CURRENT TREATMENT OF ENVIRONMENTAL JUSTICE CLAIMS: PLAINTIFFS FACE A DEAD END IN THE COURTROOM

I. INTRODUCTION

The US Environmental Protection Agency ("EPA") defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[1] It defines "fair treatment" as meaning that "no group of people, including racial, ethnic, or socioeconomic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies."[2] The EPA's definitions indicate that environmental justice claims are not limited to specific kinds of pollution.[3] In fact, the environmental justice definition "encompasses adverse health impacts related to air pollution and water and soil contamination. It also concerns all types of land use decisions, including siting and permitting."[4]

The notion of environmental justice stands in opposition to the prevalent social attitude of more industrialized nations to disregard natural laws of sustainability in favor of economic growth and development. One component of sustainability commonly disregarded is the idea of environmental responsibility, requiring the establishment of a careful balance between an individual's actions and environmental limits. A world in which most people hold environmental responsibility in high regard, is a world in which the slogan "not in my backyard" ("NIMBY") is abandoned.[5] Yet, in today's society, NIMBY is a way of life and is thoroughly integrated in the standard of living so many of us enjoy.

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[1] Maribel Nicholson-Choice, *Environmental and Land Use Law: The Many Faces of Environmental Justice*, 74 FLA. B.J. 50, 50 (2000).

[2] EPA, INTERIM FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES 2 (1997).

[3] *See id.*

[4] *Id.*

[5] *See* Robert D. Bullard, *Environmental Justice in the 21st Century*, *available at* http://www.ejrc.cau.edu/ejinthe21century.htm (last visited Jan. 12, 2003).

The average American produces more waste every day than the surrounding environment can absorb without detriment. Technology has subtly allowed many citizens of overdeveloped countries to avoid taking responsibility for their waste by enabling them to export pollution burdens out of their "backyard" into the smaller, more congested yards of minorities and low-income residents.[6] Since the advent of sewer systems and waste disposal sites, citizens of industrialized nations have grown accustomed to having waste carried far away from them. Because the Earth is a closed system, the inevitable result of exportation is subsequent importation elsewhere. The impacts of this NIMBY system have proven to be disproportionate.[7]

In the free market economy of the US, disposal sites and recycling facilities are commonly located where the land is the cheapest and construction of the facility is most cost-effective. Studies have shown that minorities and low-income residents commonly populate areas where land values are low.[8] The roots of environmental justice are embedded in the notion of fairness and the belief that minorities and low-income residents should not have to bear the burden of someone else's waste and pollution. However, the human population continues to grow and to produce increasing amounts of waste each day; this, in turn, feeds the demand for new or expanded disposal facilities. Since municipalities and private owners will continue to build such facilities at the lowest possible cost, minority and low-income communities will inevitably continue to bear the brunt of the nation's waste. This cycle will continue unless the less-fortunate minority and low-income communities can gain a foothold to successfully pursue a legal remedy.

Within the US, public policy programs and legal proceedings are available to address environmental injustices. Public policy programs are generally not a truly viable option because they are left to the discretion of legislative authorities and take time to draft, implement, enforce, and effectively induce change. Legal proceedings, however, are more readily available to the individual citizen seeking environmental justice. Although legal proceedings may be long and arduous, direct, albeit temporary, remedies, such as injunctions, can provide immediate relief to private citizens. Unfortunately, the litigant's path to environmental justice has thus far proven a rocky course, filled with many dead ends and one-way streets.

This Note takes the reader down the typical litigant's path and illustrates the various roadblocks along the way. Ultimately, this Note argues that a new way should be paved to the doorstep of environmental justice. This Note examines the various options available for a citizen plaintiff seeking redress in the face of environmental injustice. Section II addresses the debate over whether environmental injustice really exists and truly poses a threat to low-income and minority communities. Section III discusses the various avenues a citizen can use

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[6] *See id.*

[7] *See id.*

[8] *See id.*

to seek redress for environmental injustice. Generally, the citizen has four options: 1) to bring an Equal Protection claim in court; 2) to bring a Title VI claim; 3) to use 42 U.S.C. § 1983 as a vehicle to enforce EPA regulations promulgated under Title VI; or 4) to file an administrative complaint with the EPA. In each of the four options, the citizen encounters significant obstacles to receiving his remedy. Section IV critiques the efficacy of the current system and examines the inadequacies of the administrative complaint process and the procedural advantages over litigation. Section IV also criticizes recent judicial rulings and advocates for the establishment of a private right of action under Title VI of the Civil Rights Act and a federal right enforceable through 42 U.S.C. § 1983.

II. EVIDENCE OF ENVIRONMENTAL INJUSTICE

Not everyone agrees that environmental injustice exists. Several studies have failed to find evidence of racial discrimination regarding the construction of hazardous waste facilities.[9] These studies compared areas with and without hazardous waste facilities and found no significant statistical difference in the percentage of the population that is African-American or Hispanic in the two types of areas.[10] Studies revealing a higher proportion of minority groups near hazardous waste facilities attributed the discrepancy to the "moving to nuisance hypothesis" acting in conjunction with the "white flight theory."[11] The "moving to nuisance hypothesis" posits that hazardous facilities are not intentionally placed in areas of minority or low-income populations, but that these groups move to the nuisance after the facility is established because the land price subsequently drops.[12] Other studies have shown that when a hazardous waste facility is erected, white residents tend to flee the community at a faster rate than minorities, thereby increasing the proportion of minorities near such facilities.[13]

Despite those people who refuse to acknowledge that environmental injustice exists, scientists have conducted numerous studies showing that incidents of environmental injustice do occur, causing great detriment to those affected. A series of studies conducted in the 1980s focused on the correlation between minority communities and the location of hazardous and toxic waste facilities.[14] In 1983, the US General Accounting Office conducted a study on the racial and socio-economic profile of the communities near four hazardous waste landfills and found that blacks comprise the majority of the population in three of the four

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[9] *See* ENVIRONMENTAL LAW PRACTICE GUIDE § 12B.01(1)(e)(i) (2001).

[10] *See id.*

[11] *Id.* at § 12B.01(1)(e)(ii).

[12] *See id.*

[13] *See id.*

[14] *See* Cheryl A. Calloway & John A. Decker, *Environmental Justice in the United States—A Primer,* 76 MICH. B.J. 62, 62 (1997).

communities.[15] In 1987, the United Church of Christ Commission for Racial Justice ("UCCCRJ") presented a study showing that approximately fifteen million people, or sixty percent of the total African-American population, live in communities where at least one uncontrolled toxic waste site is located.[16] This study involved the location of all 415 commercial hazardous waste facilities throughout the US as identified through the EPA's Hazardous Waste Data Management System.[17] To describe the results of the study, Dr. Benjamin F. Chavis, Jr., the former UCCCRJ Director, coined the phrase "environmental racism."[18] Not only did this study reveal a correlation between race and hazardous waste sites, but Chavis claimed that the results "conclusively show[ed] that race has been the *most discriminating factor* of all those tested in the location of commercial hazardous waste facilities in the United States."[19] In 1994, UCCCRJ updated its report and concluded that the racial inequality in choosing hazardous waste facility locations has grown throughout the past decade.[20]

The terms "environmental racism" were more broadly defined by the Director of the Environmental Justice Resource Center, Robert Bullard, to encompass "any policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups or communities based on race or color."[21] Bullard's definition also includes "exclusionary and restrictive practices that limit participation by people of color in decision-making bodies, commissions and regulatory bodes."[22]

The validity of the environmental justice movement has been reaffirmed through the actions of the federal and state legislatures. In Massachusetts, the Senate Ways and Means Committee recommended Senate Bill 2213 for enactment.[23] Senate Bill 2213 mandated the development of a statewide environmental justice program and required every Massachusetts agency under the Secretary of Environmental Affairs to rework its criteria for promulgating and enforcing regulations, locating noxious facilities, and awarding grants to include "environmental justice principles."[24] On February 12, 2002, the Massachusetts Senate passed the bill, which was redrafted and renamed Senate Bill 2243. The

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[15] *See* ENVIRONMENTAL LAW PRACTICE GUIDE, *supra* note 9, at § 12B.01(1)(b).

[16] COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 13 (1987).

[17] *Id.* at 10.

[18] Calloway & Decker, *supra* note 14, at 14.

[19] *Id.* (emphasis added).

[20] *See* ENVIRONMENTAL LAW PRACTICE GUIDE, *supra* note 9, at § 12B.01(1)(c)(1).

[21] Calloway & Decker, *supra* note 14, at 62.

[22] *Id.*

[23] *Odd 'Justice;' An Environmental Bill's Unintended Consequence*, WORCESTER TELEGRAM & GAZETTE, Feb. 17, 2002, at C1.

[24] *Id.*

House Ways and Means Committee is currently reviewing Bill 2243.[25] In New Jersey, the Department of Environmental Protection released a proposed set of rules requiring businesses applying for an operating permit to submit their plans for review by a computer model that correlates population and pollution figures.[26] If the computer evaluation shows a possible disparate environmental impact on the community, the rules require the business to participate in an outreach program to give area residents the opportunity to voice their views.[27] If the Department of Environmental Protection determines that the business made a good faith effort to engage residents in the decision-making process, it will grant the permit.[28]

At the federal level, the National Academy of Public Administration ("NAPA") gathered a panel of scholars and experts to analyze how it could incorporate notions of environmental justice into the EPA's permit writing procedures for air, water, and waste.[29] The panel indicated that the EPA should establish an accountability process to measure the performance of managers and staff to ensure that no groups bear disproportionate consequences of industrial and commercial operations.[30] The panel also concluded that the EPA should monitor areas at high-risk for disparate impact and analyze the data to determine feasible permit terms and conditions.[31] Also on the federal level, in October 2002, Representative Mark Udall introduced Bill 5637 to the House of Representatives. Bill 5637 embodies the Environmental Justice Act of 2002.[32] The general focus of the Act is to require federal agencies to generate and apply policies and practices that encourage environmental justice.[33] On October 28, 2002, Bill H.R. 5637 was referred to the House Subcommittee on Environment and Hazardous Materials, and there has been no subsequent major action.[34] On both the state and federal levels, environmental justice is receiving increased attention and support. Unfortunately, as discussed below, this increased legislative attention does not necessarily translate into a smoother path for environmental justice litigants.

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[25] S. 2243, 2002 182nd Gen Ct., Reg. Sess. (Mass. 2002), *available at* http://www.state.ma.us/legis/history/s02243.htm (last visited Jan. 10, 2003).

[26] *See Clean Water: N.J. Proposes First Environmental Justice Rules*, 10 GREENWIRE 9 (Feb. 7, 2002), *available at* http://www.greenwire.com.

[27] *See id.*

[28] *See id.*

[29] *Panel Tells US EPA to Make Environmental Justice a Larger Concern*, 13 BUS. & THE ENV'T 15 (2002).

[30] *Id.*

[31] *Id.*

[32] H.R. 5637, 108th Cong. (2002), *available at* http://thomas.loc.gov/cgi-bin/query (last visited Jan. 10, 2003).

[33] H.R. 5637, 108th Cong. (2002), Bill Summary & Status, *available at* http://thomas.loc.gov/cgi-bin/bdquery (last visited Jan. 10, 2003).

[34] *See id.*

III. THE PATHWAYS OF ENVIRONMENTAL JUSTICE LITIGANTS

Citizens and community groups have struggled to find ways to pursue environmental justice claims in federal courts and administrative proceedings. In court, plaintiffs generally bring claims of environmental injustice under the Equal Protection Clause of the Fourteenth Amendment[35] or Title VI of the Civil Rights Act of 1964.[36] Succeeding on such claims, however, has proven to be a difficult task. In the administrative arena, complainants can file a complaint with the EPA under Title VI.[37] Both types of environmental claims offer plaintiffs different benefits and obstacles.

A. Litigation Brought Under the Equal Protection Clause of the Fourteenth Amendment

The first environmental justice case brought was pursued under the Equal Protection Clause.[38] The basis for this environmental injustice complaint is the denial of equal protection by a state or federal agency that repeatedly issues permits allowing noxious, detrimental facilities to operate in a minority or low-income community.[39] However, judicial interpretations of the Equal Protection Clause have made success nearly impossible for many environmental justice plaintiffs.

1. Requirements for Claiming Denial of Equal Protection of the Law

The Equal Protection Clause prohibits unreasonable or unjustifiable discrimination. The US Supreme Court has established three main factors to maintain an Equal Protection claim: 1) the action in question must be a government action (including government furtherance of private action); 2) the action must constitute an unjustifiable discrimination wherein similarly situated individuals are treated differently; and 3) there must be proof of intent to discriminate.[40] Under the Equal Protection Clause, a plaintiff can challenge a

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[35] U.S. CONST. amend. XIV.

[36] *See* 42 U.S.C. § 2000d (2000) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination, under any program or activity receiving federal financial assistance.").

[37] *See id.*; 40 C.F.R. § 7 (2002).

[38] Julie H. Hurwitz & E. Quita Sullivan, *Using Civil Rights Laws to Challenge Environmental Racism: From* Bean *to* Guardians *to* Chester *to* Sandoval, 2 J.L. SOC'Y 5, 18 (2001).

[39] *See* U.S. CONST. amends. V and XIV. The language of the Fourteenth Amendment applies to the states, and the language of the Fifth Amendment's Due Process Clause applies similarly to the federal government.

[40] *See* MICHAEL GERRARD ET AL., THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS (Michael Gerrard ed., 1999); *see also* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 254 (1977).

wide range of government action, including state and federal statutes, zoning ordinances, or state administrative actions, such as granting or denying a permit.[41]

In past cases based on Equal Protection claims, plaintiffs have challenged a state's issuance of permits to noxious or hazardous waste disposal or treatment facilities located in minority and low-income neighborhoods.[42] Where a noxious facility is situated in one neighborhood instead of another, a state's differential treatment of similarly situated individuals is more easily shown. However, difficulties can arise when defendants argue that one neighborhood is more environmentally suitable for the facility.[43] The most difficult hurdle for the environmental justice plaintiff is the requirement to prove intent to discriminate. Satisfying the intent element takes on even greater significance when considering the applicable standard of judicial scrutiny.

The standard of judicial scrutiny applied to Equal Protection claims depends on various elements. Courts normally apply a rational basis test. Under the rational basis test, the court will uphold a government action[44] applicable to a specific group as long as there is some reasonable basis for the classification. For example, the Court in *City of Cleburne v. Cleburne Living Center* held that a city zoning ordinance violated the Equal Protection Clause because its definition of a single-family residence excluded group homes for the mentally handicapped.[45] The court reasoned that the ordinance permitted similar types of non-traditional single-family uses including apartments, dormitories and hospitals, but failed to include mentally handicapped group homes without a rational basis for making such a distinction.[46] Generally, courts defer to legislative discretion and, as a result, courts have invalidated few regulations on the grounds irrationality.

If the government action in question applies to a suspect class[47] or a fundamental right,[48] courts will apply strict scrutiny, a higher standard of review. In the context of environmental justice cases, plaintiffs are usually members of a suspect class (either minority or low-income) and thus trigger the application of strict scrutiny rather than the rational basis test. In the famous footnote 4 in *United States v. Carolene Products Co.*, Justice Stone was the first to specify that a stricter level of scrutiny might be appropriate where the suspect regulation is directed at particular religions, national or racial minorities, or interferes with

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[41] *See* GERRARD ET AL., *supra* note 40.

[42] *See, e.g.*, Bean v. Southwestern Waste Mgmt. Corp., 482 F. Supp. 673, 675 (S.D. Tex. 1979).

[43] *See id.* at 679.

[44] Frequently this is a regulation, but, in environmental cases, a permit or permitting process could be challenged.

[45] *See* 473 U.S. 432, 450 (1985).

[46] *See id.*

[47] *See* GERRARD ET AL., *supra* note 40, at 6 (commenting that suspect class can be based on race, ethnic origin or religion).

[48] *See id.* (stating that fundamental rights include freedom of speech, the right to vote, and access to justice).

fundamental rights.[49] Strict scrutiny shifts the burden to the government to prove that the statute is narrowly tailored to serve a compelling state interest.[50]

Following the landmark case *Brown v. Board of Education*,[51] courts continued to hold that the government cannot satisfy the strict scrutiny burden when an action facially discriminates against a racial minority.[52] The resurfacing of government action openly discriminating on the basis of race is unlikely.[53] The threat exists, however, that environmental injustice will continue via government action that is facially neutral but nonetheless discriminatory in application.

Upon showing that a government act intentionally and unjustifiably discriminates on the basis of race, the burden shifts to the government to show that the contested action serves a compelling government interest. Since the strict scrutiny standard is extremely demanding, a plaintiff who can impose such a standard on the defendant is likely to succeed.[54] However, in claims of environmental injustice, courts have been generally unwilling to find intent to discriminate,[55] and plaintiffs have been unsuccessful in pursuing claims under the Equal Protection Clause.

2. The Intent to Discriminate Requirement

In *Village of Arlington Heights v. Metropolitan Housing Development Co.*, the US Supreme Court enumerated various ways to prove intent to discriminate: discrimination in applying statutory criteria; shifts in agency procedure; statements evincing an intent to discriminate; and circumstantial proof of intent to discriminate.[56] A disparate impact alone is not enough to prove intent; there must be an actual discriminatory purpose.[57]

Discriminatory intent is evident when a state agency applies the same statutory

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[49] *See* 304 U.S. 144, 152 fn.4 (1937).

[50] *See* GERRARD ET AL., *supra* note 40, at 6.

[51] 347 U.S. 483 (1954).

[52] *See* GERRARD ET AL., *supra* note 40, at 6.

[53] See *id.*

[54] *See id.* at 7.

[55] *See, e.g.*, *Bean*, 482 F. Supp. at 680.

[56] *See* 429 U.S. 252, 266-68 (1977). The Court held that a zoning ordinance that excluded low-income apartments from a single-family district was valid, despite an extreme disparate effect on the non-white members of the community, because the Court failed to find evidence of intent to discriminate on the basis of race. *See id.* at 270. The Court looked to the zoning history of the community and found that the single-family zone had been established decades before Metropolitan applied for a permit to build multi-family, inter-racial housing. *See id.* Justice Powell observed that the case may have been decided differently had the village been rezoned immediately after Metropolitan applied for a permit. *See id.* at 267.

[57] *See id.* *See also* Washington v. Davis, 426 U.S. 229, 246 (1976) (holding that proof that a law imposes a greater burden on one racial group than another, absent proof of intent to discriminate, does not make out a claim of denial of equal protection).

criteria inconsistently between different racial groups. For example, in *United States v. Yonkers Board of Education*, the city refused to approve any public minority housing beyond the areas that were already heavily populated by minorities, but the city approved housing to meet the needs of other non-minority residents.[58] The Court found that this inconsistent application of the housing statute for a period of three decades constituted sufficient evidence of the city's intent to discriminate.[59] So far, environmental justice plaintiffs claiming denial of equal protection have uniformly "failed to show discrimination in applying statutory standards for locating landfills and the like sufficient to trigger a violation of the Clause."[60] Frequently, the geography of the facility's site and the traits of the surrounding area are different enough to justify granting a permit for one location and denying it for the other. For example, in *R.I.S.E. v. Kay*, the city closed a landfill in a predominantly white community and approved a landfill in a minority neighborhood.[61] The court found that the decision was not based on the racial composition of the area but "on the relative environmental suitability of the sites."[62] The court emphasized that the first landfill was closed because of a myriad of environmental and safety violations independent of any possible discrimination.[63]

Intent to discriminate can also be proven by showing a shift in procedure or a statement by officials or witnesses that reveals intent. In *Arlington Heights*, the Court noted that a departure from the normal procedural routine may suffice to show that a discriminatory purpose is involved in the decision making process.[64] In *Ammons v. Dade City*, the Court held that a shift in procedure showed intent to discriminate when the city regularly covered expenses of paving the streets in white neighborhoods, but then informed African-American homeowners that they would have to advance the paving funds.[65] A statement from a public official admitting, or strongly indicating, an improper purpose may also be sufficient to prove intent.[66] However, obtaining these statements will be more difficult as public officials become more sensitive to environmental justice claims and begin to monitor their speech.

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[58] *See* 837 F.2d 1181, 1187-92 (2d Cir. 1987), *cert. denied*, 510 U.S. 1055 (1994); GERRARD ET AL., *supra* note 40, at 16.

[59] *See Yonkers*, 837 F.2d at 1221.

[60] GERRARD ET AL., *supra* note 40, at 15.

[61] 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd without opinion*, 977 F.2d 573 (4th Cir. 1992).

[62] *See id.* at 1150.

[63] *See id.* at 1149.

[64] *See Arlington Heights*, 429 U.S. 252 at 267 ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.").

[65] *See* 783 F.2d 982, 987 (11th Cir. 1986); GERRARD ET AL., *supra* note 40, at 15.

[66] *See* GERRARD ET AL., *supra* note 40, at 15.

3. Proving Intent to Discriminate in Environmental Justice Litigation is Difficult

Circumstantial proof of intent to discriminate is the most frequently employed device in environmental justice cases asserting denial of equal protection. A substantial discriminatory effect can be significant circumstantial proof of intent to discriminate.[67] In *Yick Wo v. Hopkins*, the city instituted an ordinance banning laundries from operating in wooden buildings because of the risk of fire.[68] The Court held that prosecuting 150 of 240 laundries with Chinese owners and not prosecuting any of the other 80 laundries with non-Chinese owners was a blatant enough example of selective enforcement to constitute evidence of intent to discriminate.[69] This kind of extreme statistical evidence is unlikely in environmental justice cases because the numbers may be not be significant enough to form a sufficient correlation between social or racial groups and the location of hazardous facilities.[70] For instance, when there are only two or three waste facilities in a given state, it is difficult to establish a pattern of discriminatory location. Defendants can easily argue that simply because the first few facilities are located in minority or low-income areas, this does not indicate a trend or that waste facilities will always be located in such areas, and, therefore, the data fails to reveal an intent to discriminate.[71]

Bean v. Southwestern Waste Management Corp. is the first significant environmental justice case litigated under the Equal Protection Clause where plaintiffs attempted to establish circumstantial proof of discriminatory intent.[72] The case was brought in 1979 when residents of East Houston-Dyersdale Road sought an injunction preventing Southwestern from constructing and operating a municipal solid waste facility in the area.[73] The determined site was adjacent to a local high school with poor ventilation.[74] Plaintiffs claimed that the Texas Department of Health's decision to grant Southwestern a permit was motivated by racial discrimination and was in violation of 42 U.S.C. § 1983.[75] The court held that the burden rested on the plaintiffs to show discriminatory purpose, meaning that they "must show not just that the decision to grant the permit is objectionable or even wrong, but that it is attributable to an intent to discriminate on the basis of race."[76] While the court acknowledged that statistical proof can be used to support such a showing, adequate proof was lacking in this case.[77] The plaintiffs

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[67] *See id.* at 14.
[68] 118 U.S. 356, 359 (1886).
[69] *See id.*
[70] *See Bean*, 482 F. Supp. at 675.
[71] *See id.* at 678.
[72] *See id.* at 675.
[73] *Id.* at 674-75.
[74] *Id.* at 679.
[75] *Bean*, 482 F. Supp. at 677.
[76] *Id.*
[77] *See id.* at 678-79.

accumulated seemingly convincing statistical data exposing a clear pattern of locating solid waste facilities in communities of color throughout Houston; the court, however, after analyzing the data, found that it fell short of establishing intent to discriminate.[78] Judge McDonald concluded, "if this court were TDH [Texas Department of Health], it might very well have denied the permit. It simply does not make sense to put a solid waste site so close to a high school . . . [but] it is not my responsibility to decide whether to grant this site a permit."[79] The court's only task was to determine whether the facts warranted an injunction; without a showing of intent to discriminate, the court denied the injunction.

While it is possible to use statistics to show intent to discriminate, environmental justice plaintiffs have generally not succeeded in doing so.[80] This may be due in part to the high standards set in previous cases such as *Yick Wo*[81] and the deference courts tend to afford government agencies. Courts are generally hesitant to replace a government agency's discretion with their own. Even when plaintiffs can demonstrate intent to discriminate, the government has a second chance if they can establish that they would have taken the same action even absent an intent to discriminate.[82]

Proving intent to discriminate in environmental justice litigation can be difficult because, in many cases, there is none.[83] Frequently, strong policy arguments support a particular citing or permit approval. When a municipality grants a permit to a waste disposal site in a low-income or minority community, the main purpose is not necessarily to create a disproportionate impact but merely to create an efficient, cost-effective waste disposal facility for its citizens. Frequently, the facility is located in low-income or minority communities for no other reason than cheaper land, labor, and development costs.[84] Other times, the only other potential location happens to be in the midst of a high-class, wealthy community who has the money and resources to fight construction of such a facility through

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[78] *See id.* at 677-79.

[79] *Id.* at 679-80.

[80] *See* Hurwitz & Sullivan, *supra* note 38, at 22.

[81] *See* 118 U.S. at 374.

[82] *See Arlington Heights*, 428 U.S. at 264-68.

[83] *See* Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations? The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1, 10 (1999) ("Courts have failed to find evidence of intentional discrimination because siting boards and developers can almost always offer at least some race-neutral justification for a site.").

[84] *See* Bullard, *supra* note 5. Workers in economically depressed areas

> are forced to choose between unemployment and a job that may result in risks to their health, their family's health, and the health of their community. This practice amounts to 'economic blackmail.' Economic conditions in many people of color communities make them especially vulnerable to this practice.

Id.

zoning laws and public hearings.[85] Nevertheless, fairness dictates that US citizens should not be subjected to the pollutants and health risks associated with such facilities just because they lack the money or resources to fight construction in their community. The judicial interpretation of the Equal Protection Clause and the intent to discriminate requirement continues to evolve, but not in the direction of a looser standard. The Supreme Court in *Washington v. Davis* explained a valid reason for the stricter standard by stating that if courts were to hold government action invalid merely because "in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate a whole range of tax, welfare, public service, regulatory, and licensing statutes" that would impose a greater burden on the poor and minority community than on the wealthy, white community.[86] Proving intent to discriminate is a permanent requirement to establish a claim of denial of Equal Protection, and it is nearly impossible to meet in a claim of environmental injustice. Therefore, plaintiffs have turned to Title VI of the Civil Rights Act to seek a remedy.

B. Litigation Brought Under Title VI of the Civil Rights Act of 1964

Another path through which environmental justice plaintiffs have sought relief is Title VI of the Civil Rights Act of 1964.[87] Title VI contains a nondiscrimination requirement for all who receive federal financial assistance. Title VI is pertinent to environmental protection and justice because most activities influencing the quality of the human environment receive at least partial federal funding.[88] Nearly every state environmental agency receives funding from the EPA and is subject to Title VI.[89]

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[85] *See id.* ("African-Americans and other communities of color are often victims of land-use decision making that mirrors the power arrangements of the dominant society . . . . Zoning ordinances, deed restrictions and other land-use mechanisms have been widely used as 'NIMBY' (not in my backyard) tool, operating through exclusionary practices.").

[86] 426 U.S. 229, 248 (1976).

[87] *See* 42 U.S.C. § 2000d (2000) (containing a "prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin").

[88] *See* Richard J. Lazarus, *Highways and Bi-ways for Environmental Justice,* 31 CUMB. L. REV. 569, 583 (2000/2001) ("Title VI is relevant to environmental protection generally and environmental justice, in particular, because of the sheer number of activities affecting the quality of human environment that receive some form of federal financial assistance.").

[89] *See* GERRARD ET AL., *supra* note 40, at 23 (commenting that "because virtually every state environmental agency receives some funding from the EPA, almost all state permit decisions are potentially subject to Title VI's jurisdiction").

1. Section 601

Section 601 of Title VI states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[90] Similar to the Equal Protection cases discussed above, prevailing on a Title VI claim has proven difficult because courts require a plaintiff to prove discriminatory intent.[91] In 1983, in *Guardians Ass'n v. Civil Service Commission*, a divided US Supreme Court held that proof of discriminatory intent was required under Section 601, but that regulations promulgated under Section 602 could proscribe disparate impacts.[92] In 1996, *Chester Residents Concerned For Quality Living v. Seif* became the first case to bring an environmental justice claim under Title VI, including both Sections 601 and 602.[93] Plaintiffs challenged the issuance of a permit to a waste treatment facility located in a predominantly African-American community in Pennsylvania.[94] The *Chester* court ruled that the intent to discriminate requirement was required to make out a Section 601 claim.[95]

More recently, in May 2000, in *New York City Environmental Justice Alliance v. Giuliani*, the plaintiff sought an injunction to prevent the city from selling or clearing any of the 1,100 city-owned parcels, which held approximately 600 community gardens.[96] The plaintiffs alleged that clearing the lots and destroying the green spaces would have a disproportionately adverse impact on the city's African-American, Asian-American, and Hispanic residents.[97] The New York City Environmental Justice Alliance ("NYCEJA") brought their action under Title VI, Sections 601 and 602 and 42 U.S.C. § 1983.[98] With respect to Section 601, the court followed precedent and held that Section 601 prohibits only intentional discrimination.[99] The court did not find adequate evidence to support

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[90] 42 U.S.C. § 2000d.

[91] *See* Hurwitz & Sullivan, *supra* note 38, at 24 (commenting that "an action brought under [Section] 601 of Title VI, as with the Equal Protection Clause, now requires a showing of intent to discriminate").

[92] *See* 463 U.S. 582 (1983). Black and Hispanic police officers challenged written exams administered by New York that were used to make entry-level appointments to the city's Police Department. *Id* at 585. Plaintiffs claimed that this practice amounted to a violation of the Department of Labor's Title VI regulations prohibiting federal funded entities from creating a discriminatory impact. *Id.* at 586; *see* Mank, *supra* note 83, at 14.

[93] 132 F.3d 925 (3rd Cir. 1997), *vacated*, 524 U.S. 974 (1998).

[94] *Id.*; *see* Hurwitz & Sullivan, *supra* note 38, at 28.

[95] *See Chester*, 132 F.3d at 929 (stating that "a private right of action exists under section 601, but this right only reaches instances of intentional discrimination as opposed to instances of discriminatory effect or disparate impact").

[96] 214 F.3d 65, 67 (2d Cir. 2002).

[97] *Id.* at 67.

[98] *Id.*

[99] *See id.* at 68.

the claim of intent to discriminate.[100]

The requirement to prove intentional discrimination under Section 601 was influenced by the application of that standard in Equal Protection Clause claims. Therefore, courts will generally be unlikely to alter the intent requirement under Section 601 as long as it upholds the requirement under the Equal Protection Clause.[101] Since the courts are unlikely to loosen the discriminatory intent standard under the Equal Protection Clause, the environmental justice plaintiff has also attempted to pursue a claim under Title VI, Section 602.

2. Section 602

Since courts require a discriminatory intent to make out a Section 601 claim, plaintiffs have attempted to pursue environmental justice claims by alleging a violation of EPA regulations promulgated under Section 602. Section 602 states:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.[102]

Various federal agencies have promulgated regulations forbidding recipients of federal funds to engage in discriminatory practices or to distribute the funds in a manner that results in disparate treatment.[103] Specifically, the EPA has promulgated 40 C.F.R. § 7.35 under Title VI, Section 602. This regulation requires that the EPA, or any program receiving EPA assistance, not discriminate on the basis of race, color, national origin or, if applicable, sex.[104] Specifically subsection (c) of the regulation provides:

> A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them benefits of, or subjecting them to discrimination under any program to which this part applies on the grounds of race, color, or national origin or sex.[105]

The court in *Guardians* was the first to distinguish the standards of proof required to proceed under Section 601 and 602.[106] The court held that claims brought under Section 601 must satisfy the intent to discriminate requirement. The court went on to explain that when a plaintiff seeks enforcement of 40

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[100] *See id.* at 72.
[101] *See* Mank, *supra* note 83, at 59.
[102] 42 U.S.C. § 2000d-1 (2000).
[103] *See* GERRARD ET AL., *supra* note 40, at 24.
[104] 40 C.F.R. § 7.35 (2002).
[105] *Id.* § 7.35(c).
[106] *See* 463 U.S. 582 (1983).

C.F.R. § 7.35, or any regulation promulgated under Section 602, only proof of disparate impact, and not intent to create those impacts, is necessary.[107] There is no evidence that Congress intended to impose different standards of proof under Sections 601 and 602; rather, Congress was silent as to standards of proof.[108] However, the intent to discriminate requirement for Section 601 evolved first, stemming from early judicial analysis of the Equal Protection Clause. By the time the court reached the question of whether Section 602 imposed the same intent requirement in *Guardians*, various agencies had already relied on disparate impact regulations for nineteen years.[109] Instead of invalidating previous regulations, the court in *Guardians* adopted the distinction, and Congress did not object. Since the court has established that Section 602 regulations do not require discriminatory intent, environmental justice plaintiffs have attempted to sue for violations of 40 C.F.R. § 7.35 and allege disparate impacts. These claims, however, face serious obstacles in the courtroom.

While Section 602 allows agencies to promulgate disparate impact regulations (such as 40 C.F.R. § 7.35), it does not explicitly grant the individual the right of action to sue in federal court when those regulations are violated.[110] The judicial interpretation of when a right of action can be implied has fluctuated substantially.[111] Over the past few years, courts have been wrestling with the question of whether there is an implied right of action to enforce agency regulations promulgated under Section 602. Then, in April 2001, the Supreme Court addressed the issue conclusively in *Alexander v. Sandoval* and found that a private right of action does not exist with respect to regulations promulgated under Title VI, Section 602.[112]

a. Judicial Evolution of Implied Private Rights of Action

Traditionally, the Supreme Court has been hesitant to imply a private right of action because of separation of powers concerns. The Court is wary of implying a right Congress did not intend, thereby overstepping the judicial bounds and usurping legislative authority. In *J.I. Case Co. v. Bork*, one of the earliest cases in which the Court implied a private right of action, the Court only questioned whether creating the right would further the purpose of the statute at under consideration.[113] Ultimately, the Court determined that a private right of action

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[107] *See id.* at 593 ("Title VI reaches unintentional, disparate-impact discrimination as well as deliberate racial discrimination."); *see also* Mank, *supra* note 83, at 16 (commenting that "Congress has clearly acquiesced to federal agencies promulgating disparate impact regulation pursuant to Section 602").

[108] *See* Mank, *supra* note 83, at 15.

[109] *See id.* at 16.

[110] *See* 42 U.S.C § 2000d-1.

[111] *See* Mank, *supra* note 83, at 1.

[112] *See* 532 U.S. 275 (2001).

[113] 377 U.S. 426 (1964) (holding that the Securities Exchange Act of 1934 created an

should be granted because the agency responsible for the statute lacked the resources to enforce the statute effectively on its own.[114] In the landmark case of *Cort v. Ash*, the Supreme Court refused to imply a private right of action under a federal regulation barring corporations from monetarily contributing to presidential elections.[115] The Court in *Cort* formed a four-factor test for determining whether a private right of action is implicit in a statute: 1) is the plaintiff part of a class that the statute intends to provide special status to or benefits; 2) is there implicit or explicit evidence that Congress intended to create or deny the proposed private right of action; 3) is such a private right of action consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; 4) is the cause of action one traditionally relegated to state law and, thus, in an area where a federal cause of action would intrude on important state concerns.[116]

Application of *Cort's* four-factor test in subsequent cases led to an increase in decisions implying a private right of action and increased criticism. Justice Powell argued vehemently against use of the *Cort* four-factor test and advocated focusing exclusively on whether Congress intended to create a remedy for the private citizen.[117] Justice Powell stated that "the *Cort* analysis too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement."[118] Additionally, Justice Powell warned that the *Cort* test was too flexible and allowed judges to overstep their authority, ignore legislative intent, and assume lawmaking power.[119] He warned that when Congress fails to include an express right of action, the Court should assume that an express private right of action was proposed and voted down by Congress.[120] Persuaded by Justice Powell, the Supreme Court has since adopted a less liberal interpretation of the *Cort* test, one that emphasizes Congressional intent over the other three factors.[121] Most recently, the Supreme Court has focused specifically on the language and structure of the statute in question to determine whether Congress intended to imply a private remedy.[122]

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implied private right of action for claims of violations of Section 14(a)).

[114] *See id.*

[115] 422 U.S. 66 (1975); *see* Mank, *supra* note 83, at 26-27.

[116] *See Cort*, 422 U.S. at 84-85; Mank, *supra* note 83, at 27.

[117] *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 731 (Powell, J., dissenting).

[118] *Id.* at 740.

[119] *See id.*

[120] *See id.* at 742 (stating that "it defies reason to believe that in each of these statutes Congress absentmindedly forgot to mention an intended private action").

[121] *See* Mank, *supra* note 83, at 31.

[122] *See* Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263, 489 U.S. 527, 532-33 (1989).

b. Implied Private Right of Action Under Section 602

The judicial history of implied private rights of action under Title VI, Section 602 is convoluted and unsettled. In light of the most recent holding in *Alexander v. Sandoval*, most environmental justice plaintiffs will likely not be able to establish an implied right of action under 40 C.F.R. § 7.35.[123]

Plaintiffs in *Cannon v. University of Chicago* brought suit under Title IX of the 1976 Education Act Amendment, prohibiting discrimination in educational institutions receiving federal funding.[124] Since Congress modeled Title IX on Title VI, the two statutes are virtually identical in language and procedure. The Supreme Court in *Cannon* used previous interpretations of Title VI's "language, legislative history and regulation" to connote that Congress likely intended a private right of action under Title IX.[125] Though the Court in *Cannon* never explicitly stated that an implied private right of action also exists under Title VI, "courts and commentators understand *Cannon* to create a private right of action under both statutes."[126]

The Court in *Cannon* did not offer any guidance as to whether Section 601 and regulations promulgated under Section 602 have an implied right of action or if the implied right of action applies only to Section 601. It is likely that the Court did not deem such a distinction necessary because *Cannon* was decided four years before *Guardians* and the establishment of different standards of proof under Section 601 and Section 602.[127] Before *Guardians*, plaintiffs had a private right of action under Section 601 and were not burdened with the intent to discriminate requirement under Section 601; it is likely that they would always seek redress under Section 601. The issue of whether they could also bring suit to enforce agency regulations promulgated under Section 602 never arose. However, after the Court in *Guardians* imposed the discriminatory intent requirement on Section 601 claims, plaintiffs attempted to enforce regulations promulgated under Section 602 and encountered the question of whether an implied right of action exists.

Although the majority in *Guardians* held that a private right of action existed under Section 602, there is an argument that "five members of the Guardians" implied the right of private litigants to state a claim of action for disparate impact discrimination under Title VI's implementing language.[128] Additionally, the fact that the Court in *Guardians* did not dismiss the plaintiffs' suit for failure to state a claim supports the notion that the Court implicitly identified a private right of action. The district, appellate, and Supreme Court all acknowledged that the discrimination in that case was not intentional and, therefore, the case should have been dismissed if there was no implied cause of action under Section 602 for

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[123] *See* 532 U.S. at 290-91.

[124] 441 U.S. 677 (1979); *see* Mank, *supra* note 83, at 27.

[125] *See* Mank, *supra* note 83, at 28.

[126] *Id.*

[127] *See id.* at 30.

[128] *See* 463 U.S. 582; Mank, *supra* note 83, at 33.

discriminatory effects.[129]

Chester v. Seif presents an intriguing look at the question of whether Title VI, Section 602 provides a private right to action.[130] Chester Residents Concerned for Quality Living ("CRCQL") alleged that the Pennsylvania Department of Environmental Protection's ("PADEP") grant of a permit for a soil remediation facility in a predominately black community violated Title VI, Sections 601 and 602, and 42 U.S.C. § 1983.[131] With respect to the Section 602 claim, plaintiffs asserted that the PADEP's issuance of the permit violated the EPA's civil rights regulations promulgated pursuant to section 602 of Title VI.[132] After an extensive discussion of past case law, the court held that "private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to [S]ection 602 of Title VI of the Civil Rights Act of 1964."[133] The court applied a three-prong test to determine whether a private right of action existed by examining: 1) whether the agency rule was within the scope of the enabling statute; 2) whether the statute under which the rule was promulgated permitted the implication of a private right of action; and 3) whether implying a private right of action would further the purpose of the enabling statute.[134] In 1998, the Supreme Court vacated the decision on grounds of mootness and completely avoided addressing the controversial issue of whether a private right of action exists.[135] Consequently, *Chester's* influence on subsequent cases has been ambiguous.

The district court in *New York City Environmental Justice League v. Giuliani* held that 40 C.F.R. § 7.35(b) did not give rise to a private cause of action.[136] The Second Circuit affirmed the district court's holding that the plaintiffs failed to make a prima facie showing of adverse disparate impact and denied their request for an injunction.[137] In doing so, the court avoided the more expansive issue of "whether a private right of action may be brought under 40 C.F.R § 7.35(b), and by extension, other regulations issued by federal agencies under Title VI."[138] The court acknowledged the difficulty other circuits encountered when wrestling with the same issue and suggested that in order to show that a private right of action exists, a party must show Congress intended it to exist.[139] The court recognized that "it may be difficult for a plaintiff to establish that Congress intended to create

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[129] *See* 431 F. Supp. 526 (S.D.N.Y. 1977); 635 F.2d 232 (2d Cir. 1980); 463 U.S. 582 (1983); Mank, *supra* note 83, at 34.
[130] *See* 132 F.3d at 933.
[131] *Id.* at 927.
[132] *Id.*
[133] *Id.* at 937.
[134] *See id.* at 933 (quoting Polaroid Corp. v. Disney, 862 F.2d 987, 994 (3d. Cir. 1998)).
[135] 524 U.S. 974 (1998).
[136] 50 F. Supp. 2d 250, 253-54 (S.D.N.Y. 1999).
[137] *See NYCEJA*, 214 F.3d 65, 66 (2d Cir. 2002).
[138] *Id.* at 73.
[139] *See id.*

a private right of action under [Section] 602 of Title VI," but concluded that they were not compelled to address this issue at this time.[140]

Finally, in April 2001, the Supreme Court in *Alexander v. Sandoval* directly addressed the issue of whether individuals have a private right of action to enforce disparate-impact regulations promulgated under Title VI, Section 602.[141] The Court's decision in *Alexander* is the most recent holding on the issue of implied rights of action. Plaintiffs asserted that the Alabama Department of Public Safety's administration of an English-only driver's test violated the Department of Justice's Section 602 regulation prohibiting funding to recipients with regulations having discriminatory effects.[142] Plaintiffs asserted that the English-only test subjected non-English speakers to discrimination based on their national origin.[143] The Court stated that "neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under Section 602. We therefore hold that no such right of action exists."[144] The majority conceded that a private right of action exists under Section 601, prohibiting only intentional discrimination, and that regulations issued pursuant to Section 602 may forbid activities creating a disparate impact.[145] However, the majority applied a restrictive approach in determining the existence of an implied right of action and refused to look beyond its narrow, isolated interpretation of Congressional intent. The Court's narrow approach in *Alexander* resulted in the holding that a private right of action does not exist for regulations promulgated pursuant to Section 602.[146]

C. Litigation Brought Under 42 U.S.C. § 1983

An environmental justice plaintiff faces severe difficulties when litigating under Title VI. Plaintiffs who bring suit under Section 601 of Title VI face the same heavy burden of proving discriminatory intent as parties claiming racial discrimination under the Equal Protection Clause.[147] While environmental justice plaintiffs do not have to satisfy the intent to discriminate requirement under Section 602 regulations, they are inhibited from bringing a claim because the Court's decision in *Alexander* has left them without a private right of action.[148] One last possible litigation venue may be a claim made under 42 U.S.C. § 1983,

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[140] *Id.*
[141] 532 U.S. 275, 279 (2001).
[142] *Id.*
[143] *Id.* at 293.
[144] *Id.* at 288-89.
[145] *See id.* at 524-26.
[146] *See Alexander*, 532 U.S. at 524-26.
[147] *See* Julia B. Latham Worsham, *Disparate Impact Lawsuits under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631, 645 (2000).
[148] *See Alexander*, 532 U.S. 275.

based on a violation of 40 C.F.R. § 7.35, as promulgated under Section 602. Under 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage,of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.[149]

Traditionally, under the *Wright v. City of Roanoke Housing Authority*[150] line of cases,[151] courts generally hold that once a federal right has been recognized and the plaintiff is shown to be the intended beneficiary of that right, 42 U.S.C. § 1983 acts as a vehicle to enforce that right.[152] The defendant then carries the burden of showing that either the federal law in question does not create enforceable rights within the meaning of Section 1983 or that Congress expressly or implicitly foreclosed a Section 1983 right of action by creating a separate remedial, statutory scheme that is inconsistent with a Section 1983 suit.[153]

This analysis is somewhat more lenient than the standard normally used to determine if there is an implied private right of action because Congress has already expressly authorized the possibility of Section 1983 suits where appropriate.[154] Plaintiffs claiming an implied right of action have the difficult burden of proving Congressional intent. In order to establish Congressional intent, the Supreme Court in *Blessing v. Freestone* instituted a three-part test.[155] First, the statute must inflict a binding obligation on the government. Second, the plaintiff must show that Congress intended for the statute to benefit the plaintiff. Third, the plaintiff must assert a sufficiently unambiguous interest that may be judicially enforceable.[156] The standard of Congressional intent necessary to establish an enforceable right under Section 1983 is significantly less; Section 1983 only requires a showing that Congress intended the plaintiff to benefit from the statute when enacting it.[157] One of the dual purposes of Title VI is to protect

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[149] 42 U.S.C § 1983 (2000).

[150] 479 U.S. 418 (1987).

[151] *See* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498 (1990); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981); Maine v. Thiboutot, 448 U.S. 1 (1980).

[152] *See* Hurwitz & Sullivan, *supra* note 38, at 39.

[153] *See* Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 KAN. L. REV. 321, 325 (2001); *see* Hurwitz & Sullivan, *supra* note 38, at 43-44.

[154] *See* Mank, *supra* note 153, at 323.

[155] 520 U.S. 329 (1997).

[156] *See id.*; Mank, *supra* note 153, at 332-33.

[157] *See* Mank, *supra* note 153, at 333.

the individual from discriminatory effects.[158] Therefore, plaintiffs bringing Section 1983 claims may argue that Congress clearly had them in mind when enacting the statute and intended for them to benefit from it.

Federal circuit courts are split on whether agency relations alone can create an enforceable right under Section 1983.[159] "Some circuits allow Section 1983 suits based on rights created by regulations issued by agencies acting under delegated congressional authority. However, in other circuits, regulations may only help define the scope of a statutory right created by Congress, and may not serve as an independent basis for Section 1983 suits."[160] The Third Circuit held in *Powell v. Ridge* that there is a private right of action under Section 602 of Title VI, but, alternatively, plaintiffs could enforce the same regulation under Section 1983.[161] The court rejected the defendant's argument that Title VI's comprehensive enforcement scheme for administrative complaints precluded Section 1983 claims.[162] Justice Powell reiterated the Supreme Court's warning in *Blessing* that the availability of administrative mechanisms does not automatically preclude Section 1983 suits.[163]

Since the Court's exclusion of an implied private right of action under Title VI regulations in *Alexander*, lower courts have expressed contrasting views on whether Section 1983 may be used to enforce rights and remedy violations of Title VI regulations. In August 2001, the Eastern District of Michigan, in *Lucero v. Detroit Public Schools*, held that "there is no doubt that Title VI creates a federal right of action pursuant to 42 U.S.C. § 1983 where Plaintiffs, who are African-American and Hispanic, were the intended beneficiaries."[164] The *Lucero* court maintained that Section 602 regulations have the full force and effect of the

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[158] *See Cannon*, 441 U.S. at 707 (1979) ("Title VI sought to accomplish two related, but nevertheless somewhat different, objectives."); Mank, *supra* note 83, at 29 ("First, Congress sought to prevent the use of federal resources to support discriminatory practices; and second, Congress wanted to protect individual citizens against discriminatory actions.").

[159] *See* Lucero v. Detroit Pub. Schs., 160 F. Supp. 2d 767, 783-84 (E.D. Mich. 2001) ([T]here is a question, however, with respect to whether agency regulations such as Section 602 creates rights within the meaning of Section 1983. There is a split among circuits regarding whether agency regulations alone create a federal right."); Mank, *supra* note 153, at 324.

[160] Mank, *supra* note 153, at 324.

[161] *See* 189 F.3d 387 (3d Cir. 1999); Mank, *supra* note 153, at 365-66.

[162] *See Powell*, 189 F.3d at 401-02.

[163] *See id.* at 402.

[164] 160 F. Supp. 2d 767, 784 (E.D. Mich. 2001). *Lucero* involved a claim against Detroit Board of Education for deciding to build a new school on a contaminated site. Plaintiffs claimed that Defendants negotiated to gain control of the property with little expense and that the whole process subjected the student population, which was fifty-eight percent African-American and twenty-one percent Hispanic, to discriminatory effects. Plaintiffs contended that building the school on the contaminated site violated 34 C.F.R. §§ 100.3(2) and (3), promulgated pursuant to Title VI, Section 602.

law because they are issued under delegated Congressional authority.[165]

Conversely, in November 2001, the Federal District Court of Oregon, in *Lechuga v. Crosley,* determined that in light of the Supreme Court's failure to imply a private right of action under Section 602 regulations, plaintiffs did not have a "federal right upon which to base their Section 1983 claim."[166] The *Lechuga* court found that Congressional intent is relevant when considering whether Congress intended the plaintiff to benefit from the statute under the Section 1983 test. The *Lechuga* court interpreted the holding in *Alexander* to mean that Section 602 is not intended to benefit any specific class of persons. The *Lechuga* court inquired whether a Section 1983 right might exist under Section 602 and concluded that such a right could not exist where Congress did not intend for the plaintiff to benefit from the statute.[167]

In *Ceaser v. Pataki,* the Southern District of New York court agreed with the *Lechuga,* holding that, in light of the Supreme Court's decision in *Alexander,* "there is no private right of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964."[168] The *Lechuga* and *Ceaser* courts agreed that not all federal regulations create Section 1983 rights. Thus, if the regulation is too far removed from Congress' proscription in Section 601, it cannot create an enforceable right under Section 1983.[169]

The Third Circuit's decision in *South Camden v. New Jersey Department of Environmental Protection* was the first to address the question of whether regulations creating a disparate effect, which after *Alexanderl* can no longer be enforced through a private right of action brought directly under Section 602, can be enforced pursuant to 42 U.S.C. § 1983.[170] *Camden* is also one of the only decisions to directly address the EPA's Section 602 regulations as they relate to Section 1983 claims. The court in *Camden* held that "an administrative regulation cannot create an interest enforceable under section 1983 unless the interest already is implicit in the statute authorizing the regulation."[171] Furthermore, the court went on to explain that since Section 601 is construed to prohibit only intentional discrimination, plaintiffs do not have an enforceable right under Section 1983 for violations of the EPA's Section 602 regulations that prohibit disparate impact.[172] The plaintiff's interest in not being subjected to disparate impacts is not found to be implicit in Section 601's goals of preventing intentional discrimination, and Section 601 does not extend to the plaintiff's

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[165] *See id.*

[166] No. 01-450-AS, 2001 U.S. Dist. LEXIS 23589, at *13 (D. Or. Nov. 14, 2001) (referring to the Supreme Court's decision in *Alexander,* 532 U.S. 275).

[167] *See id.* at *12.

[168] 98 Civ. 8532, 2002 U.S. Dist. LEXIS 5098, at *1-2 (S.D.N.Y. Mar. 26, 2002).

[169] *See id.* at *11.

[170] *See* 274 F.3d 771 (3d Cir. 2001).

[171] *Id.* at 774.

[172] *See id.*

interest in remedying disparate impact.[173]

The Supreme Court's decision in *Gonzaga University v. Doe* clarified whether spending clause legislation provides for a federal right enforceable under Section 1983.[174] *Gonzaga* involved the Family Educational Rights and Privacy Act of 1974 ("FERPA"), which forbids schools who receive federal funding from instituting a policy or practice of releasing students' educational records without written parental consent.[175] The holding in *Gonzaga* is controlling precedent for environmental justice claims to enforce 40 C.F.R. § 7.35 under Section 1983 because FERPA's nondisclosure provisions and 40 C.F.R. § 7.35 contain similar spending clause language. FERPA provides that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without written consent of their parents to any individual, agency, or organization."[176] Similarly, 40 C.F.R § 7.35 states that recipients of federal funding shall not locate facilities in areas where the negative effects of such facilities will impose disparate impacts on surrounding residents. Both FERPA and 40 C.F.R § 7.35 are examples of spending clause statutes in which Congress may terminate funding as a negative incentive to prevent certain undesirable actions such as the disparate impacts created from the operation of hazardous facilities. Therefore, *Gonzaga*'s holding that FERPA is not enforceable under Section 1983 can also be applied to 40 C.F.R. § 7.35 and Section 602. *Gonzaga* specifically stated that the Court has "never before held, and decline[s] to do so here, that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights."[177]

The respondent in *Gonzaga* attended the university's School of Education. Before graduation, a faculty member (Roberta League) in the School of Education overheard students speaking of respondent's sexual misconduct against a female undergraduate student. League began an investigation and discussed the allegations involving the respondent with the state agency responsible for teacher certification. Respondent sued the university and League under state law and under Section 1983 for releasing personal information, without consent, in violation of FERPA.[178] The Supreme Court held that "FERPA's nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual, focus, and they serve primarily to direct the Secretary of Education's distribution of public funds to educational institutions."[179] The Court reiterated the reasoning in *Pennhurst State School and Hospital v. Halderman*, which held that the typical remedy for state noncompliance with federal requirements is an

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[173] *See id.*
[174] *See* 122 S. Ct. 2268 (2002).
[175] *Id.* at 2271.
[176] 20 U.S.C. § 1232g(b)(1) (2000).
[177] *Gonzaga*, 122 S. Ct. at 2273.
[178] *Id.* at 2272.
[179] *Id.* at 2279.

action by the federal government, not a private individual.[180] The court in *Gonzaga* further rejected the notion that an inquiry into the existence of an implied right of action should be completely separate from the analysis of whether there is an enforceable right under Section 1983.[181] The Court acknowledged that once a federal right is demonstrated, the right is presumptively enforceable by Section 1983. However, "the initial inquiry - determining whether a statute confers any right at all - is no different from the initial inquiry in an implied right of action case, the express purpose of which is to determine whether or not a statute 'confer[s] rights on a particular class of persons.'"[182] The Court meshed the analysis of implied right of action and enforceable right under Section 1983 into one inquiry of whether there is Congressional intent to infer a right. The *Gonzaga* court relied on past cases such as *Alexander* and *Cannon* to delineate the "rights creating language critical to showing the requisite congressional intent to create new rights."[183] The court required that statutes have specific rights-creating language, such as the verbiage of Title VI, Section 601 which states "no person in the United States shall . . . be subjected to discrimination under any program or activity receiving Federal financial assistance."[184] FERPA's nondisclosure provisions and 40 C.F.R. § 7.35 under Section 602 are not phrased in terms that clearly indicate Congress' intent to create a specific class to benefit. Instead, both focus on the Secretary of Education or the recipient of federal funding, not the protected individuals. In conclusion, the court in *Gonzaga* held that if Congress wants to create new rights enforceable under Section 1983, it must do so in clear and unambiguous terms.[185] Because recent cases have already established that Congress did not intend to create an implied private right of action under Section 602, it can also be inferred that Congress did not intend Section 602 regulations to create rights enforceable under Section 1983.

Because the Supreme Court in *Gonzaga* determined that spending clause regulations, like 40 C.F.R. § 7.35, do not create rights enforceable through 42 U.S.C. § 1983 and that a private right of action does not exist under Section 602, environmental justice plaintiffs are limited to only one other option for redress: file an environmental justice administrative complaint.

D. Administrative Proceedings

At first, the EPA was hesitant to enforce regulations such as 40 C.F.R. § 7.35 because the ultimate remedy would be to discontinue funding.[186] Terminating

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[180] *See id.* at 2273.

[181] *See id.* at 2275.

[182] *Gonzaga*, 122 S. Ct. at 2276 (quoting California v. Sierra Club, 451 U.S. 287, 294 (1981)).

[183] *Id.* at 2277 (quoting *Alexander*, 532 U.S. at 288-89).

[184] 42 U.S.C. § 2000d (2000).

[185] *See Gonzaga*, 122 S. Ct. at 2279.

[186] *See* Worsham, *supra* note 147, at 646.

funding may be an effective way to halt programs with a discriminatory effect. However, termination may undermine the initial purpose of providing funding to establish pollution control or waste treatment programs.[187] A particular landfill or waste treatment plant may constitute a disparate impact on the minority or low-income population immediately surrounding it, but it is also likely to benefit the greater community as a whole. Terminating funding for such a facility may shut down the facility and stop discriminatory effects, but this may be detrimental to the entire surrounding area, including both the upper-class and minority and low-income residents.[188] The EPA was also concerned that revoking the funding would be insufficient to induce state and local authorities to change their behavior, resulting in continued discriminatory programs, which are less effective in achieving the goal of pollution control.[189] This result would also cause detriment to the entire community, including minority and low-income members.

With the advent of the Clinton Administration came a wave of pressure for the EPA to change its non-enforcement policies and to begin to meet Title VI's nondiscrimination requirements.[190] In 1993, President Clinton issued Executive Order 12,898, which required federal agencies providing funding to programs affecting human health or the environment to enforce Section 602 of Title VI by ensuring that finding recipients are in compliance with its requirements.[191] The executive order affirmatively denied a private right of action; citizens may not bring claims in court to force compliance with the order's requirements.[192] "The order directs each federal agency with an environmental or public health mandate to 'make achieving environmental justice part of its mission by identifying and addressing . . . disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.'"[193]

In response to the executive order, the EPA created the Office of Civil Rights ("OCR") to handle the increasing number of Title VI environmental justice complaints.[194] From the beginning, however, the EPA has faced criticism for falling behind in processing complaints and being overly secretive regarding its

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[187] *See* GERRARD ET AL., *supra* note 40.

[188] *See* Worsham, *supra* note 147, at 651 ("Even if [the EPA] revoked funding to recipients for discrimination, state and local authorities might continue their objectionable practices, and pollution control could suffer from the lack of funds—ultimately minorities might be adversely affected rather than assisted by the funding sanction.").

[189] *See id.*

[190] *Id.* at 647

[191] *See* Exec. Order No. 12,898, 3 C.F.R. § 859 (1995), *reprinted in* 42 U.S.C. § 4321 (2000).

[192] *See* Worsham, *supra* note 147, at 651.

[193] Dominique R. Shelton, *Community Groups are Pursuing Novel Civil Rights Claims to Limit the Disproportionate Impact of Environmental Policies on Minority and Low-Income Neighborhoods: Dumping Grounds*, 21 L.A. Law. 32, 35 (1998).

[194] *See* Worsham, *supra* note 147, at 647.

investigations.[195] Between September 1993 and August 1998, fifty-eight environmental justice complaints were lodged with the agency. The EPA failed to reach conclusions in at least fifteen and did not find a single violation of Title VI.[196] In 1998, the OCR issued the *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* ("Interim Guidance").[197] The Interim Guidance was intended to provide "a framework for the processing by [OCR] of complaints filed under Title VI . . . alleging discriminatory effects," specifically addressing "complaints that allege discrimination in the environmental permitting context."[198] The Interim Guidance provides OCR with the following procedural steps to address environmental justice complaints. First, the OCR has twenty days from when it receives a complaint to decide whether to reject or accept the complaint.[199] Such a complaint must be officially recorded within 180 days of the alleged discriminatory act.[200] Second, if the OCR accepts the complaint, it will investigate to determine if granting the permit will result in disparate impact.[201]

The Interim Guidance sets forth a five-step analysis of how to determine whether a disparate impact has been or will be created.[202] Step one is to identify the population affected.[203] Step two is to determine the racial/ethnic formation of the affected population.[204] Step three is to establish whether a pattern of discriminatory effect exists.[205] To do so, the EPA must decide which nearby facilities should be examined and the racial/ethnic composition of the surrounding population.[206] In step four, the EPA analyzes the data and compares the racial composition of the allegedly affected population with the non-affected population, concluding whether "persons protected under Title VI are being impacted at a disparate rate."[207] In step five, the EPA analyzes the amount of difference in impact between the two populations.[208] If the EPA finds a statistically significant disparity, they then conclude a prima facie finding of discriminatory effect.[209]

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[195] *See id.*

[196] *See id.* at 648.

[197] *See* EPA, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING, *available at* http://www.epa.gov/civilrights/docs/interim.pdf (last visited Jan. 21, 2003).

[198] *Id.* at 2; *see* Worsham, *supra* note 147, at 648.

[199] Maura Lynn Tierney, *Environmental Justice and Title VI Challenges to Permit Decisions: The EPA's Interim Guidance,* 48 CATH. U. L. REV. 1277, 1288 (1999).

[200] *See* Worsham, *supra* note 147, at 648.

[201] *See* Tierney, *supra* note 199, at 1288-89

[202] *See* Worsham, *supra* note 147, at 649.

[203] *See id.*

[204] *See id.*

[205] *See id.*

[206] *See id.*

[207] Worsham, *supra* note 147, at 649.

[208] *See id.*

[209] *See id.*

If OCR concludes that a disparate impact would result, the funding recipient is afforded a chance to rebut the finding, to offer a plan to alleviate the impact, or to demonstrate a justification for the impact. In order to show justification, the recipient has to prove there is a substantial, legitimate state interest at stake, such as an overall benefit to the greater community.[210] The EPA, however, will only uphold such a justification if no less discriminatory alternative exists.[211] If the recipient does not make one of these showings, the OCR then notifies he recipient of a preliminary finding of noncompliance with Title VI, which could result in termination of funding.[212] The advantages to a plaintiff seeking environmental justice redress through litigation rather than an administrative complaint are outlined in the subsequent section.

IV. RETHINKING THE REMEDIAL ENVIRONMENTAL JUSTICE FRAMEWORK

Both the Equal Protection Clause and Title VI, Section 601 require environmental justice plaintiffs to prove discriminatory intent. Since proving intent to discriminate is virtually impossible, environmental justice claims generally have not been successful. Section 602 of Title VI requires only proof of a disparate impact and not discriminatory intent, but in *Alexander* the court denied the existence of a private right of action to enforce Section 602 regulations. Faced with such a high chance of failure in court, environmental justice plaintiffs do have the option of filing an administrative complaint. However, there are significant procedural disadvantages to an administrative proceeding over litigation. In order to give environmental justice plaintiffs an adequate opportunity for judicial redress, courts should allow for a private right of action under Section 602.

A. Procedural Advantages to Litigation over Administrative Proceedings

According to Section 602 regulations, once the EPA finds a funding recipient has violated Title VI, the recipient has many procedural rights while the complainant has very limited procedural rights.[213] First, the recipient may request a hearing before an Administrative Law Judge ("ALJ") within thirty days. If the ALJ affirms the EPA's conclusion, the recipient may appeal to the EPA Administrator, who has the authority to refuse, postpone, or discontinue the EPA funding or part of the funding. [214] The Administrator must first present a full report of its findings to all congressional committees with legislative power over the program and allow a thirty-day response time.[215] Even if the EPA

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[210] *See id.*
[211] *See id.*
[212] Worsham, *supra* note 147, at 649.
[213] *See* 40 C.F.R. § 7.35 (2002).
[214] *See id.*; Worsham, *supra* note 147, at 650.
[215] *See* 40 C.F.R § 7.35.

successfully terminates funding, the recipient can seek judicial review of the agency's action outside of the administrative proceeding.[216]

On the other hand, when OCR fails to find a violation of Title VI, the complainant has no venue to seek additional redress under the Interim Guidance or EPA Section 602 regulations. Complainants are precluded from suing the EPA in a judicial proceeding, alleging a violation of the Administrative Procedure Act ("APA"), and they have no cause of action under the Interim Guidance or the Executive Order. Another procedural disadvantage to filing an administrative complaint is that the complainant does not directly participate in the investigative process.[217] In the course of litigation, the plaintiff is given the opportunity to participate in a discovery, including taking depositions and document production. A prevailing plaintiff can receive injunctive relief as well as compensatory damages.[218] If the violator does not modify its behavior to comply with Title VI, the main remedy in an administrative proceeding is termination of the violator's funding, which may not even stop the discriminatory action.[219] Further, a complainant in an administrative proceeding has little or no opportunity for judicial review under Title VI or the APA, while the funding recipient has ample opportunity for judicial review.[220]

Despite all the downfalls, filing an administrative complaint does have a few procedural benefits for the complainant. For example, a complainant must only file a letter alleging a violation of Title VI; representation by a lawyer is not necessary.[221] Many environmental justice plaintiffs may be unable to bear the potentially exorbitant litigation costs, even if such claims were deemed actionable in court. Plaintiffs deserve the opportunity to pursue such claims beyond the limited sphere of administrative complaints. Also, with the continued increase in non-profit, non-governmental organizations assisting environmental justice plaintiffs through the web of litigation, the associated costs can be managed effectively.[222]

B. Critique of Alexander v. Sandoval*: Section 602 of Title VI Should Provide a Private Right of Action*

In *Alexander*, a divided Supreme Court held that a private right of action cannot be implied under Section 602 implementing regulations.[223] Despite this substantial blow by the Supreme Court, many valid arguments exist in favor of

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[216] *See id.*

[217] *See* GERRARD ET AL., *supra* note 40, at 28.

[218] *See id.*

[219] *See* Worsham, *supra* note 147, at 646.

[220] *See id.* at 651.

[221] *See* GERRARD ET AL., *supra* note 40, at 27.

[222] PEOPLE OF COLOR ENVIRONMENTAL GROUPS DIRECTORY 2002, *available at* http://.www.ejrc.cau.edu/poc2000.htm (last visited Jan. 12, 2003).

[223] *See Alexander*, 532 U.S. at 293.

future decisions implying a private right of action under Section 602. The dissent in *Alexander*, accused the majority of carving out a harsh exception to the settled judicial concept implying a private right of action under Title VI Section 602.[224] The majority claimed to conduct a close analysis of congressional intent to determine that no private right of action existed.[225] However, the majority chose to exclude from their analysis pertinent factors that, if taken into account, could show that Congress did intend to imply a private remedy.[226] Justice Stevens reiterated three major reasons in support of Congress' intention to imply a private right of action: 1) prior case law suggesting a private right of action under Title VI; 2) the structure of Title VI and the relationship between Sections 601 and 602 show that both sections contain a private right of action; and 3) a more accurate interpretation of the implied right of action test set forth in *Cannon v. University of Chicago*, resulting in finding such a right under Section 602 regulations.[227]

1. Language in Prior Case Law Shows an Implied Private Right of Action Exists Under Section 602

The majority in *Alexander* narrowly interpreted the holdings in prior case law,[228] disregarding all relevant language supporting an implied private right of action under Section 602 regulations.[229] Since Title VI was promulgated, the Supreme Court has consistently held that it created a private right of action. The dissent in *Alexander*, along with numerous commentators,[230] agreed that a "fair reading of those cases, and coherent implementation of the statutory scheme, requires the same result under Title VI's implementing regulations."[231] Furthermore, the dissent accused the majority of applying a muddled interpretation of *Cannon*.[232] The dissent reiterated that the Court in *Cannon* held that a right of action is implied in Title VI as a whole, and the Court did not differentiate between Section 601 and Section 602. Further, the Court in *Cannon* specified that a private right of action exists for the victims of all forbidden discrimination.

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[224] *See id.* at 294 (Stevens, J., dissenting).
[225] *See id.* at 286.
[226] *See id.* at 294 (Stevens, J., dissenting).
[227] *See id.* at 301-03.
[228] *See Guardians*, 463 U.S. 582; *Cannon*, 441 U.S. 677; Lau v. Nichols, 414 U.S. 563 (1974).
[229] *See Alexander*, 532 U.S. at 282 ("But in any event, this Court is bound by holdings, not language.").
[230] *See* Worsham, *supra* note 147; Hurwitz & Sullivan, *supra* note 38; Mank, *supra* note 83.
[231] *See Alexander*, 532 U.S. at 294 (Stevens, J., dissenting).
[232] *See id.*

2. The Structure of Title VI and the Relationship Between Section 601 and Section 602 Shows that a Private Right of Action Exists Under Both Sections

The majority in *Alexander* demonstrated a flawed portrayal of Title VI's structure and the necessary consistency between Sections 601 and 602.[233] Section 601 and 602 are closely related and Congress did not express an intent to imply a private right of action under one but not the other. The majority claimed to closely examine Congress' intent and yet ignored the actual language of the statute.[234] Facially the statute is simple: Section 601 states the general principle that people shall not suffer discrimination by a federally funded action, while Section 602 delegates power to agencies to develop the specifics of how this principle will be achieved.[235] The language of Section 602 expressly states that agencies can promulgate regulations to "effectuate" or reach the goals set forth in Section 601.

In *Cannon*, the Supreme Court established that Title VI created a general private right of action. The Court found that Congress had two objectives in promulgating Title VI.[236] The first objective was to preclude federal money from supporting discriminatory actions, and the second objective was to protect citizens from discrimination.[237] Even though the first objective can sometimes be met without providing for a private cause of action in Section 602, a private remedy is necessary. Potential plaintiffs can file administrative complaints against the funding recipient who has created a discriminatory effect. Theoretically, the agency can terminate funding, thereby ensuring that the recipient's discriminatory action is no longer furthered by federal funding.[238] For example, suppose that the recipient has a one-time grant to pursue an action that creates the discriminatory effect.[239] The agency then has no recourse. The recipient may not be receiving continuous funding, so there is no funding to cut. The recipient, however, did receive the benefit of agency resources when the agency granted the one-time permit.[240] The deed is done; federal resources have been used, and a discriminatory effect is the result. A private cause of action is necessary to allow the injured plaintiff to sue for damages, punish the violator, and deter future one-time grant recipients from causing discriminatory effects.[241] Unless a private right of action is recognized, Congress' objective of preventing the use of federal resources from supporting discriminatory action cannot be satisfied.

Congress' second Title VI objective, as laid out in *Cannon,* to protect individual citizens, can only fully be satisfied by allowing a private right of action

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[233] *See id.* at 295.
[234] *See id.* at 304.
[235] *See id.* at 303.
[236] *See Cannon*, 441 U.S. at 705.
[237] *See id.*; Mank, *supra* note 83, at 29.
[238] *See* EPA, INTERIM GUIDANCE, *supra* note 197.
[239] *See* Mank, *supra* note 83, at 29-30.
[240] *See id.*
[241] *See id.*

under Section 602.[242] As stated in Section III(c) above, a complainant cannot participate fully in an administrative proceeding, but plaintiffs are afforded the opportunity to participate throughout litigation. Also, the administrative remedy of terminating funding may not protect the complainant at all. The recipient may be able to continue the discriminatory action without federal aid.[243] Given the Supreme Court's clear establishment of a private right of action under Title VI generally, there is no logical reason to apply this finding to Section 601 but not Section 602.[244]

Alternatively, the dissent in *Alexander* argued that an analysis under the *Chevron* doctrine[246] is also ignored by the majority and can also support the implication of a private right of action under Section 601 and 602.[247] Under *Chevron*, when agencies issue regulations to interpret a vaguely worded statute, the Court will give deference to the agency and treat the regulation's interpretation of the statute as controlling unless it unreasonably construes the statute.[248] The issue of a private right of action in *Alexander* is a paradigm illustration of when *Chevron* is appropriate. Through Section 602, Congress has clearly delegated to agencies the power to "effectuate" the anti-discrimination principles set out in Section 601.[249] If the Court were to proceed with a *Chevron* analysis of Section 602 regulations, it would find that the EPA has interpreted its Title VI regulations as not precluding a private right of action.[250] The EPA's regulations set forth administrative proceedings that complainants "may" pursue.[251] The EPA interprets "the meaning of the word 'may' . . . as indicating that the administrative process is not the sole means to enforce its regulations and, accordingly, that its regulations do not preclude private enforcement of discriminatory effects regulations."[252] Following the *Chevron* analysis, the Court

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[242] *See id.*

[243] *See* Worsham, *supra* note 147, at 646.

[244] *See Alexander*, 532 U.S. at 303 (Stevens, J., dissenting).

[246] 467 U.S. 837 (1984).

[247] *See Alexander*, 532 U.S. at 309 (Stevens, J., dissenting).

[248] *See id.*

[249] *See* 42 U.S.C. § 2000d-1 (2000). The statute states:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of [S]ection 601 with respect to such program or activity by issuing rules, regulation, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

[250] *See* Mank, *supra* note 83, at 55 (commenting that the EPA views its Title VI regulations as advancing the overall purpose of the statute and not interfering with the EPA's enforcement program).

[251] *See* 40 C.F.R § 7.35 (2002).

[252] Mank, *supra* note 83 at 56. *See Chester*, 123 F.3d at 929-30.

should give deference to the EPA's interpretation of the vague word "may," since the agency does not unreasonably construe the statute or frustrate its principles. Accordingly, the Court should find that the EPA's Title VI regulations do not preclude a private right of action.

C. A Critique of Gonzaga v. Doe*: Section 602 Regulations Should Establish Rights Enforceable Through 42 U.S.C. § 1983*

In June 2002, the Supreme Court in *Gonzaga*[253] decided the long-standing question whether Section 602 regulations create a right enforceable under 42 U.S.C. § 1983. The Court held that a Section 1983 right is not created, and the analysis for coming to such a conclusion is analogous to the process of determining when a right of action is implied under a statute. However, Justice Stevens raised several arguments in his dissent in favor of finding a right in FERPA's nondisclosure provision that is enforceable under Section 1983.[254] The dissenting Justice also argued that the Section 1983 analysis and the implied right of action analysis should be independent inquiries.

First, the dissent explained that the statutory language does not have to be as explicit as the majority requires in order to prove Congressional intent to confer a right.[255] A Federal right can be created in the substance of the statute, as well as through implicit rights-creating language.[256] When considering FERPA, the substantive right provided is the parental right to prevent the release of their child's personal information by refusing consent.[257] In the context of environmental justice regulations, such as 40 C.F.R. § 7.35, the right would be the right of individuals to be free from discriminatory effects imposed by federally funded facilities.[258]

Second, the dissent confronts the majority's claim that since the FERPA provisions reference a practice or policy, they have an aggregate focus and, therefore, cannot create an individual right.[259] Likewise, one could argue that Section 602 regulations also have an aggregate focus on a policy or practice of choosing sites for hazardous facilities, and so they too do not create an individual right.[260] However, the dissent in *Gonzaga* points out that FERPA does more than systematically forbid an institution from implementing policies for releasing student's information.[261] FERPA allows such policies as long as the policy meets

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[253] 122 S. Ct. 2268.

[254] *See id.* at 2281-86 (Stevens, J., dissenting).

[255] *See id.* at 2281.

[256] *See id.*

[257] *See id.*

[258] *See* PRINCIPLES OF ENVIRONMENTAL JUSTICE, FIRST PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT, (adopted Oct. 27, 1991), *available at* http:// www.ejrc.cau.edu/princej.html.

[259] *See Gonzaga*, 122 S. Ct. at 2282 (Stevens, J., dissenting).

[260] *See* 42 U.S.C § 2000d-1 (2000).

[261] *See Gonzaga*, 122 S. Ct. at 2282 (Stevens, J., dissenting).

the requirements set out in section 1232g(b)(2)(A), which refers directly to the individual student involved.[262] Section 602 regulations are similar in structure; the regulations allow organizations receiving EPA financial assistance to implement policies and practices when designating a location of a hazardous waste site, but these policies and practices must not impose disparate impacts on the affected individuals.[263] The dissent in *Gonzaga* goes on to argue that the language of the requirements in § 1232g exemplify FERPA's focus on protecting the individual student's right to privacy and not the aggregate student body.[264] Similarly, the language in the EPA's Section 602 regulations demonstrates that the focus of the statute is to protect individuals from discrimination.[265]

Third, the dissent notes that when considering the nondisclosure provisions within the overall context of FERPA, an individual federal right is evident.[266] Past Section 1983 cases have established that statutory meaning is to be determined by examining the entire legislative enactment.[267] FERPA provisions surrounding the nondisclosure provisions are filled with "rights" language. Likewise, Title VI and the Civil Rights Act contain the same language indicating the overarching Congressional intent to create individual rights, even absent specific language required by *Gonzaga*.

Fourth, the dissent admits that even if a Section 1983 enforceable right is established under spending clause legislation, Congress can "rebut the presumption of enforcement under Section 1983 either 'expressly, by forbidding recourse to [Section] 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement [actions].'"[268] The dissent explains that past decisions have only found an administrative scheme comprehensive enough to preclude enforcement in two cases.[269] In each case, the statute "not only had 'unusually elaborate enforcement procedures,' but it also permitted private citizens to bring enforcement actions in court."[270] Both FERPA and Section 602 administrative proceedings do not allow for federal judicial review and do not outline extraordinary procedures. Therefore, the limited administrative enforcement proceedings available under FERPA and 40 C.F.R. § 7.35 do not meet the threshold for precluding enforcement under Section 1983.

The dissent's last major criticism of the majority opinion attacks the analysis used to determine if a Section 1983 enforceable right exists. The majority merges

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[262] *See* 20 U.S.C. § 1232g(b)(A) (2000).
[263] *See* 40 C.F.R. § 7.35 (2002).
[264] *See Gonzaga*, 122 S. Ct. at 2282 (Stevens, J., dissenting).
[265] *See* 40 C.F.R. § 7.35.
[266] *See Gonzaga*, 122 S. Ct. at 2282 (Stevens, J., dissenting).
[267] *See id.;* Suter v. Artist M., 503 U.S. 347, 348 (1992).
[268] *Gonzaga*, 122 S. Ct. at 2283 (Stevens, J., dissenting).
[269] *See id.* at 2883; Smith v. Robinson, 468 U.S. 992 (1984); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).
[270] *Gonzaga*, 122 S. Ct. at 2283 (Stevens, J., dissenting).

the Section 1983 analysis with the implied right of action analysis. The dissent explains that conflating the two issues is problematic because "the implied right of action cases do not necessarily cleanly separate out the 'right' question from the 'cause of action' question."[271] It is inappropriate to address both questions when determining if a Section 1983 enforceable right exists. Traditionally, this analysis only involves the question of whether Congress intended to create a federal right and not whether Congress also intended to create a private remedy.[272] The majority blurs together the two inquiries and then directs courts to apply this profoundly unclear analysis to Section 1983 claims. The implied right of action and Section 1983 analysis should remain separate endeavors. Furthermore, even if courts continue to hold that a private right of action cannot be implied under Section 602 regulations, the courts should find an enforceable right under Section 1983.

V. CONCLUSION

Successful litigation of an environmental justice claim under the Equal Protection Clause or Section 601 of Title VI can be expensive, time consuming, and difficult. Proving intent or even disproportionate impact involves retention of knowledgeable attorneys, experts, and support staff. In most cases, intent will not be evident and the individual suffering from environmental injustice is left with three other options: to bring a claim under Title VI, Section 602; to bring a claim under 42 U.S.C. § 1983 to enforce Section 602 regulations; or to file an administrative complaint. The Court in *Alexander v. Sandoval* effectively foreclosed environmental justice claims under Section 602 regulations by holding that a private right of action cannot be implied.[273] The Court in *Gonzaga* precluded a private right of action for violations of Section 602 regulations brought under Section 1983 by holding that Section 602 and subsequent regulations do not confer a federal right. The environmental justice plaintiff is left with only one viable option: to file an administrative complaint.

As stated in Section IV, litigation can provide for more adequate and speedy recourse than an administrative proceeding given the excessive amount of administrative complaints and the excruciating slow speed at which the EPA is currently responding.[274] The EPA is currently inundated with complaints and lacks the means to address them in a timely manner.[275] The EPA has admitted that it lacks the resources necessary to pursue all Title VI complaints of environmental injustice.[276] Also, administrative proceedings deny a plaintiff full participation in the remedial scheme and cannot award punitive or compensatory

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[271] *Id.* at 2285.

[272] *See id.* at 2284.

[273] *See Alexander*, 532 U.S. 275 (2001).

[274] *See* GERRARD ET AL., *supra* note 40.

[275] *See id.;* Worsham *supra* note 158, at 655.

[276] *See* GERRARD ET AL., *supra* note 40; Tierney, *supra* note 199, at 1288.

damages. The environmental justice plaintiff must have a day in court in order to achieve the appropriate relief.

Environmental justice violations are legitimate concerns for minority or low-income communities facing adverse health effects and degraded living conditions resulting from noxious facilities. Citizens should be afforded adequate redress in court to protect one of the most fundamental rights associated with life: the right to a clean living environment. Without judicial review of claims of environmental injustice, minority and low-income communities will be helpless against the infiltration of noxious activities in their neighborhoods. As wealthy communities continue to exert their money and power to push polluting enterprises and waste treatment facilities into poorer neighborhoods, these citizens will be forced to absorb the negative impacts. The concentration of noxious activities also fosters a larger dilemma: lack of sustainability. If no one wants to live next to these facilities, then perhaps we should discontinue or alter these activities and facilities. There will never be an adequate incentive for change if the powerful and wealthy can push these noxious activities across "the tracks" and never face their effects. Those with money and consumer power have great potential for creating change in the way items are produced and demanding cleaner plants and more advanced treatment facilities.

However, if claims of environmental injustice are bogged down in administrative proceedings or dismissed for lack of private cause of action, the road to a cleaner, sustainable society will continue to be blocked. If claims of disparate environmental impacts receive substantive judicial review, the concentration of noxious activities in minority and low-income communities may be reduced and redistributed equally among all residential communities. When "upper class" citizens are forced to deal with their own waste and pollution, perhaps they will begin investing in ways to reduce these unwanted materials and society will progress closer to a sustainable existence.

Suzanne Smith