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Picking up the Pieces after Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact

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Picking up the Pieces after *Alexander v. Sandoval*: Resurrecting a Private Cause of Action for Disparate Impact

INTRODUCTION

In *Alexander v. Sandoval*,[1] the Supreme Court broke sharply with thirty years of tradition,[2] holding that section 602 of the Civil Rights Act of 1964 implies no private right of action.[3] Prior to *Sandoval*, private individuals enforced federal regulations enacted

1. 532 U.S. 275 (2001).

2. *The Supreme Court, 2000 Term: Leading Cases*, 115 HARV. L. REV. 306, 498 (2001).

3. *Sandoval*, 532 U.S. at 285–86. The Civil Rights Act of 1964 includes several different sections, each referred to as Title VI, Title VII, etc. *See, e.g.*, 42 U.S.C. § 2000d (2000) (Title VI); *id.* § 2000e (Title VII). Title VI correlates to sections 601 and 602. Likewise, Title VII correlates to sections 701, 702, etc. Each title addresses a different subject area. Title VI outlines the prohibitions against racial discrimination for federal fund recipients. Title VII establishes the laws regarding employment discrimination. This Comment will use "Title VI" to refer to sections 601 and 602 generally, and will use "section 601" and "section 602" to refer to the specific sections of the Act. Section 601 flatly prohibits racial discrimination in federally funded programs. Section 602 authorizes federal agencies to enact regulations to further this prohibition.

pursuant to section 602 by bringing private causes of action.[4] Numerous federal agencies have enacted regulations that prohibit policies and actions that have racially disparate effects.[5] Plaintiffs sued under these regulations to combat problems such as environmental racism, racial inequalities in education, and overall general barriers that limit the access and participation of racial minorities in public programs. *Sandoval* has closed a door that was once essential to ensuring the enforcement of civil rights legislation and providing equal opportunity to people of all races and ethnicities.[6] Without an avenue through which individuals can enforce section 602 privately, civil rights may take a step backward.[7] Now, plaintiffs must be creative and find new ways to achieve the

4. *Sandoval*, 532 U.S. at 285–86.

5. *See, e.g.*, 12 C.F.R. § 528.9(b) (2002) (prohibiting discriminatory effects in housing loans); 24 C.F.R. § 6.4(a)(1)(ix) (2002) (prohibiting discriminatory effects in housing); 34 C.F.R. § 100.3(2) (2002) (prohibiting discriminatory effects in determining the types of services or benefits that will be provided under a program or activity receiving federal funding); 40 C.F.R. § 7.30 (2001) (prohibiting discriminatory effects in programs that receive funds from the Environmental Protection Agency).

6. Carolyn Magnuson, *'Disparate-Impact' Suits May Survive After High Court Ruling on Civil Rights Act*, TRIAL, July 2001, at 17, 96.

7. Those federal agencies with insufficient staff may be unable to devote the resources necessary to enforce the civil rights violations that were once handled by private parties. *See, e.g.*, Julie Zwibelman, *Broadening the Scope of School Finance and Resource Compatibility Litigation*, 36 HARV. C.R.-C.L. L. REV. 527, 554 (2001) (stating that the Department of Justice will not have the capacity to bring suits against all violators). Individuals who seek redress for violations of section 602 regulations may now be forced to file administrative complaints with federal agencies rather than going to court, which may limit some avenues of redress. *See, e.g.*, Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 409 (2001) (exploring the benefits of combining the relevant strengths of disability law and Title VI of the Civil Rights Act of 1964 to fight systemic discriminatory problems in special education of minority students). For political and administrative reasons, agencies are sometimes limited in their capacity to mandate redress for aggrieved plaintiffs. The only penalty an agency can impose on a federal fund recipient is termination of funds. But the all or nothing nature of such a penalty makes it an unattractive option. If an agency terminated funds because of a single violation, it would at the same time be harming numerous other innocent students because less funds would then be available for their education. This is not to suggest that the threat of such a measure is not effective in persuading compliance with Title VI, but as a practical matter, it will be difficult for an agency to completely withhold funds from a recipient if the recipient fails to comply with Title VI. For instance, the Department of Education has only terminated funds on two occasions in the past two decades. *See In re* W. Palm Beach Beauty & Barber Sch., No. 97-107-ST, 1997 WL 1048281, at *4 (E.D.O.H.A. Oct. 23, 1997); *In re* Unified Sch. Dist., No. 89-33-CR (89-IX-3), 1992 WL 220791, at *1 (E.D.O.H.A. Apr. 30, 1992). Further, the decreased enforcement that may result from inadequate federal resources and the absence of the threat of litigation may cause violations to increase and push the problem toward a vicious cycle.

same ends that implied causes of action under section 602 provided for the past thirty years. This Comment proposes three new theories by which a plaintiff might bring a private cause of action to enforce regulations enacted under section 602.

First, this Comment will analyze the Court's decision in *Alexander v. Sandoval*, determining the scope of the decision and how it squares with other relevant Supreme Court decisions and Circuit Court interpretations of this precedent. Next, this Comment will discuss three options by which individuals may enforce section 602 regulations through a private cause of action. The most widely discussed theory, but one that recently has fallen into disfavor, is that § 1983 would provide a cause of action regardless of whether Title VI creates a cause of action because § 1983 is meant to enforce all federal laws that protect individual rights. If Title VI regulations are interpreted as "laws," section 602 regulations create the private rights and § 1983 creates the cause of action to enforce them.[8] A second, and yet undiscussed and untried theory, draws upon Supreme Court precedent from the Title IX context. The theory is that deliberate indifference toward violations of Title VI regulations would support a cause of action. The Supreme Court already has established that deliberate indifference toward unintentional violations of Title IX establishes the basis for private causes of action in sexual harassment cases,[9] and the underlying reasoning is also applicable to Title VI regulations.[10] Discussing a third theory, this Comment shows how fact patterns that would give rise to a deliberate indifference claim would also establish an intentional discrimination claim if framed correctly.[11] Thus, even if the Supreme Court refused to explicitly extend deliberate indifference to cover disparate impact regulations, plaintiffs still might be able to prove intentional discrimination under traditional intent standards.

I. ANALYSIS OF *SANDOVAL*

The plaintiff in *Sandoval* challenged an Alabama policy of only administering drivers' license tests in English.[12] The plaintiff claimed

8. *Infra* notes 48–147 and accompanying text. The accompanying text, however, reveals recent Supreme Court developments that are very damaging to this theory. *See* Gonzaga Univ. v. Doe, 122 S. Ct. 2268 (2002).

9. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 639–49 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

10. *Infra* notes 148–218 and accompanying text.

11. *Infra* notes 219–42 and accompanying text.

12. Alexander v. Sandoval, 532 U.S. 275, 278–79 (2001).

that the law had a disparate impact on certain non-English ethnicities.[13] The Supreme Court, however, found that no implied private cause of action existed to enforce Title VI regulations.[14] The Court reached its conclusion by conceptualizing sections 601 and 602 of the Civil Rights Act of 1964 as two distinct entities.[15] The Court concluded that section 601 creates individual rights with the language "no person ... shall ... be subjected to discrimination ...."[16] According to the Supreme Court, this language creates a private right of action, but it only prohibits intentional discrimination. Similarly, the language of section 602 authorizes federal agencies to enact regulations to further the purposes of section 601 and ensure that recipients of federal funds do not engage in discrimination.[17] However, the Court found that section 602 focuses neither on the person regulated nor the persons protected; rather, it focuses on the agencies.[18] Thus, according to the Court, nothing in section 602 confers any private rights beyond those created in section 601.[19] Agencies may use section 602 to further the conferred rights of section 601, but section 602 cannot create new private rights that are not contained in section 601, nor can it create an additional private cause of action.[20] Because section 601 only prohibits intentional discrimination and section 602 only furthers rights granted in section 601, section 602 cannot create an independent private cause of action

13. *See id.*

14. The test for finding an implied cause of action is relatively high. Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321, 323 (2001). In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court considered four factors to determine whether an implied private right of action exists under a statute: (1) whether the plaintiff is one of the class for whose benefit the statute was enacted; (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) whether it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiffs; and (4) whether the cause of action is one traditionally relegated to state law. *Id.* at 78. The *Sandoval* Court applied the *Cort* test and found that no implied private right of action exists under section 602. *Sandoval*, 532 U.S. at 287–91.

15. *Sandoval*, 532 U.S. at 285–86. Section 601 of Title VI prohibits discrimination on the basis of race, color, or national origin in federally assisted programs. 42 U.S.C. § 2000d (2000). Section 602 authorizes the federal agencies providing funding to such programs to effectuate the provisions of section 601. *Id.* § 2000d-1. Section 601 creates the implied cause of action by expressly prohibiting intentional discrimination. Thus, although disparate impacts are discrimination, they are not always intentional, and under *Sandoval*, seemingly are not subject to an implied private cause of action. *Id.* at 293.

16. § 2000d.

17. *Sandoval*, 532 U.S. at 289.

18. *Id.* at 289–90.

19. *Id.* at 289.

20. *Id.* at 291–92.

for disparate impact.[21] In sum, in so far as section 602 regulations proscribe activities permitted by section 601, they are not enforceable by an implied private right of action.[22]

Many federal agencies have enacted regulations that prohibit activities that have the effect of discriminating or result in disparate impact.[23] In *Sandoval*, the Court did not address whether federal agencies can properly enact such regulations. Rather, it merely assumed that such power exists.[24] The Court did, however, explicitly acknowledge that many regulations enacted pursuant to section 602 prohibit activities permissible under section 601, namely neutral policies with disparate effects.[25] Thus, under the Court's reasoning, "discrimination" means intentional discrimination in section 601 but may include unintentional discrimination in section 602.[26] Despite this apparent inconsistency, the Court only addressed whether an implied private right of action exists to enforce the regulations promulgated under section 602.[27]

The remaining issue not directly addressed in *Sandoval* is how the regulations enacted under section 602 relate to section 601 when they proscribe activities that are also impermissible under section 601. *Sandoval*, read narrowly and only for its holding, does not necessarily reach those regulations. *Sandoval* states that the purpose of section 602 is to effectuate the "rights already created by [section] 601."[28] This implementation by federal agencies is particularly necessary in light of the inherent ambiguity of section 601.[29] The language of

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21. *Id.* at 289.

22. Other plaintiffs could be left in similar situations. For instance, non-English speaking or limited English proficiency students could face serious problems from the disparate effect of schools that do not choose to accommodate them with bilingual education programs. For a discussion of how racial minorities may suffer in education, see *infra* pages 388–89.

23. *See supra* note 5 and accompanying text.

24. *Sandoval*, 532 U.S. at 281–82.

25. *Id.*

26. The Court recognizes this inconsistency in a footnote, writing, "[H]ow strange it is to say that disparate-impact regulations are 'inspired by, at the service of, and inseparably intertwined with' § 601 . . . when § 601 permits the very behavior that the regulations forbid." *Id.* at 286 n.6.

27. *Id.* at 279.

28. *Id.* at 289.

29. As stated by the Ninth Circuit in *Monteiro v. Tempe Union High School District*, 158 F.3d 1022 (9th Cir. 1998), "[t]he term 'discrimination' as used in Title VI is, of course, notoriously ambiguous, generating more than thirty years of litigation over its precise meaning." In *Guardians Ass'n v. Civil Service Commission of New York*, 463 U.S. 582 (1983), Justice White wrote, "The language of Title VI on its face is ambiguous; the word 'discrimination' is inherently so." *Id.* at 592.

section 601 establishes a general right and principle and then leaves its effectuation to federal agencies. Because agencies such as the Department of Education are charged with enforcing Title VI, their interpretation of sections 601 and 602 should be given great deference so long as it is reasonable and does not conflict with congressional intent.[30] The Ninth Circuit relied on this principle in *Monteiro v. Tempe Union High School District*,[31] extending the rule from *Chevron U.S.A. Inc. v. Natural Resources Defense Council*[32] that affords deference to agency interpretations.[33] Prior to *Monteiro*, no court had held that student-on-student racial harassment was a Title VI violation. Instead, the court deferred to the Department of Education, which had previously warned districts that in certain

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Discrimination can encompass or exclude various activities, including animus, disparate impact, racial goals, balancing, quotas, stereotypes, and improper use of discretion. Whether one or more of these types of discrimination is included in the Supreme Court's definition of "discrimination" has changed through the years. *See generally* David Crump, *Evidence, Race, Intent, and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases*, 27 HOFSTRA L. REV. 285 (1998) (providing a history of discrimination jurisprudence); Christopher E. Smith, *Race-ing into the Twenty-First Century: The Supreme Court and the (E)quality of Justice*, 28 U. TOL. L. REV. 279 (1997) (describing the changes in the Supreme Court's notions of discrimination). Further complicating the issue is the fact that four different major federal laws prohibit racial discrimination: the Fourteenth Amendment, U.S. CONST. amend. XIV; Civil Rights Acts of 1866, 42 U.S.C. § 1983 (2000); Title VI of the Civil Rights Act of 1964, § 2000d; and Title VII of the Civil Rights Act of 1964, § 2000e. The meaning of discrimination may vary within each law. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) (finding that plaintiffs suing under Title VII of the Civil Rights Act of 1964 must demonstrate that an application of a particular employment practice created disparate impact, and when the employer claims the employment practice is justified, the dispositive issue is whether the challenged practice serves the legitimate employment goals of the employer); *Guardians*, 463 U.S. at 593 (stating that Title VI of the Civil Rights Act of 1964 reaches unintentional, disparate-impact discrimination as well as deliberate racial discrimination); Washington v. Davis, 426 U.S. 229, 247–48 (1976) (holding that standards applicable to equal employment opportunity cases should not have been applied in resolving the issue of whether a qualifying test administered to applicants for police officers violated the due process clause of the Fifth Amendment). For a while, section 601 of Title VI was thought to define discrimination differently than the Fourteenth Amendment, but in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), the Court held that the two were co-extensive. *Id.* at 281–87. Regulations under section 602, however, define a broader range of activities as falling within the meaning of discrimination, including discriminatory effects. *See, e.g.*, 34 C.F.R. § 100.3(2)(b) (2001) (prohibiting discriminatory effects in education). It was unclear until *Sandoval* whether the Court recognized section 602's definition as being privately actionable. The ultimate problem with defining discrimination may simply be that it occurs within an "indefinite variety of contexts." Crump, *supra*, at 288 n.11.

30. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984).

31. 158 F.3d 1022 (9th Cir. 1998).

32. 467 U.S. 837 (1984).

33. *Id.* at 842–45.

circumstances they could be liable for such harassment under non-discrimination laws.[34] The Supreme Court has never explicitly stated that the reasoning of *Chevron* extends to agency regulations and guidelines such as those of the Department of Education regulations, but it is implicit and almost a prerequisite to the Court's holdings in two key cases, *Gebser v. Lago Vista Independent School District*[35] and *Davis v. Monroe County Board of Education.*[36] In those cases, the issue was whether sexual harassment was discrimination under Title IX and whether a federal fund recipient could be held liable for sexual harassment committed by third parties.

Gebser was the first Supreme Court case to hold that a school could be held liable for sexual harassment not directly committed by the institution or its officers.[37] *Gebser* established standards by which a school can be held liable for sexual harassment of which it has knowledge and the authority to correct.[38] A crucial issue in *Gebser* was what circumstances are deemed to give the school knowledge or place it on notice of inappropriate behavior.[39] In *Davis*, the Court further suggested what constitutes notice by favorably citing Office for Civil Rights ("OCR") guidelines that informed school districts that they might be liable for certain types of behavior.[40] In this area of the law, sexual harassment in the workplace already was established as discrimination,[41] but the importance of the OCR guidelines is that they further delineate the boundaries of Title IX and establish what is or is not a Title IX violation by informing schools that things such as sexual harassment in education are also prohibited. Implicit in the Court's holding was that OCR regulations that include sexual harassment within the ambit of Title IX discrimination do so correctly, and thus notify schools that sexual

34. *Monteiro*, 158 F.3d at 1032–33 ("We are aware of no reported decision addressing the circumstances under which a school district's failure to respond to racial harassment ... by other students constitutes a violation of Title VI. However, the Department of Education in 1994 interpreted Title VI as prohibiting student-to-student racial harassment ....").

35. 524 U.S. 274 (1998).

36. 526 U.S. 629 (1999).

37. *Gebser*, 524 U.S. at 290–92.

38. *Id.* at 288–89.

39. *Id.*

40. *Davis*, 526 U.S. at 647–48 (citing Department of Education, Office for Civil Rights, SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, 62 Fed. Reg. 12034, 12039–40 (Mar. 13, 1997)).

41. *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 63–69 (1986).

harassment is a Title IX violation.[42] Working from this framework, the only real question at issue was whether this harassment would sustain a private right of action.[43] Again the Court referred to OCR guidelines as a means of making districts aware that they may incur liability.[44] These cases suggest, in fact, that an agency's regulatory authority holds sway in defining discrimination and placing recipients on notice. *Sandoval* does not necessarily undermine this principle. Its holding was merely that Title VI regulations cannot create a private right of action to enforce rights that are outside the scope of section 601.[45]

Although *Sandoval* does not completely undermine section 602 regulations, it does cloud their legal authority in the courts. Now that an implied private cause of action does not exist to enforce section 602 regulations,[46] the meaning of these regulations is far from clear.[47] Only further litigation and court decisions, or new legislation by Congress, will settle the matter. Until the Supreme Court or Congress speaks further on this issue, plaintiffs should bring claims that build on causes of action previously established by the Court in relevant contexts. Thus, the remainder of this Comment discusses what avenues still may remain for plaintiffs after *Sandoval.*

II. ENFORCING TITLE VI REGULATIONS THROUGH 42 U.S.C. § 1983

Prior to *Sandoval,* several circuits had permitted individuals to enforce Title VI regulations through private rights of action by asserting that regulations create "rights" within the meaning of 42

42. *Sandoval* did not alter federal agencies' ability to enact regulations and enforce them. Thus, agencies such as OCR can continue to define discrimination for themselves and impose these definitions on recipients. This power and active stance has been important in the sexual harassment context and can also play a similar role in other areas. For any possibility of continued private causes of action for disparate impacts to exist, federal agencies such as OCR must publicize interpretations of what constitutes Title VI violations and make it clear that some disparate impacts continue to be impermissible. Without such interpretations, those guilty of racially disparate impacts will have no clear notice that their actions are Title VI violations. Thus, plaintiffs will have greater difficulty asserting private causes of action.

43. *Davis,* 526 U.S. at 633; *Gebser,* 524 U.S. at 277.

44. 526 U.S. at 647–48.

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

46. *Id.*

47. Whether section 602 regulations have force of law, fall within the meaning of § 1983, further define the term "discrimination," can be used to support different causes of action, or are nothing more than the contract conditions for the receipt of federal funds that can only be enforced by federal agencies, is uncertain. *Id.* at 288–89.

U.S.C. § 1983.[48] Section 1983 provides a private right of action for individuals who have been deprived of a right under the federal constitution or laws.[49]

Thus, after *Sandoval*, many civil rights advocates looked to § 1983 with hope that it could sustain causes of action for Title VI regulation violations.[50] Shortly before the publication of this Comment, however, the Supreme Court in *Gonzaga University v. Doe*[51] delivered a decision in regard to § 1983 that greatly damages these hopes. The case involved a plaintiff's attempt to assert a Family Educational Rights and Privacy Act (FERPA) claim under § 1983.[52] One could argue that *Gonzaga* is not directly controlling on a Title VI inquiry. In fact, the Court distinguished Title VI from FERPA, stating that unlike Title VI, Congress expressed no intent for any type of cause of action under FERPA.[53] Notwithstanding this distinction, when *Sandoval* and *Gonzaga* are read together, it seems likely the Court would not permit a cause of action to enforce Title VI disparate impact regulations under § 1983. *Gonzaga* explicitly reinterprets or modifies a core § 1983 test discussed in the following Section, blurring the distinctions between an implied cause of action and a § 1983 claim.[54] Thus, from a practical standpoint, pursuing a disparate impact claim under § 1983 may be an exercise in futility. Despite this recent development, this Comment will discuss the theories behind § 1983 claims, as some advocates are still pursuing them and a few lower courts may remain receptive.

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48. Sandoval v. Hagan, 197 F.3d 484, 501–07 (11th Cir. 1999), *rev'd*, Alexander v. Sandoval, 532 U.S. 275 (2001) (permitting a private cause of action to enforce Title VI regulations); Powell v. Ridge, 189 F.3d 387, 397–400 (3d Cir. 1999) (recognizing a private cause of action to enforce Title VI regulations under both the regulations themselves and § 1983); Villanueva v. Carere, 85 F.3d 481, 486 (10th Cir. 1996) (permitting a private right of action under Title VI implementing regulations); N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1996) (permitting a disparate impact claim under Title VI regulations); City of Chicago v. Lindley, 66 F.3d 819, 827–29 (7th Cir. 1995) (recognizing a private right of action under Title VI implementing regulations). The Third Circuit, however, has since changed its stance to prohibit such a claim. *See* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 790–91 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 2621 (2002).

49. 42 U.S.C. § 1983 (2000).

50. Since *Sandoval*, plaintiffs have relied on this theory in several cases. For examples of how plaintiffs may rely on *Sandoval*, see Robinson v. Kansas, 295 F.3d 1183 (10th Cir. 2002); *S. Camden*, 274 F.3d 771.

51. 122 S. Ct. 2268 (2002).

52. *Id.* at 2271.

53. *Id.* at 2277.

54. *Id.* at 2275 (writing that the two tests "overlap in one meaningful respect—in either case we must first determine whether Congress *intended to create a federal right*").

South Camden Citizens in Action v. New Jersey Department of Environmental Protection,[55] a district court decision, was the first case to address this issue post-*Sandoval*. The court in *South Camden* asserted that *Sandoval* only addressed the narrow issue of whether a private right of action is implied in section 602.[56] Because the § 1983 issue was not before the Supreme Court and nothing in its holding precluded recognizing the right under § 1983, the district court asserted that its circuit's prior holding permitting a § 1983 suit to enforce Title VI regulations is still binding.[57] The Third Circuit, however, reversed the district court, finding that the implications of *Sandoval* preclude a § 1983 claim.[58] Conversely and even more recently, the Tenth Circuit held that § 1983 claims still may be sustained post-*Sandoval*.[59] How the remaining circuits will interpret *Sandoval* is unsettled, but the following Section outlines the relevant Supreme Court precedent that should control their analysis, reviews how the circuits have previously approached the question, and suggests how the Supreme Court might ultimately decide the matter.

A. Regulatory Law and § 1983 Causes of Action

Circuits have allowed a private right of action to enforce Title VI regulations under § 1983 by applying Supreme Court precedent that suggested the test that applies to § 1983 causes of action is a different inquiry than that of implied rights of action under other statutes.[60] Because the *Sandoval* and *Gonzaga* Court did not consider whether a plaintiff might use § 1983 to privately enforce section 602, some

55. 145 F. Supp. 2d 505 (D.N.J. 2001), *rev'd*, 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 122 S.Ct. 2621 (2002).

56. *Id.* at 517.

57. *Id.* at 518. In *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999), the United States Court of Appeals for the Third Circuit permitted a disparate impact cause of action to move forward on two different theories: implied cause of action and § 1983. *Id.* at 397–400. Because *Sandoval* only expressly overruled the implied cause of action, the court in *South Camden* asserted it was still bound by the remaining portion of *Powell's* holding. *S. Camden*, 145 F. Supp. 2d at 518.

58. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 790–91 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 2621 (2002).

59. Robinson v. Kansas, 295 F.3d 1183 (10th Cir. 2002). Speaking of *Sandoval*, the Tenth Circuit stated, "The Court's decision does not bar all claims to enforce such regulations, but only disparate impact claims brought by private parties directly under Title VI. Disparate impact claims may still be brought against state officials for prospective injunctive relief through an action under 42 U.S.C. § 1983 to enforce section 602 regulations." *Id.* at 1187.

60. Mank, *supra* note 14, at 357. The *Gonzaga* Court continued to recognize that a different test applies to § 1983, but found that the test is largely the same as that in an implied cause of action. Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2275 (2002).

circuits that have recognized a private cause of action under § 1983 might continue to do so.[61] Unlike section 602, § 1983 clearly creates a cause of action.[62] In § 1983, the issue is not whether a cause of action exists, but whether the federal regulation creates a "right" that falls within the meaning of § 1983.[63] This is a particularly important distinction because an implied right of action requires congressional intent,[64] whereas § 1983 does not because the right already has been created.[65]

In 1871, when Congress first enacted § 1983, the statute only protected rights that were secured under the Constitution,[66] but three years later, the statute was amended to also encompass violations of federal laws that create private rights.[67] The test for determining whether a federal law creates a "right" that falls within the scope of § 1983 was established in *Blessing v. Freestone*.[68] First, Congress must have intended that the statute in question benefit the plaintiff.[69] Second, the plaintiff must demonstrate that the right protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence.[70] Last, the statute must unambiguously impose a binding obligation on the states.[71] The *Gonzaga* Court stated that it was not changing the *Blessing* test, but *Gonzaga* stressed that Congress must intend to create a federal right, not merely intend

61. In fact, Justice Stevens in dissent stated *Sandoval* was merely an exercise in mental gymnastics because a cause of action is still available under § 1983. Alexander v. Sandoval, 532 U.S. 275, 299–300 (2001).

62. "Any person in any State, Territory, or the District of Columbia, who has been deprived of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (2000).

63. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 508 n.9 (1990).

64. *See* Cort v. Ash, 422 U.S. 66, 78 (1974).

65. Mank, *supra* note 14, at 357–58.

66. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983).

67. Lisa E. Key, *Private Enforcement of Federal Funding Conditions Under § 1983: The Supreme Court's Failure to Adhere to the Doctrine of Separation of Powers*, 29 U.C. DAVIS L. REV. 283, 304–05 (1996). For further discussion of the history of the change and scholarly debate of whether and how the amendment changed the statute, see Mank, *supra* note 14, at 327–29.

68. 520 U.S. 329, 340–41 (1997). An example of a right that conforms to *Blessing* is the right to be free from intentional racial discrimination in federally funded programs. Thus, one can sue to prevent racial discrimination by private universities if they receive federal funds. *See* 42 U.S.C. § 2000d (2000).

69. *Id.* at 340.

70. *Id.* at 340–41 (quoting Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 431 (1987)).

71. *Id.* at 341.

the statute to benefit the plaintiff.[72] Thus, courts must apply the *Blessing* test more rigorously now and refrain from finding a § 1983 cause of action when Congress intends "anything short of an unambiguously conferred right."[73]

The courts are divided as to how regulatory laws factor into the *Blessing* analysis and whether they are "laws" that create rights as contemplated in § 1983. The circuits have yet to readdress this issue since *Gonzaga*. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[74] the Supreme Court established that if Congress enacts a statute that is vague or silent on certain issues and leaves regulatory authority to an agency, the agency's interpretation of the statute should be given considerable deference.[75] But when the statute is not vague or the agency goes "beyond mere interpretation and essentially

72. Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2275 (2002).

73. *Id.*

74. 467 U.S. 837 (1984).

75. *Id.* at 843–44; Mank, *supra* note 14, at 340. During this term, the Supreme Court further defined the standards of *Chevron* in *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001). In *Mead*, the Court held "that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 2171. Although some commentators interpret *Mead* as undermining *Chevron*, it may have merely been a restatement of *Chevron* that more clearly explained what *Chevron* did not sanction. *See, e.g.*, Thomas W. Kirby, *Toppling Rules? Supreme Court Makes Agency Decisions More Vulnerable*, 165 N.J. L. J. 593 (2001) (arguing that *Mead* undermined the deference principle of *Chevron*). Any pessimistic view of *Mead* probably results from a prior willingness to interpret *Chevron* overexpansively. Some litigants used *Chevron* as precedent to afford a general deference to agency activities, determinations, and policies across the board, but the language of *Chevron* was not so definite as to provide sound support for such agency deference. *See Chevron*, 467 U.S. at 843–44 (stating that a court may not substitute its construction for the agency's when "Congress has explicitly left a gap for the agency to fill [because] there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."). The Court in *Mead* created a sound foundation under those regulations authorized by Congress. This foundation was not necessarily created by *Chevron*, but was rather only assumed by *Chevron*'s interpreters. *See* Kirby, *supra*, at 593. *Mead* stated that when Congress expressly delegates authority to an agency to enforce a statute through regulation, the regulation is binding in the courts "unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Mead*, 121 S. Ct. at 2171. Essentially, *Mead* still acknowledged that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* (quoting *Chevron*, 467 U.S. at 844). These reiterations of *Chevron* in *Mead* are the core of *Chevron*. All that *Mead* added to the central aspects of *Chevron* was the explanation that agency interpretations expressed through letters, guidelines, policy statements, and other materials do not have force of law and are not to be used as definitive authority. *See id.* at 2174–75. If such statements by the Supreme Court have changed the way agencies operate or are viewed, it is only because *Chevron* was improperly being relied on before.

exercises lawmaking authority in promulgating a regulation that creates rights that are not apparent in the governing statute," then the courts have divided over whether agency regulations alone may create "rights" enforceable under § 1983.[76]

The Supreme Court faced this issue in *Guardians Ass'n v. Civil Service Commission of New York*[77] but failed to resolve it because the decision was splintered with no majority opinion.[78] Following *Guardians* was a line of Supreme Court cases involving § 1983 claims and federal regulations but none of these cases spoke definitively on whether regulations alone can establish rights.[79] Although it is not entirely clear, these cases appear to recognize primary "rights" when the regulation works in conjunction with a statute.[80] For example, *Wright v. City of Roanoke Redevelopment & Housing Authority*[81] involved United States Housing and Urban Development regulations, which the Court held helped define a vague statute and further establish a federal right.[82] This decision was followed by *Wilder v. Virginia Hospital Ass'n*[83] in which the Court again stated that federal regulations may help define a statutory right.[84] These cases suggest that section 602 regulations also might define a statutory right and thus be actionable under § 1983. The circuits have yet to uniformly conclude this, however, and *Gonzaga* calls into question the propriety of doing so.[85]

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76. Mank, *supra* note 14, at 340.

77. 463 U.S. 582 (1983).

78. Five different opinions were written. Five judges concurred in the opinion, but no opinion garnered more than three votes. The Court was divided over what standard of proof is necessary "to prove violations of rights in cases involving Title VI." *Id.* at 608 n.1. For further discussion of the case, see Patricia Kines, *Intent to Discriminate and Title VI of the Civil Rights Act of 1964:* Lau, Bakke, *and* Guardians, 17 EDUC. L. REP. 443, 447–49 (1984).

79. *See, e.g.*, Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990) (stating that the Court would not find that Congress intended to foreclose private enforcement unless Congress affirmatively withdrew the private remedy); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) (finding that the availability of § 1983 remedies "turns on whether the statute . . . creates obligations 'sufficiently specific and definite' to be within the 'competence of the judiciary to enforce.' "); Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987) (holding that § 1983 generally establishes a cause of action to enforce violations of federal law unless the defendant can show that Congress intended to foreclose private enforcement).

80. *See Wilder*, 496 U.S. at 511.

81. 479 U.S. 418 (1987).

82. *Id.* at 431–32.

83. 496 U.S. 498 (1990).

84. *Id.* at 511.

85. *Gonzaga* did not address the issue of how regulations factor into this analysis, but it appears to realign the *Wilder* cases. Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2275 (2002)

B. Circuit Split: Can Regulations Independently Create a § 1983 Right?

The circuits interpret the *Wilder* line of cases differently. Several circuits have read these cases to stand for the principle that federal regulations can create federal § 1983 rights if they meet a three-prong test described in *Blessing*.[86] In *Powell v. Ridge*,[87] the Third Circuit squarely addressed this issue as it relates to Title VI. The court held that administrative regulations prohibiting disparate impact could be enforced under § 1983.[88] Prior to *Powell*, the Third Circuit had also stated that "valid federal regulations as well as federal statutes may create rights enforceable under section 1983."[89] Similarly, the Sixth and Ninth Circuits essentially have concluded that regulations may create independent rights that are enforceable under § 1983.[90]

Other circuits, however, have taken a more restrictive posture toward agency regulations. They have couched the § 1983 issue in terms of whether the regulation has the "force and effect of law."[91] Thus, the "force and effect" test, as set out in *Chrysler Corp v. Brown*,[92] of whether Congress has mandated that the agency enact regulations would control.[93] If Congress has mandated such, the

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(rejecting previous interpretations of the *Wilder* cases). In fact, the *Gonzaga* Court stated that one of the purposes of its decisions was to clear up the confusions surrounding these cases. *Id.* Because of the recent nature of *Gonzaga*, however, the lower courts have yet to interpret it in relation to regulations. For this reason, the remainder of this Section of the Comment will concentrate on the circuits' previously prevailing views on the matter.

86. *See supra* notes 68–71 and accompanying text; Blessing v. Freestone, 520 U.S. 329, 340–41 (1997) (finding that the three factors to be considered are whether Congress intended the provision to benefit the plaintiff, whether the right is not so vague as to strain judicial competence, and whether the statute unambiguously imposes a binding obligation on the states); *see, e.g.*, Buckley v. City of Redding, 66 F.3d 188, 190–92 (9th Cir. 1995) (holding that regulations accompanying an act create enforceable rights under § 1983); Loschiavo v. City of Dearborn, 33 F.3d 548, 551–53 (6th Cir. 1994) (applying the test developed in *Blessing* and reiterated in *Wilder*); W. Va. Univ. Hosps., Inc. v. Casey, 885 F.2d 11, 18 (3d Cir. 1989) *aff'd*, 499 U.S. 83 (1991) (finding that "valid federal regulations as well as federal statutes may create rights enforceable under section 1983").

87. 189 F.3d 387 (3d Cir. 1999).

88. *Id.* at 401–03.

89. *W. Va. Univ. Hosps.*, 885 F.2d at 18.

90. *Buckley*, 66 F.3d at 190–92; *Loschiavo*, 33 F.3d at 551–53.

91. *See* Samuels v. District of Columbia, 770 F.2d 184, 199 (D.C. Cir. 1985) (citing the "force and effect" standard articulated in Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979)); DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 724 n.19 (10th Cir. 1988) (citing *Samuels* as an example of § 1983 suit based on violation of rights under federal regulations).

92. 441 U.S. 281, 301–303 (1979) (noting that a regulation has the "force and effect" of law when it is created in response to congressional legislation and it affects the rights and obligations of individuals).

93. *Id.*

regulations are generally considered to have force of law and consequently are enforceable under § 1983.[94] At least in relation to Title VI, it should make little difference whether a circuit takes this approach or the prior one because section 602 establishes a Congressional mandate for agencies to pass regulations to further section 601,[95] which means section 602 regulations have the "force and effect of law," and thus the power to establish rights for § 1983 purposes.

Under either the Third Circuit's or the "force and effect of law" approach, once a plaintiff establishes that a federal law creates a distinct "right," the *Blessing* analysis establishes a presumption that the right is enforceable under § 1983.[96] Then the burden shifts to the defendant to show either that Congress explicitly prohibited such a right from being actionable under § 1983 or that Congress implicitly intended to preclude the action by creating a remedial scheme so comprehensive that a cause of action under § 1983 would be incompatible with it.[97] For example, some courts have concluded that Title VII's remedial scheme for employment discrimination provides so many procedures and administrative adjudications that a private right of action is unnecessary and would only disrupt the process.[98] In contrast, those circuits concluding that section 602 creates "rights" also conclude that Title VI's administrative procedures are not so comprehensive as to preclude a private right of action under § 1983.[99]

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94. *Id.*

95. 42 U.S.C. § 2000d-1 (2000) (authorizing agencies to issue rules and regulations to further the objectives of such agencies). Title VI is a condition on federal funds. In exchange for federal funds, Congress expects recipients to comply with Title VI's non-discrimination principles. *Id.* § 2000d. Furthermore, Congress expects those federal agencies distributing funds to enact regulations to ensure that the recipients are not discriminating. *Id.* § 2000d-1. Thus, a circuit requiring that regulations have force and effect of law to be cognizable under § 1983 should also include Title VI regulations within § 1983's scope.

96. Blessing v. Freestone, 520 U.S. 329, 341 (1997).

97. Livadas v. Bradshaw, 512 U.S. 107, 133 (1994); W. Va. Univ. Hosps. v. Casey, 885 F.2d 11, 18 (3d Cir. 1989); *see also* Lisa L. Frye, Note, Suter v. Artist M. *and Statutory Remedies Under Section 1983: Alteration Without Justification*, 71 N.C. L. REV. 1170, 1181–82 (1993) (stating that Congress' preclusion of a § 1983 action may be implied from comprehensive remedies provided under a statute).

98. *See* Alexander v. Chicago Park Dist., 773 F.2d 850, 856 (7th Cir. 1985). Congress created the Equal Employment Opportunity Commission for the specific purpose of evaluating and remedying Title VII employment discrimination claims and remedies must be exhausted there before bringing a claim in court. § 2000e-4. Thus, the *Alexander* court found that Congress clearly intended to preclude a private cause of action when it created the administrative remedies for Title VII. *Alexander*, 773 F.2d at 856.

99. *See, e.g.*, Powell v. Ridge, 189 F.3d 387, 401–02 (3d Cir. 1999) (noting that Title VI did not establish an "elaborate procedural mechanism" for the protection of individual

Circuits are reluctant to preclude § 1983 actions based on finding an implied intent because on only two occasions has the Supreme Court found remedial schemes to be so comprehensive that they negate the viability of a § 1983 claim.[100] In both instances, the statute in question provided the plaintiffs with extensive statutory remedies,[101] unlike Title VI, which does not create a specific remedial scheme for private plaintiffs, but only authorizes agencies to terminate funds to recipients who violate Title VI.[102] Furthermore, the Supreme Court in other cases has emphasized that "a plaintiff's ability to invoke § 1983 cannot be defeated simply by '[t]he availability of administrative mechanisms to protect the plaintiff's interests.' "[103]

The specifics of Title VI's administrative remedies only further the argument that they do not preclude a § 1983 cause of action. As a general matter, the administrative remedies of Title VI do not operate to protect or vindicate the individual rights of potential plaintiffs.[104] Individuals who issue Title VI complaints with administrative agencies do not have a right to participate in the administrative resolution of the complaint.[105] Although the agency has discretion to permit the participation, the complaint becomes essentially one of agency concern, with the agency's objective being future compliance with the regulations and not necessarily the

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rights). The only formal procedures for enforcing Title VI are notifying the recipient of the violation, holding a hearing, giving him the opportunity to voluntarily comply, and then after Congressional approval, halting the recipient's funding in the particular program against which it has discriminated. *See* § 2000d-1. In contrast, Title VII created the EEOC, the agency with which plaintiffs must file employment discrimination claims. After a claim is filed, the EEOC notifies the defendant of the complaint, investigates the claim, and determines whether there is probable cause for the claim. *Id.* § 2000e-5(b). If the EEOC finds such probable cause, it takes steps to eliminate the discrimination and makes formal findings on the claim. *Id.*

100. *See* Smith v. Robinson, 468 U.S. 992, 1010–11 (1984) (characterizing the administrative procedures as "elaborate" and stating that because Congress established protections for the benefit of the plaintiff class, it did not intend to create any other private causes of action); Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13–14 (1981) (characterizing the remedial scheme as "unusually elaborate" because it provided the government and private individuals with a cause of action with both criminal and civil penalties).

101. *See Smith*, 468 U.S. at 1010–11 (evaluating the Education of the Handicapped Act); *Sea Clammers*, 453 U.S. at 13–14 (analyzing the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act).

102. *See* § 2000d-1 (stating compliance may be effectuated by "termination of or refusal to grant" financial assistance).

103. Blessing v. Freestone, 520 U.S. 329, 347 (1997) (quoting Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989)).

104. Mank, *supra* note 14, at 363–64 (outlining the limited rights available to complainants due to the nature of Title VI investigation procedures and remedies).

105. *Id.* at 363.

remedying of individual harms.[106] Second, the resolution of a Title VI complaint may persist for several years, with the complainant having no real input into the process.[107] Third, if the complainant is dissatisfied with the agency's resolution, the complainant has no formal right to challenge the resolution.[108] Last, the only remedy available to an agency that cannot get compliance from a recipient is to cut the recipient's funding, which agencies are reluctant to do.[109] By contrast, a private cause of action provides a complainant with personal participation, an appeals process, and a full array of remedies.[110] Only the Seventh Circuit has found that Title VI's administrative procedures preclude a § 1983 action,[111] and this conclusion is not well founded in light of the Supreme Court's stance that such preclusions are limited to very exceptional cases.[112] Thus, it seems unlikely that Title VI's administrative enforcement would interfere with the availability of a § 1983 claim.

Unlike any of the circuits that permit § 1983 claims for violations of federal regulations, the Fourth and Eleventh Circuits explicitly reject the notion that regulations independently can create rights that are actionable under § 1983.[113] Their position is that federal rights only come from "explicit or implicit statutory requirements."[114] Therefore, regulations that go beyond the statutory requirements cannot create rights enforceable under § 1983.[115] In *Harris v. James*,[116] the Eleventh Circuit argued that the Supreme Court did not hold in *Wright* that a regulation alone could create a federal right, and thus the court should adopt the fallback position that requires a finding of congressional intent to create a right.[117] The Eleventh Circuit further suggested that Supreme Court precedent only *implied* that if a statute itself creates a specific right, a regulation enacted under it could

106. *See id.*
107. *Id.* at 363–64.
108. *Id.* at 364.
109. 40 C.F.R. § 7.130 (1999).
110. Mank, *supra* note 14, at 364–65.
111. Alexander v. Chicago Park Dist., 773 F.2d 850, 856 (7th Cir. 1985) (summarily finding that Title VI's enforcement procedures were sufficient and "would be bypassed by pleading Title VI violations under § 1983").
112. Mank, *supra* note 14, at 325–26.
113. Harris v. James, 127 F.3d 993, 1008–09 (11th Cir. 1997); Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987).
114. *Harris*, 127 F.3d at 1009 n.21.
115. A regulation may serve as the basis of a § 1983 suit only if there is an appropriate "nexus between the right in the regulation and congressional intent" to establish an enforceable federal right in the statute that authorized the regulation. *Id.* at 1010.
116. 127 F.3d 993, 1008–09 (11th Cir. 1997).
117. *Id.* at 1008.

"further define" or "flesh out the content of that right."[118] Under this interpretation, a right is created only when Congress clearly intends to create a right, but leaves the definition of the right or its contours ambiguous. In such a case, the authorized agency regulations could serve as a mechanism to further define the right.[119] Essentially, although the regulations cannot create rights, "courts often recognize that regulations can play a role in interpreting and explicating rights implicit in an underlying statute."[120] Yet in the end, it is the courts, not the agency, that decide whether an agency's interpretation is accurate or authorized.

C. Sandoval*'s Impact on the Viability of § 1983 claims*

The district court in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*[121] was the first court to consider a private cause of action for section 602 after the *Sandoval* ruling. The *South Camden* court allowed plaintiffs, who were victims of a racially disparate impact, to proceed with their suit, reasoning that *Sandoval* does not expressly prohibit a cause of action under § 1983.[122] The court is technically correct because the *Sandoval* Court did not address § 1983. Furthermore, the Supreme Court in *Sandoval* explicitly stated that only its holdings, not its dicta, bind subsequent courts.[123] Because no prior Supreme Court decision had ever strictly held that a private right of action existed under section 602, *Sandoval* found that language suggesting otherwise was only dicta.[124] Thus, the district court in *South Camden* held *Sandoval* to its own principle and refused to prohibit a § 1983 cause of action under section 602 regulations merely because of dicta or suggestive reasoning in *Sandoval*.[125]

In a split decision, the Third Circuit reversed the district court.[126] Unlike the district court, the split-panel's decision was based in

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118. *Id.* at 1008–09.

119. *See id.*

120. Mank, *supra* note 14, at 348.

121. 145 F. Supp. 2d 505 (D.N.J. 2001), *rev'd*, 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 2621 (2002).

122. *Id.* at 518.

123. Alexander v. Sandoval, 532 U.S. 275, 282–84 (2000).

124. *Id.* The *Sandoval* Court stated that nothing in *Bakke*, *Guardian's*, or Cannon v. Univ. of Chicago, 441 U.S. 677, 703 (1979), supported a private cause of action for section 602 disparate impact regulations. Rather, all three cases either required or were premised on a finding of intentional discrimination. *Sandoval*, 532 U.S. at 282–86.

125. *S. Camden*, 145 F. Supp. 2d at 518.

126. S. Camden Citizens in Action v. N. J. Dep't Envtl. Prot., 274 F.3d 771, 790–91 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 2621 (2002).

principal part upon what *Sandoval* implied, rather than what it held.[127] Recognizing this, the Tenth Circuit also found *Sandoval* did not prohibit a § 1983 claim.[128] When the implications of *Sandoval* are considered in conjunction with *Gonzaga*, however, the Third Circuit appears to have correctly forecast the Supreme Court's position. *Gonzaga* focuses on congressional intent to create a right, which is the support *Sandoval* also found lacking in section 602.[129]

Thus, although the district court's and the Tenth Circuit's decisions appeared wise at the time, subsequent developments appear to undermine their position. The *Gonzaga* Court has effectively conflated the § 1983 test with the test for establishing an implied private cause of action.[130] Despite the Supreme Court's statements in *Wilder* that the test for determining whether a plaintiff can bring a § 1983 claim is different than the test for whether Congress created an independent cause of action in a statute,[131] the *Gonzaga* Court stated, "our implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983."[132] Consequently, the inconsistency between § 1983 and implied causes of action that once troubled commentators seems to have disappeared.[133]

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127. Judge Greenberg, writing for the split-panel, found that the trial court had made errors of law. *Id.* at 782–84. He asserted that the trial court overread *Powell v. Ridge* as permitting a § 1983 claim to enforce a Title VI violation. *Id.* at 784–85. Instead, he argued that *Powell* only assumed such a cause of action. *Id.* Thus, he essentially addressed the issue as a matter of first impression in light of the *Sandoval* decision. He relied on *Sandoval*'s ultimate conclusion—that no Congressional intent exists to create a section 602 right for the purposes of an independent private cause of action—to conclude that Congress did not intend to create a right in section 602 for the purposes of § 1983. *Id.* at 788–90. Furthermore, because section 602 regulations prohibit disparate impact, they go beyond the meaning of the specific rights in section 601 and thus are unenforceable under § 1983. *Id.* at 790. In sum, federal regulations alone cannot create enforceable rights and Congress did not intend to create a right to be free from disparate impact. *Id.* at 790–91. The dissent, however, argued that the majority approached the case incorrectly and that the Circuit's prior decision in *Powell v. Ridge* was controlling. *Id.* at 791 (McKee, J., dissenting). Prior to most recent *South Camden* case, *Powell* had not been overruled and the majority here only overrules *Powell* by overreading *Sandoval*. *Id.*

128. *See* Robinson v. Kansas, 295 F.3d 1183, 1187 (3d Cir. 2002) (holding that § 1983 claims still may be sustained post-*Sandoval*).

129. *Compare* Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2275–77 (2002), *with* Alexander v. Sandoval, 532 U.S. 275, 286–88 (2001).

130. *Gonzaga*, 122 S. Ct. at 2286 (Stevens, J., dissenting) (stating this decision "blurs the long-recognized distinction between rights and remedies").

131. Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 508 n.9 (1990).

132. *Gonzaga*, 122 S. Ct. at 2275.

133. *See* Mank, *supra* note 14, at 359 (citing Henry Paul Monaghan, *Federal Statutory Review Under Section 1983 and the APA*, 91 COLUM. L. REV. 233, 247 (1991)); Michael A. Mazzuchi, Note, *Section 1983 and Implied Rights of Action: Rights, Remedies, and*

This anomaly, according to Chief Justice Rehnquist, began long ago in *Wilder*. Finding it unacceptable to recognize a cause of action under § 1983 when the statute in question did not create its own, he dissented.[134] He essentially argued that the very fact that the statute does not confer a cause of action shows that Congress did not intend to confer a substantive right to benefit a plaintiff class.[135] He stated that "for relief to be had either under § 1983 or by implication under *Cort v. Ash*, the language used by Congress must confer identifiable enforceable rights."[136] Thus, if a statutory provision does not rise to the level of creating an enforceable right, neither does it create a cause of action under § 1983.[137]

The Court in *Gonzaga* asserted that it has now cleared the confusion surrounding the *Wilder* line of cases.[138] Chief Justice Rehnquist's authorship of the majority opinion in *Gonzaga*, however, is telling, as his twelve-year wait to have his view predominate has ended with his former dissent becoming the opinion of the Court. But rather than overruling precedent, the *Gonzaga* Court redefines the *Wilder* line of cases, leaving its distinct § 1983 test's terms intact while changing their substance.[139]

Now, including section 602 within the scope of § 1983 causes of action appears to counter new Supreme Court precedent.[140] The assumptions and interpretations that serve as the foundation for a § 1983 argument were made prior to *Sandoval* and *Gonzaga*. But these cases are not a complete surprise, as Bradford Mank wrote,

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Realism, 90 MICH. L. REV. 1062, 1109 (1992) (arguing it is inconsistent to permit a cause of action under § 1983).

134. *See Wilder*, 496 U.S. at 525–27 (Rehnquist, C.J., dissenting).

135. *Id.* at 527 (Rehnquist, C.J., dissenting).

136. *See id.* at 526 (Rehnquist, C.J., dissenting) (internal citations omitted) (citing Cort v. Ash, 422 U.S. 66 (1975)).

137. Chief Justice Rehnquist's argument appears to be circular. Instead of applying the three-part test to determine whether a right is created within § 1983, he looks at the test for determining whether an implied cause of action is created in the law in question. Thus, if there is an implied cause of action contained in the law, then it creates a right enforceable by § 1983, and vice versa. However, if he were in fact correct, § 1983 would be virtually useless because it would only provide causes of action for those plaintiffs who already have causes of action, and it would not offer any relief to those who did not have an independent cause of action.

138. Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2275 (2002).

139. *Id.* at 2275–76 (retaining the *Blessing* methodology while focusing on the issue of rights-creating language and intentions, which were not contained in the original test). In his dissent, Justice Stevens concludes that the Court has done "nothing to clarify . . . § 1983 jurisprudence" and has only made things worse by shifting a burden to the plaintiff that was once on the defendant. *Id.* at 2285–86.

140. *See supra* notes 51–54.

"There is a significant possibility that the Supreme Court could reject a private right of action under Title VI's regulations . . . ."[141]

Prior to *Sandoval*, the possibility always existed that the Supreme Court simply might find that there was no congressional intent to create a private right of action under section 602.[142] Now, with the Court's decisions in *Sandoval* and *Gonzaga*, the arguments against enforcing Title VI regulations through § 1983 appear to be stacked too high. The old assumption was that a decision denying an implied cause of action would not affect § 1983 claims. The Court's reasoning in *Sandoval*, however, has heavy implications in the § 1983 context, particularly after *Gonzaga*. In *Sandoval*, the Court made explicit distinctions between sections 601 and 602,[143] finding an implied cause of action exists under section 601 but not under section 602.[144] The Court characterized section 602 as merely an extension of section 601, and thus section 602 cannot create any rights not already encompassed by section 601.[145] Therefore, section 602 regulations that prohibit disparate effects, which could be unintentional, attempt to create rights not contained in section 601. The Court assumed without holding, however, that promulgating such regulations under section 602 is within a federal agency's authority,[146] but the very fact that the Court found that the regulations go beyond section 601 was the implicit reason why it concluded Congress did not intend to create a private right of action under section 602. Thus, it is unlikely that the Court would find that section 602 creates a "right" for purposes of § 1983 while not creating an independent right in section 602. As the Court in *Gonzaga* stated, this lack of intent also will guide the Court's inquiry under § 1983,[147] and most likely will prove to be the end of attempts to enforce Title VI regulations through § 1983.

III. ENFORCING TITLE VI REGULATIONS THROUGH DELIBERATE INDIFFERENCE

Those advocates who wish to resurrect a private cause of action for disparate impact have a much better chance of success with a theory predicated on deliberate indifference. The Court already has

141. Mank, *supra* note 14, at 353.
142. *Id.*
143. 532 U.S. 275, 288–89 (2001).
144. *Id.* at 280.
145. *Id.*
146. *Id.* at 281.
147. Gonzaga Univ. v. Doe, 122 S. Ct. 2268, 2275 (2002).

implemented the "deliberate indifference" standard in Title IX[148] sexual harassment jurisprudence and might implement it to establish a cause of action under the analogous Title VI. Most of the jurisprudence on deliberate indifference originally derives from § 1983 claims, but the Supreme Court in *Gebser v. Lago Vista Independent School District*[149] extended the theory to the Title IX context.[150] Now, deliberate indifference can be used to establish a school system's culpability when it has not engaged in discrimination itself, but when it is aware of discrimination that has been occurring under its control and which it fails to remedy.[151] Thus, by failing to prevent or remedy sexual discrimination of which it is aware, a recipient is, in a sense, the cause of the discrimination's continuation, or effectively causes the discrimination.[152] There are four basic elements of deliberate indifference: (1) there must be an official with the authority and power to correct the discrimination; (2) the official must be on notice that the recipient could be liable in the event that certain misconduct occurred; (3) the official must have actual notice of the misconduct; and (4) the official must be deliberately indifferent to the violation of a victim's rights, misconduct, or discrimination.[153] The Ninth Circuit in *Monteiro v. Tempe Union High School District*[154] also extended the deliberate indifference line of reasoning to Title VI and thus placed a duty on schools to prevent student-on-student racial harassment once a school becomes aware of a problem.[155]

148. "Title IX" refers to Title IX of the Education Amendments of 1972. Title IX, Prohibition of Sex Discrimination, Pub. L. No. 92-318, § 901, 86 Stat. 373, 373–375 (1972) (codified as amended at 20 U.S.C. § 1681 (2000)). Title IX prohibits gender discrimination in federally funded educational programs. *See* 20 U.S.C. § 1681(a) (2000). It operates in a manner similar to Title VI and is enforced by OCR. *Id.*

149. 524 U.S. 274 (1998).

150. *Id.* at 290–91.

151. *Id.* at 290. Title IX was modeled after Title VI, and many of the principles developed in one of the areas are applicable to the other. The Supreme Court has recognized the similarities between the two in rendering its decisions. *See, e.g., id.* at 287 (noting that the Court will scrutinize the propriety of private actions for monetary damages in suits or noncompliance with Titles VI and IX); *id.* at 294 (Stevens, J., dissenting) (observing that by the time Title IX was passed, the Court already had construed Title VI to contain a private remedy; therefore, Congress must have been aware that by their repeated references to Title VI, similar remedies would be inferred from Title IX); Cannon v. Univ. of Chicago, 441 U.S. 677, 703 (1979) (stating that the Court has no doubt that Congress intended to create Title IX with the same right to private causes of action as Title VI).

152. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 643 (1999).

153. *See id.* at 644–47.

154. 158 F.3d 1022 (9th Cir. 1998).

155. *Id.* at 1034.

The deliberate indifference framework is easily applied in the racial and sexual harassment contexts because the harassment generally evidences obvious regulation violations. Applying deliberate indifference becomes more complex in other situations. Because deliberate indifference has been used only in harassment cases, courts may hesitate to extend the concept to other types of discrimination such as disparate impact. Some factors may make this initial step problematic. First, the Court is well settled that sexual and racial harassment rise to the level of discrimination and are thus prohibited by Titles VI and IX.[156] Conversely, now that *Sandoval* has brought the viability of disparate impact regulations promulgated under section 602 into question by holding that they do not include a private cause of action, discrimination cannot be as easily defined to include policies that result in disparate impact.[157] Thus, policies with disparate impact may not constitute a level of discrimination toward which a school official could be indifferent.[158] Second, because school officials generally are the ones implementing the policies, one could argue that they either enact them with discriminatory intent or they do not.[159] Some might argue that if the recipient did not have discriminatory intent upon enacting a policy, then the policy cannot later be transformed into an intentionally discriminatory one. To suggest that such recipients are deliberately indifferent to their own unintentional action may stretch the concept beyond its definition. Third, the *Sandoval* decision clouds the issue of liability, notice of which is important in deliberate indifference cases.[160] The decision makes it appear that recipients cannot be held privately liable in any way for disparate impact policies.[161] This complicates the issue of reestablishing liability because the Supreme Court in *Pennhurst State School & Hospital v. Halderman*[162] required that recipients of federal

156. *Davis*, 526 U.S. at 649–50.

157. Alexander v. Sandoval, 532 U.S. 275, 285 (2001). There is no single definition for discrimination that persists throughout the law and historical jurisprudence, thus it is most often the defining of the term that determines the outcomes of cases, and as of late, the term has been consistently defined more narrowly. *See supra* note 29.

158. *See Davis*, 526 U.S. at 649–50 (requiring a clear definition of discrimination).

159. *See* Pederson v. La. State Univ., 201 F.3d 388, 412–13 (5th Cir. 2000) (arguing that deliberate indifference tests have little relevance in determining whether intentional discrimination has occurred).

160. *See supra* notes 203–18 and accompanying text.

161. *See generally* Alexander v. Sandoval, 532 U.S. 275, 291 (2001) (holding that an examination of the text and structure of Title VI, especially the narrow scope of the remedial scheme outlined in section 602, reveals no Congressional intent to create a private right of action).

funds be made unambiguously aware of potential liability.[163] Thus, arguing that a recipient is aware of its liability after *Sandoval* may be more difficult. Furthermore, if section 602 disparate impact regulations do not set a standard for or define discrimination, notifying an official of the impact may not constitute notifying her of "discrimination" that she would have a duty to remedy.[164] Deliberate indifference is conceptualized as deliberate indifference toward rights.[165] If section 602 cannot create or define a right, then there is nothing toward which a recipient could be deliberately indifferent.

The Sixth Circuit recognized this application problem in *Horner v. Kentucky High School Ass'n*.[166] *Horner* involved a gender disparate impact claim under Title IX.[167] Although the case was pre-*Sandoval*, the claim was for monetary damages, and the court required a showing of intentional discrimination.[168] Thus, as a conceptual matter, *Sandoval* should not cast doubt on this court's reasoning because it was not operating under the assumption that unintentional discrimination alone would support a private cause of action. The policy in question in *Horner* was facially neutral and was

162. 451 U.S. 1 (1981). In *Pennhurst*, a case involving a claim against a hospital under the Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 104-183, § 1, 110 Stat. 1694, 1694 (1996) (codified as amended at 42 U.S.C. § 6000 (1999)), *repealed by* Pub. L. No. 106-402, § 401(a), 114 Stat. 1737, 1737 (2000), the Court held that the receipt of funds alone did not expose the recipient to liability under the act. *Pennhurst*, 451 U.S. at 17–18. Rather, Congress must make it clear to the recipient that a condition on receiving the funds is being liable for claims. *Id.*

163. *Id.* at 24–25.

164. In *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), no question existed as to whether sexual harassment was impermissible gender discrimination under Title IX. The key issue was whether the school had notice of the harassment and the authority to prevent it. If a school had notice and authority, then the school would know that it was in violation of Title IX. However, if section 602 regulations do not set a standard for "discrimination," it would be more difficult for a school to readily know that a disparate impact is a violation of Title VI. Knowledge of a disparate impact alone might not be notice of discrimination or a Title VI violation; it might merely be notice of a disparate impact.

165. *See generally* City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) (holding that inadequate police training may be a basis for liability when it amounts to deliberate indifference to the rights of people with whom the police interact).

166. 206 F.3d 685 (6th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000). *Horner* involved a claim by female high school students against their school system, alleging that its failure to sanction a fast-pitch softball team was a violation of the Equal Protection and Title IX. *Id.* at 687.

167. *Id.* at 693.

168. *Id.* at 692. The plaintiffs were required to show intentional discrimination because they asserted monetary damages. *Id.* at 692. They failed to allege intent, and the case was dismissed on this basis. *Id.* at 693. This does not affect the court's theoretical discussion about deliberate indifference, however.

challenged on a disparate impact theory.[169] The court, however, was not clear on how to proceed because it stated that the only definite test the Supreme Court has provided is "deliberate indifference."[170] Furthermore, the deliberate indifference test was developed in the sexual harassment context and is not directly transferable to other contexts.[171] The Sixth Circuit explained that in the Supreme Court's sexual harassment cases, "intent" is proven by " 'actual notice' of the abuse by a third party and a failure to stop it."[172] The court then discussed whether the proper analysis to apply to a facially neutral law is one requiring "discriminatory animus" or "deliberate indifference."[173] In a footnote, the court argued that the appropriateness of either test varies depending upon the facts of the case.[174] The court stated that "a deliberate indifference test might be appropriate when Plaintiffs claim that defendant school officials had actual knowledge of the disparate impact of their policies, either at the time of enactment or when subsequently brought to their attention post-enactment, and turn a blind eye."[175] On the other hand, the court stated that there are times when a school adopts a policy because of gender bias without knowing of its disparate impact.[176]

The Sixth Circuit, however, was not forced to adopt or apply either test because the plaintiff failed "to establish a violation of Title IX, let alone an intentional violation."[177] Although the court did not move forward on the disparate impact claim, implicit in the discussion was the notion that a plaintiff can, in certain circumstances, sue under a disparate impact theory.[178] The plaintiff would have to show the disparate impact of a neutral regulation actually violated Title IX.[179] Such a violation could be established under Title IX's implementing regulations and guidelines.[180] A violation of these regulations, in and of itself, however, would not sustain a private right of action for *monetary* damages because the initial violation may have been

169. *Id.* at 693.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 693 n.4.
175. *Id.*
176. *Id.*
177. *Id.* at 693.
178. *Id.* at 692–93.
179. *Id.* at 696.
180. *Id.* at 694.

unintentional.[181] Nevertheless, the requisite intent could be created by a deliberate indifference to the Title IX violation.[182] Although the school did not initially intend the Title IX violation, its failure to correct the violation, or deliberate indifference, would suffice for intent.[183] In such a circumstance, what was an unintentional disparate impact would have risen to the level of a privately actionable intentional Title IX violation.

A deliberate indifference theory structured in this way is equally applicable to Title VI.[184] Although *Sandoval* held that there was no implied private right of action under section 602,[185] the Court did not question federal agencies' authority to enact disparate impact regulations under it.[186] Thus, there would be no independent implied private cause of action under section 602 for unintentional discrimination with a disparate impact,[187] but the disparate impact would still be a Title VI violation,[188] which a federal agency could prohibit and which a recipient would have a duty to correct once it had notice of the violation.[189] Analogous to the Title IX argument above, deliberate indifference to the violation would be equivalent to intent and could give rise to a private cause of action.

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181. *Id.*

182. *Id.* at 693 n.4.

183. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 643 (1999) (holding that a school could be liable for discriminatory acts it did not initially intend, but toward which it was deliberately indifferent after becoming aware of them).

184. *See* Grove City Coll. v. Bell, 465 U.S. 555, 566 (1984) (stating that the congressional intent behind Titles VI and IX was the same). Although *Grove City* was extracting from Title VI to Title IX, the reverse has also been done in other instances. *See, e.g.*, Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1034 (9th Cir. 1998) (holding that when a school district is deliberately indifferent to an atmosphere of racial hostility and discrimination, the district may be liable for damages under Title VI). In *Sandoval*, the Supreme Court also reiterates that the Title IX cause of action jurisprudence from *Cannon v. University of Chicago*, 441 U.S. 677 (1979), is applicable to Title VI. Alexander v. Sandoval, 532 U.S. 275, 280 (2001).

185. *Sandoval*, 532 U.S. at 286.

186. *Id.* at 281–82.

187. *Id.* at 285.

188. *Id.* at 281 (assuming that "§ 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601").

189. *See generally* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (establishing a duty to remedy known violations of federal antidiscrimination regulations). A Title VI violation means that the recipient has violated its contractual agreement with the federal funding agency. *Sandoval* did not alter this contractual relationship; it merely addressed what contractual violations also provided grounds for private causes of action.

A. *Determining What Amounts to Discrimination in a Deliberate Indifference Theory*

Title VI claims hinge on two basic issues: (1) whether discrimination has occurred; and (2) whether it was intentional. Because *Sandoval* did not question federal agencies' regulatory authority, the agencies can still prohibit neutral policies with disparate impacts.[190] At no point did the Court in *Sandoval* claim that such policies do not amount to discrimination.[191] In fact, because the agencies can prohibit them, implicit in the Court's decision is the implication that such policies continue to be considered discriminatory. As discussed above, the key distinction for the Court is between intentional and unintentional discrimination.[192] Deliberate indifference toward disparate impacts could, however, become equivalent to intention.[193] If a federal agency has enacted a regulation or guideline prohibiting certain practices that result in disparate impact, and the recipient is given actual notice that it is in violation of Title VI, the recipient should take action to remedy the effect.[194] If, however, the recipient turns a blind eye, its deliberate indifference could result in liability.[195] A recipient's conscious choice to ignore or refuse to remedy the effect causes the disparate effect to continue.[196]

B. *Reasons Deliberate Indifference Should Extend to Disparate Impact*

One might argue that deliberate indifference toward sexual harassment is distinctly different from deliberate indifference toward disparate impact. For example, although a school itself may not be a harasser, sexual harassment is an intentional act by some individual that the school tacitly allows to continue, whereas no one may have intended a disparate impact when one occurs. Such a distinction,

190. *Sandoval*, 532 U.S. at 281–82.

191. *See supra* notes 23–27 and accompanying text.

192. *Sandoval*, 532 U.S. at 280–81.

193. *See Davis*, 526 U.S. at 644 (equating deliberate indifference with intention in the sexual harassment context).

194. *See* 34 C.F.R. § 100.3 (2001) (prohibiting discriminatory effects in services such as financial aid); *id.* § 100.7 (requiring the agency to make the recipient aware of any violation); *id.* § 100.8 (authorizing the withdrawal of federal funds from recipients that fail to comply with the section).

195. *See* Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1034 (9th Cir. 1998) (holding that "[w]hen a district is 'deliberately indifferent' to its students' right to a learning environment free from racial hostility and discrimination, it is liable for damages under Title VI").

196. *See Davis*, 526 U.S. at 642–43 (stating a school's deliberate indifference may create a private right of action under Title IX).

however, is not meaningful. In neither *Gebser* nor *Davis*, the key Supreme Court deliberate indifference cases, was the school board a firsthand participant to the harassment.[197] In both cases, the issue was whether the school system could become liable for the acts of a third party that were within the school's control.[198] Further, the Supreme Court recognized that the school system could in some circumstances, namely when it is deliberately indifferent, be held liable for the acts of third parties even though neither the school nor a school official brought about or engaged in harassment. The Court relied on federal agency guidelines in these cases that suggested such behavior by third parties is sexual discrimination, and thus a violation of Title IX for which a school system might be liable.[199] The Court held that once an official in the school system is made aware of the discrimination, the official has a duty to attempt to remedy it.[200] Otherwise, the school contributes to its continuation and is culpable. Thus, courts should not be reluctant to hold the school liable because cases of deliberate indifference toward a violation involve a different level of cognition than situations in which discrimination is occurring unintentionally or students are being disparately impacted unknowingly.[201]

The above analysis also would apply to disparate impacts under Title VI. A deliberate indifference theory would not presume to hold a school privately liable for disparate impacts alone, just as a school would not be held liable simply because sexual harassment occurred at school.[202] In neither the sexual harassment nor the disparate impact context does the school intentionally contribute to the discrimination directly. However, just as a school is liable once it learns of the sexual harassment—which it did not intend, but which is a Title IX violation—and ignores it, so too would it be liable for disparate impacts which are Title VI violations, if the school turns a blind eye to them upon their discovery.

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197. *Davis*, 526 U.S. at 633–35; Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277–79 (1998).

198. *Davis*, 526 U.S. at 636; *Gebser*, 524 U.S. at 277.

199. *Davis*, 526 U.S. at 647–48.

200. *Id.* at 649–50.

201. This is an important distinction because holding "innocent" defendants liable seems to be at the heart of other Supreme Court jurisprudence that prohibits certain liability. *See, e.g.*, Wygant v. Jackson, 476 U.S. 267, 281–82 (1986) (noting that the permissibility of imposing burdens of racial remedies varies with the weight of the burden to be imposed); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (disapproving of remedies that are implemented at the expense of innocent individuals absent judicial, legislative, or administrative findings of constitutional or statutory violations).

202. *See supra* note 153 and accompanying text (discussing the several requirements for liability).

C. Pennhurst *Notice*

As to the *Pennhurst* requirement of clearly attaching conditions to the receipt of funds,[203] the *Sandoval* decision should not present insurmountable obstacles. *Sandoval* did not alter recipients' duty to comply with Title VI disparate impact regulations.[204] First, the prohibition against disparate impact, established by federal regulations, attaches a clear condition to the receipt of federal funds.[205] Second, Supreme Court decisions consistently have held that federal fund recipients are liable under section 601 for intentional discrimination.[206] Third, deliberate indifference to Title VI violations is equivalent to, or sufficient to establish, intent.[207] Therefore, a federal fund recipient has the requisite notice to make it aware that if it takes the funds, it may be liable for damages through private actions.

D. *Placing Recipients on Factual Notice*

If the courts hold that a private plaintiff may proceed under a deliberate indifference theory, a factual issue will be presented as to a second type of notice in addition to the above-mentioned *Pennhurst* notice. This second type of notice involves actual knowledge of presently occurring violations. According to the Supreme Court, a recipient of federal funds must have notice that a particular practice has a disparate effect and is a violation of Title VI before it may be liable for such violation.[208] The recipient also needs to know the discrimination has in fact occurred in a program under its control.[209] In *Gebser*, the first type of notice was not at issue because it was well established that sexual harassment is a form of sexual discrimination.[210] In *Davis*, the sexual harassment was student-on-student and the Court had not previously addressed the issue, nor made it clear that a school could be held liable for it.[211] The Court stated that the National School Boards Association's proviso warning school boards of a potential Title IX violation satisfied this prong of

203. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

204. Alexander v. Sandoval, 532 U.S. 275, 282 (2001).

205. *See* 34 C.F.R. § 100.3 (2001) (prohibiting discriminatory effects in financial aid and other services).

206. *Sandoval*, 532 U.S. at 279–80.

207. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 644 (1999) (equating deliberate indifference with intention in the sexual harassment context).

208. *Id.* at 643–44.

209. *Id.* at 645.

210. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S 274, 281 (1998).

211. *See Davis*, 526 U.S. at 637.

notice.[212] Although it had not yet been published at the time of the discrimination, the Court noted that the Department of Education guidelines prohibiting such conduct also would have sufficed as notice to the schools.[213]

The second prong of notice requires that a violation of Title IX occur and that an official with the power to remedy it be made aware of the violation.[214] Sexual harassment cases may present a clearer delineation of these issues than do disparate impact cases because harassment has no justification, whereas there may be legitimate explanations for a disparate impact.[215] Also, a school might operate a neutral program that has a slight disparate impact, but without OCR guidelines, the school may not know whether its program rose to the level of discrimination. Thus, if a school is unable to identify a clear violation on its own, there is nothing toward which it is deliberately indifferent. Conversely, if a school learned that a neutral policy had an enormously disparate impact, it would immediately know it was likely a Title VI violation.[216] However, the middle ground between knowledge and ignorance of a violation probably occupies the greatest percentage of daily events that create a disparate impact. Thus, guidelines and interpretations by federal agencies that flesh out the effects of certain practices would be necessary to establish the notice.[217] If a recipient has notice that a disparate impact is a violation, then that impact becomes something toward which a recipient may be deliberately indifferent.

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212. *Id.* at 647.

213. *Id.*

214. *Id.* at 642, 644.

215. For example, pursuing a legitimate educational goal, such as improving basic skills through high stakes testing, may be a justification for disparate impact. *See, e.g.*, G.I. Forum v. Texas, 87 F. Supp. 2d 667 (W.D. Tex. 2000) (holding that the Texas Assessment of Academic Skills test did not have an impermissible adverse impact on minority students because it was an educational necessity).

216. Schools may not know whether the impacts are actually violations, but quite often they are aware of the disparate impacts themselves. Each year schools are required to fill out forms that report by race and gender the rates of graduation, suspension, gifted placement, etc. 34 C.F.R. § 100.6(b) (2001). Thus, although they may not be aware that an impact is a violation, they could not claim they were unaware of the impact. Yet it is important to note again that courts recognize there is a point when disparate impacts are so high they are intuitively impermissible.

217. For instance, guidebooks on sexual harassment or high stakes testing must tell recipients which actions are problematic and which are not if a plaintiff is going to show that a recipient knew it was in violation. *See, e.g.*, OFFICE OF EDUC. RESEARCH & IMPROVEMENT, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, 62 Fed. Reg. 12034 (Mar. 13, 1997) (detailing the legal framework that schools can expect to face in dealing with sexual harassment).

In summary, deliberate indifference standards have yet to be applied to neutral policies with disparate impacts. Some courts may be reluctant to take that step because of the differences between a disparate impact claim and harassment.[218] These differences, however, are largely irrelevant because the underlying actions constituting sexual harassment or disparate impact are not the violations for which the recipients would be liable. Instead, deliberate indifference could theoretically make a recipient liable for any violation of Titles VI or IX because it is the deliberate indifference to the violation that makes the recipient institution liable, not the underlying violation itself. Thus, the only relevant inquiry should be whether an underlying violation has occurred and whether the recipient was deliberately indifferent toward it.

IV. ENFORCING TITLE VI REGULATIONS BY PROVING INTENT

The third theory a potential plaintiff could pursue to privately enforce disparate impact regulations is found by revisiting old-fashioned intent. Essentially, intent can be proven through a derivation of deliberate indifference. If intent can be shown, plaintiffs may bring private causes of action under section 601 rather than section 602. At times, the line that distinguishes deliberately indifferent acts from intentionally discriminatory acts is relatively thin.[219] The Supreme Court has repeatedly stated that the disparate impact of a facially neutral policy is not, in and of itself, sufficient to establish discriminatory intent.[220] Yet the Court has explicitly stated that disparate impact is a good starting point in determining whether intentional discrimination has occurred.[221] As this Section will explain, when a recipient undertakes actions that reasonably qualify as deliberate indifference toward disparate impacts, the recipient

218. *See supra* notes 156–65 and accompanying text.

219. In fact, because of the difficulty in drawing this line, agencies simply cast a broad net by prohibiting all disparate impacts. Some policies with disparate impact are intentionally discriminatory or cannot be justified, whereas others are not. For the sake of efficient regulation, however, the best choice is to prohibit all disparate impacts even though it may result in preventing certain policies that would otherwise be permissible. Now that a plaintiff's ability to sue under disparate impact regulations has been withdrawn in *Sandoval*, the real issue is at what point disparate impacts may be used to prove intent.

220. *See, e.g.*, Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (stating that "impact alone is not determinative"); Washington v. Davis, 426 U.S. 229, 246–47 (1976) (finding that the disproportionate impact of a verbal skills test used to hire police officers was not facially unconstitutional).

221. *Arlington Heights*, 429 U.S at 266.

creates the circumstances from which one can infer discriminatory intent.

Often with facially neutral policies, a recipient's intentions are not readily discernable from the policy. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[222] the Supreme Court stated that the issue of whether a neutral policy bears more heavily on one race than another (i.e., disparate impact) is a proper place to begin in determining intent.[223] In addition, there will be instances, as in *Yick Wo v. Hopkins*,[224] when official actions have such a stark disparate impact that the circumstances make it relatively easy to infer that discriminatory intent was a motivating factor.[225] Of course, most policies will not have a disparate impact that is so stark that discriminatory intent is unambiguous.[226] More often, the disparities will be subtle enough that statistics or effects alone are insufficient to prove intent.[227]

A derivation of the deliberate indifference theory, however, may be able to bridge the gap between the instances of subtle and stark disparate impacts. The Supreme Court in *Sandoval* made it clear that a policy that merely violates section 602 prohibitions against disparate impacts does not establish a basis for a private right of action.[228] A good argument, however, can be made that under some circumstances, such a violation can rise to the level of intentional discrimination sufficient to violate section 601.[229] When the intent of a policy is unexpressed or discriminatory intent is not clear on the policy's face, the Supreme Court looks to the totality of the circumstances to determine intent.[230] In *Arlington Heights*, the Supreme Court included among these factors: (1) whether a policy bears more heavily on one race; (2) the historical background of the policy; (3) the sequence of events leading up to the policy enactment; (4) any departures from normal procedure; and (5) substantive departures, "particularly if the factors usually considered important

222. 429 U.S. 252 (1977).
223. *Id.* at 266.
224. 118 U.S. 356 (1886).
225. In *Yick Wo*, a facially neutral policy prohibited the licensing of hand laundries in wooden buildings except on consent of a commissioner. *Id.* at 357–58. Consent was granted to all but one of the non-Chinese applicants but none of the Chinese applicants. *Id.* at 359.
226. *Arlington Heights*, 429 U.S. at 266.
227. *Id.*
228. Alexander v. Sandoval, 532 U.S. 275, 293 (2001).
229. *See* LEP example at *infra* page 388–89.
230. *Arlington Heights*, 429 U.S. at 266–68.

by the decisionmaker strongly favor a decision contrary to the one reached."[231] These factors are by no means exclusive and could vary depending on the context.[232] The essential point is that intent can be inferred from the totality of the circumstances.

With respect to disparate impacts that violate section 602 regulations, the fifth factor may play a significant role in proving intent through deliberate indifference. For example, when educators make educational decisions, the assumption is that they do so with the intention of improving or maintaining the educational opportunities of their students, not detracting from them.[233] Of course, their decisions will not always be sound and will, on occasion, have deleterious effects. In short, educators will at times enact policies that have disparate effects on racial minorities, and there may be no discernable discriminatory intent motivating the policy. If deliberate indifference occurs, however, discriminatory intent can be inferred.

Several specific factual circumstances must exist to show a type of deliberate indifference that rises to the level of intent, all of which relate to the fifth factor articulated in *Arlington Heights*.[234] First, the results of the policy depart from the substantive purpose of the policy.[235] Second, the result of the policy is a racially disparate impact. Third, the recipient learns of the impact or that it violates Title VI. Fourth, the recipient learns that the policy it is using is not achieving the substantive goal it purports to pursue. Fifth, the recipient learns, is informed, or becomes aware that an alternative way to achieve the results without a racially disparate impact exists. In totality, the recipient is deliberately indifferent to the Title VI violation/disparate impact, and fails to take a better course of action that is within its power. In such a case, the recipient's action begins to be "unexplainable on grounds other than race"[236] and begins to look more like intentional discrimination.

For example, a school decides that it is going to institute a new gifted and talented program to identify gifted and talented students and provide them with the additional stimulation necessary to keep

231. *Id.* at 266–67.

232. *Id.* at 267.

233. *See, e.g.*, Castaneda v. Pickard, 648 F.2d 989, 1009 (5th Cir. 1981) (stating that courts should be deferential when reviewing the appropriateness of state and local educational agencies' actions with regard to students with limited English-speaking ability).

234. 429 U.S. at 267.

235. *See id.* (recognizing the relevance of decisions that substantively depart from logical considerations).

236. *Id.* at 266.

them engaged in school. The school administers the test in English only, but a significant number of Limited English Proficient (LEP) students attend the school and none of them score high enough to participate in the program. However, some of these students may have previously been in a gifted and talented program at another school that utilized different standards, or they may have been identified within their own school as being gifted through a different screening procedure. The implication here is that the test is not accurately identifying gifted students. Some parents notify an appropriate school official that children are being misevaluated, and the official is further notified through federal guidelines that this particular test is not indicative of giftedness or talent in LEP students and that a better screening process exists. If the school refuses to change its policy, at this point, the most logical inference is that the school intends this result. Because a result contrary to the purported substantive goal of identifying gifted and talented students is being achieved and other alternatives for achieving the goal exist, the deliberate indifference by the school provides the basis to infer discriminatory intent from the disparate effects. Through essential deliberate indifference, unintentional discrimination becomes intentional and actionable under section 601.

At first blush, *Personnel Administrator of Massachusetts v. Feeney*[237] seems to be relevant to the analysis. Although *Feeney* is a sex discrimination case, it addressed broader issues of determining discrimination. The Supreme Court in *Feeney* stated that discriminatory intent "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... [acted] at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[238] However, this case actually addressed the idea that effects alone do not prove intent.[239] *Feeney* involved a state actor that attempted to pursue a legitimate goal through a policy that resulted in a disparate impact on women.[240] But the important distinction in *Feeney* was that the means implemented did in fact achieve the legitimate goal—giving veterans a preference

237. 442 U.S. 256 (1979). In *Feeney*, the plaintiff challenged a state employment policy that gave preference to veterans. *Id.* at 259. Because veterans were overwhelmingly male, the policy had a disparate impact on females. *Id.*

238. *Id.* at 279.

239. *Id.* at 272 (finding disparate impacts unconstitutional only when they can be traced to discriminatory intent).

240. *Id.* at 269.

in hiring did increase the employment of veterans.[241] Thus, the disparate impact was merely an unintentional byproduct.[242]

Conversely, the gifted and talented example contemplates a situation in which the goal of identifying gifted children is not being achieved and the recipient persists in its action. In such a case, it cannot be said that the recipient is acting "in spite of" the disparate impact in order to achieve its goal. The disparate impact is actually one of the primary results of the policy because its goal is not being achieved. Furthermore, failure to achieve the goals eliminates justification for the policy, and leaves the question of why a recipient would persist in using a policy that does not achieve its end. One might infer that the policy is being continued "because of" race. Thus, in the deliberate indifference/intent theory, *Feeney* would not preclude a finding of discriminatory intent, which could be proved along the lines described above. With proof of intent, a plaintiff could proceed under section 601.

CONCLUSION

The Supreme Court's decision in *Alexander v. Sandoval* diminished civil rights proponents' ability to combat racial discrimination in federally funded programs. Their right to enforce section 602 through private causes of action is now seriously in jeopardy. Aggrieved parties may file administrative complaints alleging violations of section 602 regulations with federal agencies, but such measures are unlikely to yield the deterrent or extensive policing necessary to ensure full and fair participation in federally funded programs. To protect civil rights, new approaches must be pursued. Precedent suggests that plaintiffs may be able to pursue causes of action under § 1983. Although such a route is not precluded, the Court's perspective in *Sandoval* and *Gonzaga* strongly suggests that such a claim would be rejected if it were to come before the Court.[243] Conversely, the Court has permitted plaintiffs in Title IX to use a theory of deliberate indifference that is theoretically applicable to Title VI. Furthermore, a derivation of this theory would also permit plaintiffs to prove intent and possibly allege a cause of action under section 601. By litigating these theories, plaintiffs may

241. *Id.* at 274.

242. *Id.* at 275 (recognizing that the military preference was not a pretext for gender discrimination).

243. *See supra* notes 121–47 and accompanying text.

be able to revive the civil rights the Supreme Court limited in *Sandoval.*

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