677, 706-07 n.41.
179. See Cannon, 441 U.S. 677, 707 n.41.
180. See Cannon, 441 U.S. 677, 704-08.
181. See supra notes 65-77 and accompanying text.
C. Justice Powell’s Dissent in Cannon and the Court’s New Emphasis on Legislative Intent

In his dissenting opinion in Cannon, Justice Powell argues that the Court should abandon Cort’s four-part test and instead focus exclusively on whether Congress intended to create a private remedy.\(^\text{182}\) He maintains that “the Cort analysis too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement . . . .”\(^\text{183}\) Justice Powell contends that it is too easy for judges to use Cort’s other three factors to ignore legislative intent and engage in “judicial lawmaking.”\(^\text{184}\) According to Justice Powell, “Cort allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch.”\(^\text{185}\) In addition, judicial willingness to infer private causes of action despite statutory silence encourages Congress “to shirk its constitutional obligation and leave the issue to the courts to decide.”\(^\text{186}\) As a result of judicial lawmaking and congressional avoidance of controversial questions regarding whether a regulatory statute should be enforced through private litigation, “the public generally is denied the benefits that are derived from the making of important societal choices through the open debate of the democratic process.”

Although Justice Powell lost the battle in Cannon, his criticism of Cort led the Supreme Court to adopt a more restrictive application of the Cort standard for inferring a private right of action, which emphasized legislative intent much more than the other three factors. The Court also began to place the burden on the plaintiff to demonstrate that Congress intended to create a private right of action.\(^\text{187}\) In addition, the Court has increasingly required that the

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\(^\text{182. See generally Cannon, 441 U.S. 677, 730-49 (Powell, J., dissenting).}\)
\(^\text{183. See generally Cannon, 441 U.S. 677, 740 (Powell, J., dissenting).}\)
\(^\text{184. See generally Cannon, 441 U.S. 677, 740 (Powell, J., dissenting).}\)
\(^\text{185. See generally Cannon, 441 U.S. 677, 743 (Powell, J., dissenting).}\)
\(^\text{186. See generally Cannon, 441 U.S. 677, 743 (Powell, J., dissenting).}\)
\(^\text{187. See, e.g., Central Bank v. First Interstate Bank, 511 U.S. 164, 178-80 (1994) (if statute does not explicitly create a private right of action, Court examines how the Congress that passed the 1934 Exchange Act would have viewed the implication question); Suter v. Artist M., 503 U.S. 347, 363 (1992) (Cort places the burden on plaintiff to demonstrate Congress’ intent to make a private remedy available); Karahalios v. National Fed’n of Fed. Employees, Local 1263, 489 U.S. 527, 532 (1989) (courts should focus on congressional intent in deciding whether to imply a private cause of action); Thompson v. Thompson, 484 U.S. 174, 179 (1988) (four factors in Cort are guides to congressional intent); Merrill Lynch, Pierce,
language and structure of a statute demonstrate that Congress intended to create a private remedy.\textsuperscript{188} Thus, the Court has been less willing to rely on legislative history for evidence of legislative intent to establish a private right of action.\textsuperscript{189} Hence, in 1992, Justice Scalia argued that Cannon's liberal approach for inferring a private right of action from a regulatory statute belonged to an "ancien régime" no longer followed by the Court.\textsuperscript{190} However, because the Court in Cannon already recognized a private right of action for both Title VI and Title IX, the Court's more restrictive subsequent approach to inferring private remedies may not apply in deciding whether Title VI regulations create a private cause of action.


D. Did Guardians Recognize a Private Right of Action Under Title VI Regulations?

Despite the Court's more restrictive subsequent approach to inferring private remedies, the Court might defer to precedent if Guardians had established a private right of action pursuant to Section 602. There is a plausible argument that five members of the Guardians's Court implied that private litigants may state a claim of action for disparate impact discrimination under Title VI's implementing regulations.191 However, a majority of the Guardians's Court never explicitly held that such a private remedy exists.

Although he did not directly rule on the scope of Section 602 and its implementing regulations, Justice White argued in his Guardians opinion that a plaintiff should be able to present a discriminatory effect claim under Section 601.192 Accordingly, it is reasonable to infer from his approval of private rights of action under Section 601 for discriminatory effects challenges that Justice White would also allow private actions alleging discriminatory effects pursuant to Section 602 and its implementing regulations.193 Furthermore, Justice White implied that the disparate impact regulations promulgated by the Department of Labor pursuant to section 602 were valid when he stated that he "believe[s] that the regulations are valid, even assuming arguendo that Title VI, in and of itself, does not proscribe disparate impact discrimination."194

Justice Marshall argued in his Guardians dissent that private plaintiffs alleging discriminatory effects should be allowed to recover injunctive, declaratory or compensatory relief under Section 601.195 While he did not directly address private actions under Section 602, Justice Marshall's strong desire to use Title VI

191. See Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 930 (3d Cir. 1997), vacated, No. 97-1620 (U.S.), 1998 WL 477242 (1998); infra notes 192-206 and accompanying text; see generally Guardians, 463 U.S. 582, 584 n.2, 591-95 (White, J., delivering judgment of the Court); id. at 635-39 (Stevens, J., joined by Brennan & Blackmun, J.); and id at 625-26, 634 (Marshall, J.).


194. See Guardians, 463 U.S. 582, 584 n.2.

195. Id. at 615, 625 (Marshall, J., dissenting)
to vindicate the rights of private individuals affected by disparate impacts suggests that he would have sought to use Section 602 to achieve this purpose.\(^{196}\)

Justice Stevens' *Guardians* opinion, joined by Justices Brennan and Blackmun, did not distinguish between a private right of action and administrative remedies under Section 602, but his discussion of the remedies that should be available under Title VI implied that a private action should exist under the regulations. These three justices concluded that intentional discrimination is a necessary element under Section 601 of Title VI, but that regulations under Section 602 may incorporate a disparate impact standard.\(^{197}\) Although Justice Stevens' opinion did not directly recognize a private right of action under agency regulations promulgated pursuant to Section 602, his argument that victims of disparate impact discrimination are entitled to all forms of relief (including presumably compensatory damages) only follows if there is a private cause of action under Section 602’s implementing regulations. His words suggest that such a private right exists under the regulations. "[A]lthough petitioners had to prove that the respondents' actions were motivated by an invidious intent in order to prove a violation of [Title VI], they only had to show that the respondents' actions were producing discriminatory effects in order to prove a violation of [the regulations]."\(^{198}\)

Accordingly, five members of the Court implicitly recognized a private right of action for disparate impacts under Title VI’s implementing regulations.\(^{199}\) However, because *Guardians* did not directly address whether a private right of action exists under Title VI’s implementing regulations, the issue remains unresolved.\(^{200}\)

There is also an argument that *Guardians* implicitly recognized the existence of a private right of action for discriminatory effects claims under Section 602 and its implementing regulations.

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198. *See id.* at 645 (Stevens, Brennan & Blackmun, JJ., dissenting).
because the Court did not dismiss the plaintiffs' action *sua sponte* for failure to state a claim.\(^{201}\) The district court in *Guardians* relied on the Department of Labor's Title VI regulations\(^{202}\) in holding that proof of discriminatory effect was sufficient to establish a violation of Title VI.\(^{203}\) The district court, appellate court, and Supreme Court all agreed that the discrimination in the case was unintentional.\(^{204}\) Thus, one could argue that the Supreme Court should have dismissed the action *sua sponte* if there was no possibility of basing a suit on discriminatory effects under Section 602 and its implementing regulations. However, none of the parties in *Guardians* raised an objection under Rule 12(b)(6) of the Federal Rules of Civil Procedure or otherwise raised the issue of whether a private right of action exists under Section 602 and its implementing regulations.\(^{205}\) The *Guardians* Court did not clearly address the issue of whether a private right of action exists pursuant to Section 602 and its implementing regulations.\(^{206}\)

In *Alexander*, the Supreme Court suggested that *Guardians* created an implied private right of action for disparate impacts under Title VI's implementing regulations:

*Guardians*, therefore, does not support petitioners' blanket proposition that federal law proscribes only intentional discrimination against the handicapped. Indeed, to the extent our holding in *Guardians* is relevant to the interpretation of § 504, *Guardians* suggests that the regulations implementing § 504, upon which respondents in part rely, could make actionable the disparate impact challenged in this case.\(^{207}\)

However, *Alexander* never explicitly held that there was an implied private right of action for disparate impacts under Title VI's Section 602 implementing regulations.\(^{208}\)

By frequently citing to *Guardians* and *Alexander*, a number of federal circuit courts imply that Title VI's Section 602 discriminatory effects regulations can be enforced by a private right

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202. See 29 C.F.R. § 31.3(c)(1).
204. See generally *Guardians*, 463 U.S. at 582-89.
207. 469 U.S. 287, 294 (footnote omitted).
208. See supra notes 70-74, 207 and accompanying text.
of action. However, until the Third Circuit's decision in Chester, circuit courts failed to undertake an inquiry into whether the existence of a private right of action under Section 601 of the statute necessarily provided a persuasive argument for implying the same remedies under Section 602 regulations. Chester properly concluded that Section 602 creates a private right of action. Yet, its analysis of whether Congress intended to allow private suits is not fully convincing.

209. See, e.g., Villanueva v. Carere, 85 F.3d 481, 486 (10 Cir. 1996) (citing Guardians, court found a private right of action under Title VI's implementing regulations and stated that, "[a]lthough Title VI itself proscribes only intentional discrimination, certain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of discriminatory intent"); New York Urban League v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) (citing Guardians and Alexander and permitting plaintiffs to assert a disparate impact claim under Title VI's implementing regulations); City of Chicago v. Lindley, 66 F.3d 819, 827-29 (7th Cir. 1995) (citing Guardians and Alexander, court acknowledged a private right of action for disparate impact discrimination under Title VI's implementing regulations); Elston v. Talladega County Bd. of Educ., 997 F.2d 1994, 1406-07 (11th Cir. 1993) (citing Guardians and Alexander, the court held the district court properly applied a disparate impact analysis to actions challenged under the Department of Education's Title VI regulations); David K. v. Lane, 839 F.2d 1255, 1274 (7th Cir. 1988) (holding plaintiffs could bring private right of action under Title VI's implementing regulations, and, citing Guardians, stating that evidence of disparate impact discrimination is enough to prevail on claim based on regulations); Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985) (citing Guardians, court concluded that five members of Supreme Court "were of the opinion that the regulations promulgated under Title VI permit the filing of suits alleging a disparate impact theory"); United States v. Lulac, 793 F.2d 636, 648 n.34 (5th Cir. 1986) (citing Guardians and recognizing plaintiffs may seek equitable relief for disparate impact claim under both Title VI and its implementing regulations); Larry P. v. Riles, 793 F.2d 969, 981-82 (9th Cir. 1984) (citing Guardians, holding proof of discriminatory effect suffices to establish liability when the suit is brought to enforce regulations issued pursuant to the statute rather than the statute itself); see also Buchanan v. City of Bolivar, 99 F.3d 1352, 1356 n.5 (6th Cir. 1995) (in suit for intentional discrimination under Title VI, the court, citing Guardians, assumed in dictum that private party could file suit under Title VI for a disparate impact claim); Rozar v. Mullis, 85 F.3d 556, 564 n.9 (11th Cir. 1996); Latinos Unidos de Chelsea en Accion v. Secretary of HUD, 799 F.2d 774, 785 n.20 (1st Cir. 1986) (stating "[u]nder the statute itself, plaintiffs must make a showing of discriminatory intent; under the regulations, plaintiffs simply must show a discriminatory impact"); Castaneda and Castaneda v. Pickard, 781 F.2d 456, 466 (5th Cir. 1986) (suggesting plaintiffs could bring private right of action under Title VI's implementing regulations for disparate impact claim); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 832 (10th Cir.) (in Title IX case, court stated in dicta that Guardians permits plaintiffs to assert a disparate impact claim under Title IX's implementing regulations), cert. denied, 510 U.S. 1004 (1993); Pfeiffer v. Marion Center School Dist., 917 F.2d 779, 788 (3d Cir. 1990) (In Title IX case, court suggested in dicta that Guardians indicated that under Title VI "proof of discriminatory effect suffices to establish liability when suit is brought to enforce the regulations rather than the statute itself."); cf. Cohen v. Brown Univ., 101 F.3d 155, 173 (1st Cir. 1996) (deciding private suit alleging gender disparities based on Title IX regulations).
A. The District Court

In *Chester Residents Concerned for Quality Living v. Seif*, the plaintiffs, residents of Chester and members of Chester Residents Concerned for Quality Living (CRCQL), alleged that the Pennsylvania Department of Environmental Protection’s (PADEP) approval of a permit to allow Soil Remediation Services, a private company, to build a waste treatment facility in an area that already had several solid waste processing plants placed a disparate burden on the predominantly African-American population in Chester Township. Additionally, in its response brief, CRCQL alleged that PADEP’s approval of five waste facility permits in the Township from 1987 to 1996 demonstrated discriminatory intent. The district court recognized a private right of action under Title VI. However, the court concluded that the plaintiffs’ allegations in its complaint alleged only that the defendant’s actions caused discriminatory effects and, thus, did not meet the standard of proof in Section 601, which is intentional discrimination.

Additionally, the district court held that there is no private right of action under the EPA’s Section 602 regulations. It found that the Supreme Court had never decided whether a private right of action existed under Title VI’s Section 602 regulations. The court interpreted a prior Third Circuit decision, holding that a plaintiff need not exhaust her administrative remedies under Section 602 before filing a private suit under Section 601, to imply that there was no private right of action under Section 602. The District Court suggested that Section 602’s sole purpose was to

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211. The plaintiffs alleged that 53.6 percent of the population in Chester Township was black. *Id.* at 414-15 & n.1.
212. *Id.* at 415. Only two permits were granted in other areas of Delaware County. *Id.* The two permits granted in predominantly white areas were for small facilities that each had a capacity of 700 tons per year, but the five permits granted in predominantly African-American areas had a total waste capacity of over 2,000,000 tons per year. *Id.*
213. *Id.* at 416-17.
214. *Id.* at 417.
215. *Id.* at 417.
216. *Id.* at 417 n.5.
217. *Id.* at 417 & n.5 (citing Chowdhury v. Reading Hospital & Medical Center, 677 F.2d 317 (3d Cir. 1982), *cert. denied*, 463 U.S. 1229 (1983)).
create an administrative enforcement scheme that did not provide for any individual remedies or rights of participation.\textsuperscript{218}

B. The Third Circuit

The Third Circuit reversed the District Court and held that the EPA's Title VI regulations create a private right of action.\textsuperscript{219} The court applied a three-factor test to determine the existence of a private right of action under Section 602: (i), whether the agency rule is properly within the scope of the enabling statute; (ii), whether the enabling statute intended to create a private right of action; and (iii), whether the implication of a private right of action under the regulation will further the purpose of the enabling statute.\textsuperscript{220} The EPA's regulations clearly met the first test and there are strong arguments that a private right of action advance Title VI's purposes, which satisfies the third factor. However, the Third Circuit's argument concerning the second factor, congressional intent is open to criticism in light of recent Supreme Court decisions regarding the amount of evidence that must be present to show that Congress intended to create a private right of action.\textsuperscript{221}

Applying the same three-factor test,\textsuperscript{222} this Article provides a stronger argument than the Third Circuit's for concluding that the EPA's regulations under Section 602 of Title VI create an implied private right of action. Essentially, it would be inconsistent to apply today's more stringent standard for inferring congressional intent in deciding whether a private right exists under Section 602, in light of the Supreme Court's application of a more lenient standard in recognizing a right under Section 601. Accordingly, courts should infer that there is an implied private right of action under Section 602 and its implementing regulations.

1. The Three-Factor Test

\textit{Cort's} four factor test, utilized to determine if an implied private right of action exists under a statute, only partially addressed the issues raised by the question of whether to infer a private right of

\begin{itemize}
\item \textsuperscript{218} Id. at 417.
\item \textsuperscript{220} See infra notes 224-27 and accompanying text.
\item \textsuperscript{221} See infra notes 255-270 and accompanying text.
\item \textsuperscript{222} See infra notes 316-337 and accompanying text.
\end{itemize}
action to enforce regulations. Chester's three-part test supplements Cort's four-part standard: (i) whether the agency rule is properly within the scope of the enabling statute; (ii) whether the enabling statute intended to create a private right of action; and (iii) whether the implication of a private right of action under the regulation will further the purpose of the enabling statute.

Under the third prong of the test, it is not necessary to examine "congressional intent" because a court under the second prong must have already examined whether Congress intended the statute to give rise to private actions. In addition, the court does not need to examine the agency's intent in promulgating the rule. If the rule is valid, if it advances the statute's substantive purposes, and if the statute provides a private right of action as a matter of congressional intent, a court will infer that the regulation creates a private right of action regardless of the agency's intent. Thus, under this third prong, "if the rule is reasonably related to the substantive purposes of its enabling statute, we will find that the regulation 'was drafted such that a private action may be legitimately implied.'"

2. The Supreme Court Has Clearly Recognized a Private Right of Action Under the Statute

The EPA's Title VI regulations clearly meet the first test because Section 602 of the statute clearly gives agencies the authority to promulgate regulations. In Guardians, a majority of the Court

224. See Polaroid Corp. v. Disney, 862 F.2d 987, 994 (3d Cir. 1988) (applying three-part test); Angelastro, 764 F.2d at 947-48 (using two-fold inquiry that incorporates three factors); see also Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 536-37 (9th Cir. 1984) (applying two-part test that incorporates three factors); Association of Mexican-American Educators v. California, 836 F.Supp. 1534, 1546-48 (N.D. Cal. 1993) (applying two-part test that incorporates three factors), appeal pending, No. 96-17131 (9th Cir.).
225. See Angelastro, 764 F.2d 939, at 947; Robertson, 749 F.2d 530, at 536.
226. See Robertson, 749 F.2d 530, at 536; Association of Mexican-American Educators, 836 F.Supp. 1534, at 1547.
227. Robertson, 749 F.2d 530, at 537 (quoting Jablon v. Dean Witter & Co., 614 F.2d 677, 679 (9th Cir. 1980); accord Angelastro, 764 F.2d 939, at 947.
held that Title VI permits federal agencies to promulgate regulations that prohibit disparate impact discrimination (at least where the agency had consistently done so in the past). \textsuperscript{230} Guardians’ historical test clearly applies to the EPA’s Title VI regulations, which have consistently embraced a discriminatory effects test. \textsuperscript{231}

3. Congressional Intent to Create a Private Right

A much more difficult issue is whether Congress intended to authorize a private right of action under Section 602 of Title VI. In addressing this second prong, \textit{Cort’s} four factor test (as interpreted by subsequent decisions) applies. \textsuperscript{232} The two \textit{Cort} factors that are relevant under the second prong include whether: (1) there is “any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one”; and (2) such a private cause of action is “consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.” \textsuperscript{233}

a. Explicit or Implicit Indications of Congressional Intent

The Third Circuit found “some indication” in the legislative history of the Civil Rights Restoration Act of 1987\textsuperscript{234} of congressional intent to create a private right of action under Section 602 and its implementing regulations “in satisfaction of the \textit{Cort} factors.” \textsuperscript{235} The Third Circuit rejected PADEP’s argument that the legislative history of the 1987 amendments was not relevant or binding. \textsuperscript{236}

\begin{thebibliography}{9}
\bibitem{229} 463 U.S. 582 (1983).
\bibitem{230} \textit{See Guardians}, 463 U.S. 582, 584; \textit{id.} at 642-45 (Stevens, J. joined by Brennan & Blackmun, JJ); \textit{id} at 623 (Marshall, J.); \textit{accord} Alexander v. Choate, 469 U.S. 287, 293-94 (1985); \textit{see also} Lazarus, \textit{supra} note 5, at 835; Colopy, \textit{supra} note 11, at 159.
\bibitem{231} \textit{See} 40 C.F.R. § 7.35 (1991); Lazarus, \textit{supra} note 5, at 835.
\bibitem{232} \textit{See Angelastro}, 764 F.2d 939, at 947.
\bibitem{234} \textit{See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988); infra notes 238, 243-252 and accompanying text.}
\end{thebibliography}
i. Evidence in 1987 Act Supporting a Private Right of Action

In an amicus brief, the United States argued that the implication of a private right of action under Section 602 and its implementing regulations is consistent with legislative intent because Congress acknowledged the existence of such a right when it amended Title VI in enacting the Civil Rights Restoration Act of 1987. The 1987 Act made several indirect references to private rights of action. First, in a House Report on an early version of the bill, the report stated that the “private right of action which allows a private individual or entity to provide the vehicle to test [certain] regulations in Title IX and their expanded meaning to their outermost limits.” Second, several legislators, including both supporters and opponents of the amendments, explicitly recognized a private right of action based on violations of either Title VI or Title IX regulations. Third, several witnesses at the hearings (from both sides of the debate) discussed the existence of Title VI disparate impact regulations and stated that private parties could enforce those standards by suing in federal court.

Furthermore, a memorandum by the Office of Management and Budget (OMB) stated that in OMB’s view “every licensed attorney would be empowered to file suit to enforce the ‘effects test’

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regulations of agencies, challenging practices in every aspect of every institution that receives any Federal assistance."

ii. The 1987 Act Had a Different Purpose

Unfortunately, the purpose of the 1987 Act was to repudiate Grove City College v. Bell, a 1984 Supreme Court decision that applied the intended beneficiary doctrine to Title IX of the Civil Rights Act by holding that federal funds received by a subunit of an educational institution did not subject the entire institution to the non-discriminatory demands of the statute. Under Grove City's intended beneficiary test, if a subunit did not receive federal funds, then the presumption was that participants in its activities were not the intended beneficiaries of the federal aid at issue. Grove City essentially restricted standing in Title VI cases to intended beneficiaries for two reasons: (1) the language of Title IX was expressly modeled after Title VI; and (2) the Supreme Court had frequently relied on the constructions of one in interpreting the other.

The 1987 Act rejected Grove City by broadly defining the term "institution-wide basis" to include "all of the operations" of the recipient. Thus, pursuant to the 1987 Act, if a state or local government agency program receives any federal assistance, Title VI governs the entire agency.

Hence, the purpose of the 1987 Act was to address the Supreme

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244. See id. at 573.
245. See Fisher, supra note 8, at 318.
246. See United States v. Alabama, 828 F.2d 1582 (11th Cir. 1987) (per curiam).
247. See supra notes 166-171 and accompanying text.
Court's decision in *Grove City*, not to ratify or create a private right of action under Section 602 and its implementing regulations. The official history of the Act explains that its amendments directly "address[] only the scope of coverage under Title VI, Title IX, section 504, and the Age Discrimination Act of recipients of federal financial assistance." Furthermore, the official history warns that statements of individual members of Congress "made during consideration of the earlier versions of this legislation in the 98th and 99th Congresses, as well as the current versions, merely reflect the views of individual members of Congress. Such statements are not relevant to the interpretation of S. 557." Accordingly, there is a strong argument that statements in the legislative history of the 1987 Civil Rights Restoration Act that support a private right of action under Title VI's Section 602 implementing regulations are not binding.

iii. The Third Circuit Holds the 1987 Act Provides Sufficient Evidence

In *Chester*, the Third Circuit rejected the argument that the legislative history of the 1987 amendments was not relevant or binding. The court emphasized that the Pennsylvania Department of Environmental Protection failed to "cite to any statements in the Congressional Record or elsewhere that would undermine those cited by the United States." Therefore, the court argued that the legislative history of the 1987 Civil Rights Restoration Act provided "some indication" and "uncontroverted" evidence of the relevant congressional intent necessary to imply a private right of action under the Title VI implementing regulations "in satisfaction of the Cort factors."

iv. The Third Circuit's Decision Fails to Meet the Supreme Court's Test for Legislative Intent

The Third Circuit's reliance on the 1987 Act to establish a private right of action under Section 602 does not meet the Supreme Court's current standard for inferring congressional intent.

254. Id.
Several Supreme Court decisions suggest that a private right of action may be implied by courts only if the original Congress enacting a statute intended to create a private right, or a subsequent Congress explicitly amended the statute to do so. In *Suter v. Artist M.*, the Supreme Court interpreted *Cort* to place the burden on the plaintiff to demonstrate Congress' intent to make a private remedy available. In *Central Bank v. First Interstate Bank*, the Court indicated that if a statute did not explicitly create a private right of action, then courts should examine whether the Congress that passed the original statute would have viewed the implication question. Additionally, courts and commentators treat subsequent legislative history as the least reliable form of legislative history. There are formalist arguments that a later Congress may not use legislative history to explain the meaning of a prior statute because it is a separate decisionmaking body, which has no constitutional role in explaining or interpreting that which a prior body has enacted. Some also contend that once Congress has acted, only the judiciary may interpret the meaning of law. There are also pragmatic concerns about how reliable subsequent congressional

255. See *Suter v. Artist M.*, 503 U.S. 347, 363 (1992) (*Cort* places the burden on plaintiff to demonstrate Congress' intent to make a private remedy available); *Stabile, supra* note 147, at 868-71 (arguing Supreme Court beginning in 1979 began shifting away from four-factor *Cort* test to "an exclusive reliance on legislative intent."); *supra* 187-190, 256-258 and *infra* notes 265-270 and accompanying text.


During recent years, the Supreme Court has become increasingly reluctant to consider post-enactment legislative history. For instance, the Supreme Court in *Public Employees Retirement System of Ohio v. Betts* declared that "[w]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute."264

However, if a subsequent statute clearly recognizes a private right of action or explicitly approves judicial decisions implying such a private remedy, then the Supreme Court will acknowledge that a private right of action exists under the statute. Justice Scalia has suggested that the Court should never imply a right of action if a statute does not contain such a remedy and, thus, that *Cannon* improperly inferred a right of action under Title IX.265 Because 1986 amendments to Title IX explicitly waived state's sovereign immunity to remedies both at law and equity, even Justice Scalia concedes that this subsequent legislation validated the *Cannon* Court's creation of private rights of action under Title IX.266

In deciding whether to imply a private right of action, "what must ultimately be determined is whether Congress intended to create the private remedy asserted."267 In discerning this intent, the Supreme Court examines the statute's text (and possibly its legislative history) to determine whether the *enacting* legislature intended to create a private right of action. It rarely considers what subsequent legislatures might believe is the statute's intent or purpose.268 The Supreme Court has become increasingly unwilling


263. See *Mackey v. Lanier Collections Agency & Serv.*, 486 U.S. 825, 838-40 (1988) (extensive discussion); Eskridge, *supra* note 259, at 83-85 (arguing Rehnquist Court has been more hostile to post-enactment legislative history than Burger Court); *but see Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (accepting congressional adoption, or acquiescence, by silence).


to defer to subsequent legislative signals of approval or to acquiesce to judicial decisions approving an implied cause of action. Instead, the Court examines the statute to ascertain the enacting legislature's intent.\(^\text{269}\)

In 1964, when it enacted Title VI, Congress probably never considered whether it wished to establish a private right to sue under Section 602 or under Section 601. Subsequent Congresses have not resolved the issue; there have been no explicit amendments to Section 602 to allow private suits. Hence, evidence in the 1987 Act that some members of Congress acquiesced in the creation of a private right of action under Section 602 cannot sustain a plaintiff's burden of demonstrating congressional intent under \textit{Suter} or \textit{Central Bank} because the 1987 Act was not directly concerned with that issue. The legislative history of the 1987 Act is only persuasive evidence of such congressional intent if a court applies the less demanding standard for implying private rights of action in \textit{Cannon} rather than the standard found in more recent cases.\(^\text{270}\)

It is possible that the Third Circuit deliberately avoided addressing recent cases applying a restrictive reading of \textit{Cort} because the Court was eager to recognize a private right to sue under Section 602. The Third Circuit could ignore \textit{Suter} or \textit{Central Bank} because \textit{Cort} remains good law despite the Supreme Court's more restrictive interpretation of the four-factor test in recent

\(^{269}\) See \textit{Central Bank v. First Interstate Bank}, 511 U.S. 164, 185-87 (1994) (rejecting argument that Congress's amendments to the securities laws subsequent to court decisions recognizing an implied private right of action without saying that such an action was not available are evidence that Congress has acquiesced in the judicial interpretation); \textit{Stabile}, supra note 147, at 892; \textit{see generally} \textit{Patterson v. McLean Credit Union}, 491 U.S. 164, 175 n.1 (1989) (arguing courts generally should not place "undue reliance on the concept of congressional ratification"); \textit{Eskridge}, supra note 259, at 84 (Supreme Court has become increasingly unwilling to defer to subsequent legislative signals of approval or acquiescence to judicial decisions).

\(^{270}\) \textit{See supra} notes 187-190, 255-258, 265-269 and accompanying text.
years. Because the Supreme Court grants certiorari in only a small percentage of cases, federal circuit courts have some discretion in how they broadly or narrowly they interpret the Court's decisions as long as they do not openly flout precedent.

b. A Private Cause of Action Is Consistent With the Legislative Scheme of Section 602 and the EPA's Administrative Scheme

The Third Circuit concluded that a private right of action under Section 602 is consistent with the EPA's administrative process. 271

The court rejected PADEP's argument that creating a private right of action would interfere with the EPA's administrative complaint process and funding termination procedures. 272

PADEP argued that Section 602 requires that the EPA act as a gatekeeper to enforcement because the provision requires the funding agency to file an investigative report and to negotiate with the recipient before terminating funding. 273 Thus, PADEP contended it would be inconsistent with the legislative scheme to allow a private suit under Section 602 to commence before the agency had the opportunity to conduct an investigation and negotiations. 274 Conversely, the United States in its amicus brief maintained that its Title VI regulations do not preclude a private right of action, will not interfere with the agency's enforcement program, and that the remedy will advance the statute's purposes in light of the agency's limited resources. 275

The Third Circuit concluded that a private lawsuit is not inconsistent with the legislative scheme in Section 602 because a suit provides the recipient with notice similar to that of the filing of an administrative complaint. 276 Additionally, the court may not award relief without conducting an extensive trial that achieves many of the same goals as an administrative investigation.


275. See EPA Amicus Brief, supra note 79, at 12-13.

Accordingly, a private suit is not inconsistent with the notice and investigatory requirements in Section 602.277 Furthermore, even if a lawsuit does not provide the same notice and investigatory protections as the administrative process established by Section 602 and its implementing regulations, the purpose those procedural requirements serve is not as significant in private lawsuits where the remedy does not include the authority to terminate funding.278

Additionally, a private right of action under the EPA's Title VI regulations would not interfere with the agency's enforcement of its administrative sanctions because a private party may not request that a court terminate funding to a discriminatory recipient.279 Hence, a private suit would not interfere with a federal agency's decision to terminate funding to a discriminatory recipient.280 Accordingly, the implication of private rights of action under Section 602 and its implementing regulations is consistent with the administrative processes authorized by Section 602's legislative scheme.281

4. A Private Right of Action Advances Title VI's Dual Purposes

Under the third prong, the Third Circuit agreed with the United States that creating a private right of action under Section 602 would advance the statute's dual purposes of: (1) preventing discriminatory uses of federal funds and (2) protecting individual rights.282 The United States in its amicus brief argued that the court should recognize a private right of action to enforce Section 602 and its implementing regulations because the government lacked the resources to achieve adequate enforcement of the EPA's regulations.283 Additionally, a private right of action is essential in

protecting individual rights because of the limitations of the EPA's administrative enforcement mechanisms (i.e., enforcement mechanisms which allow only for funding terminations as a remedy and do not guarantee a complainant the right to participate in the administrative process).\footnote{\textsuperscript{284}} Cannon emphasized that a private right of action would advance both purposes by deputizing private attorneys general to enforce either Title IX or Title VI.\footnote{\textsuperscript{285}} Hence, the Third Circuit found that a private right of action under Section 602 would advance Title VI's dual purposes.\footnote{\textsuperscript{286}}

5. \textit{Fordice} Does Not Bar Private Rights of Action

PADEP also argued that the Court's opinion in \textit{United States v. Fordice}\footnote{\textsuperscript{287}} precluded a private right of action under Section 602.\footnote{\textsuperscript{288}} In a footnote, \textit{Fordice} stated that "the reach of Title VI's protection extends no further than the Fourteenth Amendment."\footnote{\textsuperscript{289}} Because the Fourteenth Amendment requires proof of intentional discrimination standard, PADEP suggested that the EPA's disparate impact regulations are invalid, and thus, CRCQL could not file suit based on them.\footnote{\textsuperscript{290}} However, the Third Circuit observed that \textit{Fordice} did not bar suits based on proof of discriminatory intent.\footnote{\textsuperscript{291}} Rather, "the Court merely noted that the affirmative relief called for under the statute could not reach beyond that afforded by the Constitution itself."\footnote{\textsuperscript{292}} Furthermore, the Third Circuit acknowledged that \textit{Fordice}'s footnote could be an implicit attempt by the Court to hold that discriminatory effects regulations exceed the authority of the federal government under Section 602 or the Fourteenth Amendment, but thought it unlikely "that the Court would overturn \textit{Guardians} and \textit{Alexander} in such an oblique manner."\footnote{\textsuperscript{293}}

\footnote{\textsuperscript{284}} See \textit{supra} notes 117-133 and accompanying text.
\footnote{\textsuperscript{285}} See \textit{Cannon}, 441 U.S. at 704-08.
VIII. SUPREME COURT GRANTS CERTIORARI, BUT THEN FINDS THE CASE MOOT

On June 8, 1998, the Supreme Court granted the PADEP's petition for a writ of certiorari to review the Third Circuit's determination that a plaintiff may bring a private right of action under Section 602.

Additionally, the Court granted the Washington Legal Foundation's request to file an amicus brief that maintained that the EPA's discriminatory effects regulations are invalid under the Fourteenth Amendment's intentional discrimination standard.

On July 29, 1998, CRCQL filed a motion to dismiss the case as moot because PDEQ on April 30, 1998, before the Supreme Court granted the petitioner's petition for a writ of certiorari, revoked the underlying permit in the case after it had expired and the permit applicant had indicated that it no longer planned to site a facility in Chester. Conversely, the Commonwealth of Pennsylvania filed a brief in opposition arguing that the case remain justiciable despite the revocation of the permit because the plaintiffs' complaint originally argued that PADEP's permit review process violated the EPA's Title VI regulations. Alternatively,


296. See supra notes 287-290 and accompanying text [following PDEQ's argument that EPA's Section 602 disparate impact are invalid under United States v. Fordice, 505 U.S. 717 (1992)].


Pennsylvania argued that the Court should vacate the Third Circuit's decision to prevent the case from being cited as precedent in the future if the Court dismissed the case as moot. 299

On August 17, 1998, the Supreme Court granted both the CRCQL's petition to dismiss the case as moot and Pennsylvania's request to vacate the Third Circuit's decision. 300 As a result, environmental justice plaintiffs may not rely on the decision as precedent in the Third Circuit or even cite it as a valid judgment in other circuits.

The parties' predictions about how the Court would likely decide the case on the merits may have influenced their motions on the issues of mootness and vacatur. CRCQL may have filed a motion to dismiss the case as moot because it was afraid it would lose before the high Court. Conversely, Pennsylvania may have opposed that motion because it thought it would win a reversal. Statistically, the Court reverses over fifty percent of the cases in which it grants certiorari. 301 The fact that the Court granted certiorari in Chester might suggest that at least those four members of the Court necessary to grant a hearing disagreed with or were uncertain about the Third Circuit's decision. Yet some members of the Court who were inclined to agree with the Third Circuit might have believed that the Court should decide this issue. One may guess, but never know for certain how the Court would have decided the case had it not become moot.

It is not surprising that the Court concluded the case was moot after Pennsylvania revoked the expired permit and the permit applicant indicated it would not build a facility in Chester. In the absence of a specific controversy, the Court was unlikely to address whether PADEP's permitting process is discriminatory. Similarly, the Court's decision to vacate the Third Circuit's decision was consistent with its treatment of cases in which an independent


event (i.e., the revocation of the permit) makes a case moot.\textsuperscript{302} It is only where parties voluntarily make a case moot (e.g., by negotiating a settlement) that the Court allows the judgment in a mooted case to remain valid.\textsuperscript{303}

IX. \textit{Sandoval v. Hagan}

On June 3, 1998, just before the Supreme Court granted certiorari in \textit{Chester}, in \textit{Sandoval v. Hagan},\textsuperscript{304} the District Court for the Middle District of Alabama agreed with the Third Circuit regarding the existence of a private right of action under Section 602.\textsuperscript{305} The District Court applied the same three-factor test as the Third Circuit. Under the first prong, it concluded that Alexander clearly stated that agencies have authority under Section 602 to issue disparate impact regulations.\textsuperscript{306}

Under the second prong, the court concurred with the Third Circuit that the legislative history of the 1987 Act was sufficient evidence of a congressional intent to create an implied right of action under Section 602.\textsuperscript{307} Additionally, the court agreed with the Third Circuit that a private right of action would not interfere with the EPA's administrative scheme because a suit does not interfere with the notice provisions in the EPA's regulations and a plaintiff could not compel a funding termination decision.\textsuperscript{308}

Finally, under the third prong, the court agreed that a private right of action would advance the statute's dual purposes of preventing discrimination by fund recipients and protecting individuals from such discrimination.\textsuperscript{309} A private right would advance those purposes by deputizing private attorneys general to enforce Section 602 and its implementing regulations, as well as addressing the United States' admission that it lacks the resources

\begin{itemize}
  \item \textsuperscript{302} U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 22-29 (1994) (Supreme Court normally vacates moot cases, but not if petitioner voluntarily makes case moot through settlement); United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) (Supreme Court normally vacates moot cases).
  \item \textsuperscript{303} U.S. Bancorp Mortgage Co., 513 U.S. at 22-29 (Supreme Court normally vacates moot cases, but not if petitioner voluntarily makes case moot through settlement).
  \item \textsuperscript{304} 7 F. Supp. 2d 1234 (M.D. Ala. 1998).
  \item \textsuperscript{305} \textit{Id.} at 1256.
  \item \textsuperscript{306} \textit{Id.} at 1257.
  \item \textsuperscript{307} \textit{Id.} at 1258-59.
  \item \textsuperscript{308} \textit{Id.} at 1259-60.
  \item \textsuperscript{309} \textit{Id.} at 1261.
\end{itemize}
necessary to achieve adequate enforcement. Accordingly, the court held that plaintiffs may sue to enforce regulations under Section 602.

In addition, the court observed that "Title VI relationships are, essentially, contractual in nature." Hence, the plaintiffs could bring a private right of action as third-party beneficiaries of contracts between the federal government and the recipient, the Alabama Department of Public Safety.

On the merits, the court held that the Alabama Department of Public Safety had violated Title VI by promulgating a regulation that required all driver's license examinations to be administered in English.

While the Third Circuit's decision is no longer good law, other courts may still infer a private right of action under Section 602 by citing Sandoval as precedent. Additionally, Sandoval's third-party beneficiary contract theory provides yet another ground for private suits. Because it is only a decision by a single district court judge, Sandoval will probably not have the same positive influence for environmental justice advocates as the Third Circuit's decision would have had. Nonetheless, Sandoval suggests that plaintiffs will continue to raise challenges based on a private right of action under Section 602.

X. CONSISTENCY WITH SECTION 601 ARGUES FOR INFERRING A CONGRESSIONAL INTENT TO CREATE AN IMPLIED RIGHT OF ACTION UNDER SECTION 602 OF TITLE VI

Because Sections 601 and 602 are interrelated and serve the same statutory purposes, this article proposes that it would be

310. Id. at 1261.
311. Id. at 1262.
312. Id. at 1262.
313. Id. at 1262-64.
314. Id. at 1277-1316.
315. See generally Block, Enforcement of Title VI Compliance Agreements by Third Party Beneficiaries, 18 Harv. C.R.-C.L.L. Rev. 1, 31-51 (1983) (arguing a Title VI plaintiff may bring a private right of action as third-party beneficiary of contract between federal government and federal funding recipient); Robert Adelson, Note, Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Government Intent, 94 Yale L.J. 875 (1985) (arguing case law improperly confuses congressional intent in statute with intent of federal funding agency in contract and that Title VI plaintiff should be able to file a private right of action as third-party beneficiary of contract between federal government and federal funding recipient even if statute itself would not allow such a suit).
inconsistent to apply today's more stringent standard for inferring congressional intent in deciding whether a private right exists under Section 602 in light of the Supreme Court's application of a more lenient standard in recognizing a right under section 601. Although by the time the Supreme Court decided Guardians it had begun to apply a more restrictive approach emphasizing legislative intent (as suggested by Justice Powell's Cannon dissent) seven members of the Guardians Court agreed that private parties have an implied right of action under section 601 of Title VI. They reasoned that Cannon had settled the issue in inferring a private right of action under Title IX, which contains language identical to Title VI. Similarly, it would be inconsistent to apply today's more stringent standard for inferring congressional intent in deciding whether a private right exists under Section 602 when the Supreme Court has applied a more lenient standard in recognizing a private right under Section 601.

Under a test emphasizing legislative purpose, there is a much stronger case for implying a private right of action under Section 602 and its implementing regulations than if courts were to focus on whether there is specific evidence that Congress intended to establish private suits under Title VI. Neither Title IX nor Title VI include a specific provision authorizing plaintiffs to sue recipients of federal financial assistance, but in Cannon the majority emphasized Title IX and Title VI's dual purposes of preventing recipient discrimination and of protecting individual rights, rather than the explicit evidence of congressional intent in inferring that a private right of action exists under both statutes.

Courts should acknowledge that the evidence of legislative intent to create a private right of action is relatively weak, but should still conclude that it is proper to infer such a remedy. Both Sections 601 and 602 serve the same dual purposes of combating

316. See Guardians Ass'n v. Civil Service Comm'n of N.Y., 463 U.S. 582, 594-95; id. at 612-15 (O'Connor, J.); id. at 635 (Stevens, J., joined by Brennan & Blackmun, JJ.); id. at 615 (Marshall, J.) but see id. at 608-10 (Powell, J., & Burger, C.J.) (arguing Cannon was incorrectly decided and that there should be no implied rights of action under either Titles VI or IX). In Guardians, Justices Powell and Burger's dissent argued that private parties should not have an implied right of action under section 601 of Title VI because Cannon was incorrectly decided and there should not be such a private right under Title IX either. See id. at 608-10 (Powell, J., & Burger, C.J.) (arguing Cannon was incorrectly decided and that there should be no implied rights of action under either Titles VI or IX).

317. See Cannon, 441 U.S. 677 at 704-07 (1979); supra and infra notes 158-189 and accompanying text.
discrimination by fund recipients and of protecting individual rights.\(^{318}\) If serving these dual purposes was sufficient in *Cannon* and *Guardians* to infer that Congress intended to create a private right of action under Titles IX and VI, it should be sufficient to infer the same intent under Section 602 of Title VI.

While deputizing private attorneys general under Section 602 would help combat recipient discrimination,\(^{319}\) there is an even stronger argument that recognizing a private right of action under Section 602 is essential to protect individuals from discriminatory recipient behavior because the EPA’s Title VI regulations contain the two major limitations that the *Cannon* Court used to justify creating an implied right of action: (1) a complainant may not directly participate in the administrative process; and (2) a complainant is eligible only for the indirect remedy of terminated funding to the recipient.\(^ {320}\)

Allowing a private right of action under Title VI’s implementing regulations would advance Title VI’s interest in protecting individual rights without interfering with its interest in terminating federal funding to discriminatory recipients. A private party may not request that a court terminate funding to a discriminatory recipient.\(^ {321}\) Accordingly, the funding agency retains full control over when to terminate funding to a discriminatory recipient.\(^ {322}\) Additionally, if relief for unintentional discrimination is limited to declaratory or injunctive relief, a private suit would in no way “dissuade potential nondiscriminating recipients from participating in federal programs, thereby hindering the objectives of the funding statutes.”\(^ {323}\) Hence, in light of the limited relief available to plaintiffs under *Guardians*, there is no real concern for a conflict between administrative enforcement of Title VI’s implementing regulations and a private right of action under those same regulations.

\(^{318}\) *Id.*

\(^{319}\) *See supra* notes 282-286 and accompanying text.

\(^{320}\) *See 40 C.F.R. § 7; Cannon*, 441 U.S. 667, at 707 n.41; Colopy, *supra* note 11, at 157 n.142, 178-80; *supra* notes 172-180, 282-286 and accompanying text.


\(^{323}\) *Guardians*, 463 U.S. 582, at 601-02.
The EPA has strongly argued that its Title VI regulations: (1) do not preclude a private right of action; (2) will not interfere with the agency's enforcement program; and (3) that this remedy will, in fact, advance the statute's purposes in light of the agency's limited resources.\(^{324}\)

In both *Borak* and *Cannon*, the Supreme Court gave considerable weight to whether the relevant agency believed that private remedies would interfere with its administrative enforcement scheme.\(^{325}\) The EPA's regulations establish administrative procedures that individuals "may" invoke.\(^{326}\) The EPA interprets the use of the word "may" in its Title VI regulations as indicating that the administrative process is not the sole means to enforce its regulations and, accordingly, that its regulations do not preclude private enforcement of its discriminatory effects regulations.\(^{327}\) Courts normally respect an agency's interpretation of its own regulations unless its interpretation is "plainly erroneous" or "inconsistent" with the regulation.\(^{328}\) The EPA's interpretation that private suits are consistent with its Section 602 regulations is plausible because these suits would not interfere with agency investigations or fund termination decisions. Furthermore, the agency has stated that it lacks the resources to pursue all Title VI complaints and, therefore, that private rights of action are needed to vindicate many individual Title VI violations that are not pervasive enough to justify termination of the EPA's funding to the recipient.\(^{329}\) Accordingly, an implied right of action under Title VI regulations will serve the statute's purpose of protecting individual rights without interfering with the EPA's administrative process.

Although most courts do not require exhaustion of administrative remedies before initiating a private right of action,\(^{330}\)

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\(^{325}\) See *Cannon*, 441 U.S. 667, at 706-07; *supra* notes 158, 164 and accompanying text.

\(^{326}\) See 40 C.F.R. § 7.120(a); EPA Amicus Brief, *supra* note 79, at 12.

\(^{327}\) See EPA Amicus Brief, *supra* note 79, at 12-13 n.4.


\(^{329}\) See *Polaroid*, 862 F.2d 987, at 997; EPA Amicus Brief, *supra* note 79, at 11-14.

\(^{330}\) See *Cannon*, 441 U.S. 667, 708 n.41 ("[W]e are not persuaded that individual suits are inappropriate in advance of exhaustion of administrative remedies."); Neighborhood Action Coalition v. City of Canton, 882 F.2d 1012, 1015 (6th Cir. 1989) ("[C]ourts squarely hold that litigants need not exhaust their administrative remedies prior to bringing a Title VI claim in federal court."); Chowdbury v. Reading Hosp. & Medical Ctr., 677 F.3d 317, 322-23
there is more disagreement about whether plaintiffs can entirely by-pass the administrative process or must at least file an administrative complaint.\(^{331}\) Even if a plaintiff is first required to file an administrative complaint, the limitations of the administrative process (in terms of both remedies and participation) argue in favor of allowing private parties to file suit to enforce an agency's disparate impact regulations under Section 602 of Title VI.

In addition, private suits are the only means to redress individual harms when recipients retaliate against "whistle blower" employees. The EPA's Title VI regulations prohibit retaliation by a recipient against an individual who files a complaint, but that prohibition does not appear in the statute's text.\(^{332}\) If a victim of retaliation cannot file a suit and must pursue the administrative process, there is no guarantee that a voluntary compliance agreement between the funding agency and recipient must address or remedy that harm.\(^{333}\) Because the administrative process does not provide adequate protections against retaliation by a recipient against a complainant, several courts have allowed private individuals to file suit in federal court to enforce anti-retaliation provisions in agency Title VI or Title IX regulations.\(^{334}\)

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\(^{331}\) See Cole, supra note 110, at 322-23; Colopy, supra note 11, at 158 n.144; Compare Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1380-82 (10th Cir. 1981) (plaintiffs can sue in federal court without pursuing administrative remedies) and Camenisch v. University of Tex., 616 F.2d 127, 135 (5th Cir. 1980) (same) with Scelsa v. City Univ. of N.Y., 806 F. Supp. 1126, 1138-39 (S.D.N.Y. 1992) (While plaintiffs need not delay suit until administrative remedies are completely exhausted, they must initiate a federal agency's Title VI administrative procedures before commencing a lawsuit against the recipient, unless seeking relief would be futile).

\(^{332}\) See 40 C.F.R. § 7.100; EPA Amicus Brief, supra note 79, at 14 n.5.


\(^{334}\) See, e.g., Lowrey v. Texas A & M Univ. Syst., 117 F.3d 242, 247-54 (5th Cir. 1997) (plaintiff stated private cause of action for retaliation in violation of Title IX); Preston v. Virginia, 31 F.3d 203, 206 n.2 (4th Cir. 1994) (allowing retaliation claim under Title IX, but affirming district court decision that plaintiff had failed to prove retaliation); Topol v. Trustees of Univ. of Pa., 160 F.R.D. 474, 475 (E.D. Pa. 1995) (permitting plaintiff to amend complaint to add retaliation claim under Title IX); Clay v. Board of Trustees of Neosho Community College, 905 F.Supp. 1488, 1493-95 (D. Kan. 1995) (allowing retaliation claim under Title IX); Davis v. Halpern, 768 F. Supp. 968, 984-87 (E.D.N.Y. 1991) (denying summary judgment against plaintiff's retaliation claims under Title VI); but see Holt v. Lewis,
courts ought to authorize private rights of action based upon Title VI regulations. However, if retaliation suits based on the EPA's Title VI regulations are appropriate, then courts should allow a private right of action pursuant to Section 602 for all plaintiffs based on the existence of the same problem that complainants do not have a right to participate in the administrative process or to obtain a remedy for individual harms caused them by the recipient.\footnote{335}{See supra notes 125, 130 and accompanying text.}

Theoretically, there is the possibility that Congress intended only to establish private rights of action to remedy acts of intentional discrimination under Section 601, but not actions that have unintended and unjustified disparate impacts in violation of agency regulations under Section 602. There is no real evidence that Congress intended to limit private rights of action in Title VI to acts of intentional discrimination under Section 601. The costs to minorities in not considering disproportionate impact far outweigh the risks involved in explicitly considering race.\footnote{336}{See generally Lawrence, supra note 39, at 320 n.12.; see also Colopy, supra note 11, at 146.} Under the standards of Cannon and Guardians for inferring congressional intent, the fact that a private right of action will protect Title VI's dual purposes of combating discrimination by fund recipients and protecting individual rights should be enough to imply that Congress intended to infer a private right of action under Title VI's Section 602 implementing regulations.\footnote{337}{See Cannon, 441 U.S. 677, 704-07; supra notes 172-180, 282-286, 318-324 and accompanying text.}

XI. CONCLUSION

The question of whether there is an implied private right of action under Section 602's implementing regulations would be much easier and less important if Guardians had not established the high standard of proof of intentional discrimination under Section 601 of Title VI, and an disparate impact standard under Section 602. Because Guardians's requirement that a plaintiff, under Section 601, must introduce evidence of intentional discrimination was clearly influenced by the Court's decisions

\footnote{955 F. Supp. 1385, 1388-89 (N.D. Ala. 1995) (holding Title IX does not provide for a private cause of action for retaliation claims because there is no express language in statute creating such a remedy and expressly rejecting analysis in Preston).}
applying that standard of proof under the Equal Protection Clause, the Court will likely continue to require proof of intent under Section 601 as long as it continues to do so under the Equal Protection Clause. There are strong arguments that the Court's intent standard under the Equal Protection Clause makes it too difficult for plaintiffs to prove that government has engaged in discriminatory actions. However, the Court is unlikely to modify that restrictive standard of proof in the near future. The next best solution is to allow an implied private right of action for discriminatory effects discrimination under Title VI's Section 602 implementing regulations.

In Chester, the Third Circuit cited Cart, but did not discuss more recent cases that have applied Cart more restrictively. Chester was also problematic because it relied on weak evidence in the 1987 Civil Rights Restoration Act to find that Congress intended to establish a private right of action under Section 602 of Title VI. Perhaps this failure to cite more recent cases was an implicit acknowledgment by the Third Circuit that its conclusion that the 1987 Act provided sufficient evidence to infer a private cause of action would not stand up under those cases. Additionally, because the 1987 Civil Rights Restoration Act was not directly concerned with the issue of private rights of action under either Section 601 or 602 of Title VI, the various comments made regarding private rights of action under Title VI by members of Congress, witnesses, or executive office staff cannot carry much weight.

However, to treat Sections 601 and 602 consistently, it would be incompatible to apply today's more stringent standard for inferring congressional intent in deciding whether a private right exists under Section 602 in light of the Supreme Court's application of a more lenient standard in recognizing a right under Section 601. A private right of action under section 602 and its implementing regulations would serve Title VI's dual purposes of combating discrimination by fund recipients and of protecting individual rights. A lawsuit seeking prospective relief under Section 602 could protect both purposes without interfering with any

339. See supra notes 75-77 and accompanying text; cf. supra notes 287-293.
340. See supra notes 255-270 and accompanying text.
important aspects of the administrative process for investigating complaints or penalizing a discriminating recipient.\textsuperscript{342}

Furthermore, an implied right of action under the regulations is the only effective means to achieve Title VI's second interest in protecting individual rights. The administrative process does not guarantee individual participation nor does its remedies protect individual rights.\textsuperscript{343} Additionally, a private right of action under Section 602 and its implementing regulations is the only means to address the individual harms caused when a funding recipient engages in retaliatory behavior.\textsuperscript{344}

The Supreme Court recognized the importance of the existence of a private right of action under Section 602 when it granted certiorari in \textit{Chester}. However, the Court followed its normal practice in vacating a case that had become moot for reasons beyond the control of the petitioner, PADEP, because the applicant no longer wished to pursue building a waste facility in Chester Township.\textsuperscript{345} As a result, environmental justice advocates have lost the Third Circuit's decision as precedent. However, they may still rely on its reasoning, and cite \textit{Sandoval}. Additionally, \textit{Sandoval} provides a third party beneficiary contract rationale for implying a private right of action under section 602 and its implementing regulations.\textsuperscript{346}

It is likely that environmental justice plaintiffs will continue to file claims based on a private right of action under Section 602.\textsuperscript{347} Ultimately, courts will have to address this issue. Because they have

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\textsuperscript{342} See supra notes 271-281, 321-331 and accompanying text.
\textsuperscript{343} See \textit{Cannon}, 441 U.S. 677, 704-07; supra notes 176-180, 284-286, 320, 335 and accompanying text.
\textsuperscript{344} See supra notes 332-335 and accompanying text.
\textsuperscript{345} See supra notes 320-337 and accompanying text.
\textsuperscript{346} See supra notes 312-313 and accompanying text.
\textsuperscript{347} See Powell v. Ridge, 1998 WL 726653 § 11 (E.D. Pa. 1998) (Slip Copy) (citing \textit{Chester} for proposition that Section 602 of Title VI creates private right of action without mentioning Supreme Court's vacatur of decision); Cureton v. National Collegiate Athletic Ass'n, 1998 WL § 1726653 (E.D. Pa. 1998) (denying defendant's motion to amend order to certify question for immediate appeal because Supreme Court's granting of certiorari in \textit{Chester} did not raise substantial doubts about numerous circuit decisions recognizing private rights of action because one can only speculate about how Court would have decided case if it had not vacated the Third Circuit's judgment); The South Bronx Coalition for Clean Air, Inc. v. Conroy, 20 F.Supp.2d 565, 572 (S.D.N.Y. 1998) (observing that it is uncertain whether private right of action exists under section 602 after Supreme Court vacated \textit{Chester} and dismissing claim because plaintiffs allegations are insufficient to establish a prima facie case of disparate impact discrimination under Title VI); Sturges, supra note 23, at AA-1.
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already recognized a private cause of action under Section 601, courts ought to imply the same right under Section 602 because that provision serves the same dual goals of preventing recipient discrimination and of protecting individual rights. By allowing proof based on unjustified disparate impacts, an implied private right of action under Section 602 and its implementing regulations will make it much easier for environmental justice plaintiffs to challenge state permit decisions.