Notre Dame Law Review

Volume 77 | Issue 5 Article 5

10-1-2002

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NOTES

ENVIRONMENTAL JUSTICE AND THE SPENDING POWER: LIMITS ON USING TITLE VI AND § 1983

*Keith E. Eastland**

INTRODUCTION

In recent years the movement embracing environmental justice has received significant attention and gained tremendous momentum, not only among civil and environmental rights advocates, but also among the general public.[1] The term "environmental justice" is used in reference to the discriminatory impact or adverse effect that local environmental laws, regulations, or decisions have on minority and low-income populations.[2] Advocates of environmental justice embrace action to provide enhanced protection against state programs and policies that have intentional or disparate effects on the health

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1 *See* Lisa A. Binder, *Religion, Race, and Rights: A Rhetorical Overview of Environmental Justice Disputes*, 6 WIS. ENVTL. L.J. 1, 8 (1999); Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 286 (1995).

2 Director Christine Todd Whitman of the Environmental Protection Agency (EPA) recently provided the following definition of "environmental justice": "The Agency defines environmental justice to mean the fair treatment of people of all races, cultures, and incomes with respect to the development, implementation, and enforcement of environmental laws and policies, and their meaningful involvement in the decisionmaking processes of the government." Memorandum from Christine Todd Whitman, Administrator, Environmental Protection Agency, on the EPA's Commitment to Environmental Justice (Aug. 9, 2001), *available at* http://www.epa.gov/swerosps/ej/html-doc/ejmemo.htm (on file with author).

and environment of people based on their race, color, national origin, or income. The concept of environmental justice and its advocates are important for this Note because traditional civil rights activists have started to channel energy toward the movement, and civil rights plaintiffs have recently forced a fundamental civil rights question to the forefront—whether federal regulations, specifically disparate impact regulations issued pursuant to section 602 of Title VI of the Civil Rights Act of 1964,[3] provide enforceable rights under 42 U.S.C. § 1983, the statute designed to provide a vehicle to remedy violations of constitutional and some federal statutory rights.[4]

Despite its growing appeal among civil rights activists, the environmental justice movement has achieved little success in the courts.[5] Recently, however, a group of citizens from South Camden, New Jersey (South Camden Citizens in Action) scored a small victory by obtaining a temporary injunction in federal district court against the New Jersey Department of Environmental Protection.[6] The injunction prevented the issuing of air pollution permits for a new factory in an already "environmentally burdened" and heavily minority-populated geographic area.[7] The briefly successful claim[8] alleged viola-

3 Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (1994)). The statute provides in part 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." *Id.*

4 Section 1983 provides,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

42 U.S.C. § 1983 (1994).

5 *See* Lorraine Woellert, *Dumping on the Poor?*, BUS. WK., Nov. 19, 2001, at 120, 121 (noting the fifteen-year lack of success of the environmental justice movement in the courts).

6 S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 549 (D.N.J. 2001) (SCCIA II), *rev'd*, S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 70 U.S.L.W. 3669 (U.S. June 24, 2002) (No. 01-1547).

7 *Id.*

8 The Third Circuit recently lifted the injunction. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 777 (3d Cir. 2001), *cert. denied*, 70 U.S.L.W. 3669 (U.S. June 24, 2002) (No. 01-1547).

tions of disparate impact regulations issued pursuant to section 602 of Title VI of the Civil Rights Act of 1964.[9]

Proponents of environmental justice are well pleased with the South Camden residents' initial success and have been touting their new legal strategy as "a road map for environmental justice advocates."[10] Environmental advocacy groups were—and probably still are—planning to implement this new strategy nationwide with similar § 1983 actions being contemplated in California, Michigan, and New York.[11] Opponents of this type of liability for non-intentional discrimination are fearful that allowing such claims to proceed will significantly deter business expansion in low-income neighborhoods and could significantly injure businesses that have otherwise complied with specific pollution and zoning laws.[12] These fears have been somewhat allayed, however, because the U.S. Court of Appeals for the Third Circuit recently overturned the aforementioned preliminary injunction issued by the district court.[13] The Third Circuit has denied a petition by the South Camden Citizens in Action for a rehearing en banc,[14] and the United States Supreme Court has denied certiorari.[15] But this issue is far from being resolved because the United States Supreme Court has yet to examine this precise issue under Title VI. Furthermore, Justice John Paul Stevens, joined by three other justices in dissent, has suggested that § 1983 could be used to enforce disparate impact regulations issued pursuant to Title VI.[16]

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9 *S. Camden Citizens in Action*, 145 F. Supp. 2d at 508 (SCCIA II).

10 Woellert, *supra* note 5, at 121.

11 *See id.*

12 *Id.*

13 *S. Camden Citizens in Action*, 274 F.3d at 788–90 (holding that plaintiffs could not maintain an action under 28 U.S.C. § 1983 for violations of disparate impact regulations issued pursuant to section 602 of Title VI of the Civil Rights Act of 1964). The Third Circuit further stated that "if there is to be a private enforceable right under Title VI to be free from disparate impact discrimination, Congress, and not an administrative agency or a court, must create this right." *Id.* at 790.

14 Shannon P. Duffy, *Third Circuit Won't Hear 'Environmental Racism' Case*, 167 N.J. L.J., Jan. 21, 2002, at 15, 15 (reporting that the Third Circuit denied a request to rehear the *South Camden Citizens in Action* case en banc and noting that the "[Third Circuit's] most important civil rights case from 2001 . . . is probably headed for the U.S. Supreme Court, although it's anyone's guess whether the justices will take it up").

15 S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 70 U.S.L.W. 3669 (U.S. June 24, 2002) (No. 01-1547).

16 Alexander v. Sandoval, 532 U.S. 275, 299–300 (2001) (Stevens, J., dissenting, with Souter, J., Ginsberg, J., and Breyer, J., joining)

> [T]o the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI

Environmental justice plaintiffs' newfound strategic use of § 1983 in an attempt to enforce Title VI disparate impact regulations raises significant legal concerns regarding the Court's statutory interpretation of the "and laws" language of § 1983. Additionally, if this strategy succeeds under Spending Clause legislation, it would essentially enlist the federal courts in an attempt to interfere with traditional state sovereignty by discounting state autonomy in favor of the will of federal agencies—all in the absence of a state's clear and unambiguous consent to being sued for disparate impact regulations issued under Title VI,[17] legislation enacted under Congress's Article I spending power.[18]

This Note will examine why disparate impact regulations issued under section 602 of Title VI should not create enforceable federal rights under § 1983, and why—even if they could—private individuals cannot likely bring successful § 1983 claims against states to enforce section 602 disparate impact regulations. Part I provides the necessary background on the concept of environmental justice and the movement's use of disparate impact claims under Title VI. It also examines how the recent Supreme Court decision in *Alexander v. Sandoval*[19] has led plaintiffs to devise their current legal strategy of using § 1983 to enforce disparate impact regulations issued by federal agencies pursuant to section 602. Part II will briefly examine the history of

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> claim, this case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief . . . .

Id. Justice Stevens's dissent in *Sandoval* clearly suggests that the plaintiffs would be able to re-file the action to enforce section 602 disparate impact regulations under § 1983. *See id.* at 300.

17 *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987) (holding that Congress's spending power under Article I is limited by several conditions, one being that Congress must provide "unambiguous" conditions so that a state can know the consequences of choosing to receive federal funds); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("By insisting that Congress speak with a clear voice, we enable the state to exercise their choice knowingly, cognizant of the consequences of their participation."); Westside Mothers v. Haveman, 133 F. Supp. 2d 549, 560–61, 576, 587 (E.D. Mich. 2001) (holding that private individuals did not have standing to sue the State of Michigan to enforce Title XIX of the Social Security Act, codified at 42 U.S.C. §1396 (1976), because the *Ex parte Young* doctrine is inapplicable and because Congress did not unambiguously condition its Medicaid funding with Michigan on the state waiving its sovereign immunity), *rev'd*, 282 F.3d 852 (6th Cir. 2002).

18 U.S. CONST. art. I, § 8, cl. 1. ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

19 532 U.S. 275 (2001).

the Court's interpretation of the "and laws" language found in § 1983,[20] as well as the current circuit split on whether federal regulations alone can provide enforceable federal rights under § 1983.[21] The legislative history of § 1983 is unclear, and the Court has relied upon the plain meaning of "and laws" to extend § 1983's coverage to enforce violations of federal statutes.[22] But neither the legislative history[23] nor the plain meaning interpretation of the "and laws" language supports the additional expansion of § 1983 to include a private action to remedy violations of federal regulations.[24]

Part III examines the plaintiff's argument in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, a recent federal district court decision permitting the use of § 1983 to enforce Title VI disparate impact regulations[25]—a strategy that essentially advances a combination of ideas from the circuit courts recognizing the possibility that regulations alone can provide enforceable rights under § 1983.[26] Part III will also examine the Third Circuit's recent opinion overruling the district court's injunction based upon § 1983.[27] Finally, assuming arguendo that the U.S. Supreme Court were to find that regulations could create enforceable rights under § 1983, Part IV turns to the specific question of whether a state or state officials could be sued under § 1983 for violating the disparate impact regulations

20 *See* 42 U.S.C. § 1983 (1994).

21 *See* Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws"*, 67 GEO. WASH. L. REV. 51, 53 (1998) (describing the circuit split on whether federal regulations can create rights enforceable under § 1983).

22 *See* Maine v. Thiboutot, 448 U.S. 1, 6–7 (1980) (refusing to rely on the "scanty legislative history" concerning the addition of the phrase "and laws" because it could not provide a definitive answer, and relying instead on the plain meaning of the language).

23 Pettys, *supra* note 21, at 83 (concluding that the legislative history of § 1983 does not support the inclusion of regulations in the meaning of "and laws").

24 *Id.*

25 S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 549 (D.N.J. 2001) (SCCIA II), *rev'd*, S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 70 U.S.L.W. 3669 (U.S. June 24, 2002) (No. 01-1547).

26 *See* Pettys, *supra* note 21, at 81 (noting that "if courts are ever to permit regulations to create section 1983 rights, some variation of both analyses is surely required" in criticizing the differing approaches take by circuits with regard to the issue).

27 S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 788 (3d Cir. 2001) (holding that Title VI disparate impact regulations did not create a right enforceable under § 1983), *cert. denied*, 70 U.S.L.W. 3669 (U.S. June 24, 2002) (No. 01-1547).

required by Executive Order 12,898[28] and promulgated under section 602.

Part IV will demonstrate why the environmental justice movement's specific strategy regarding Title VI disparate impact regulations cannot succeed. First, § 1983 actions filed to enforce violations of section 602 disparate impact regulations cannot be brought against a state for damages without a state's consent.[29] Second, the legal fiction adopted by the Court permitting plaintiffs to sue state officials acting in their official capacity for prospective relief[30] may not apply with regard to private enforcement of disparate impact regulations under Title VI, or to Spending Clause legislation in general.[31] And third, it is doubtful that these same § 1983 actions could be filed against state officials acting in their individual capacities.[32]

I. ENVIRONMENTAL JUSTICE, TITLE VI REGULATIONS AND *ALEXANDER V. SANDOVAL*

In order to address the legal issues involved, some background discussion of environmental justice and the statutory scheme behind Title VI of the Civil Rights Act of 1964 is required. Perhaps the best example of the intersection of disparate impact regulations and the prevention of "environmental injustice" is found in the first of the two recent federal district court decisions in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection.*[33]

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28 Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 16, 1994). For a discussion of this executive order see *infra* notes 39–42 and accompanying text.

29 *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 67 (1989) ("[I]n enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law."). The Court recognized that Congress could not sue a state without its consent at the time § 1983 was enacted and that state immunity from suit under the Eleventh Amendment continues to exist absent a clear statutory abrogation. *Id.* at 67–68.

30 *See Ex parte* Young, 209 U.S. 123, 159–60 (1908) (holding that an officer acting unconstitutionally is "stripped of his official capacity or representative character and is subjected in his person to the consequences of his individual conduct").

31 *See* Westside Mothers v. Haveman, 133 F. Supp. 2d 549, 559–82 (E.D. Mich. 2001) (finding the *Ex parte Young* legal fiction allowing plaintiffs to sue state officials in their official capacity despite the Eleventh Amendment to be problematic in the context of actions brought under Spending Clause legislation), *rev'd*, 289 F.3d 852 (6th Cir. 2002).

32 *Id.* Also, executive officials are typically not held liable under § 1983 unless "clearly established" constitutional or statutory rights are violated. *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 588 (1998) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817–18 (1982)).

33 145 F. Supp. 2d 446 (D.N.J. 2001) (SCCIA I). This was the first opinion issued by the district court in this case; a second opinion followed after the Supreme Court

In this case, discussed at length in Part III,[34] EPA regulations prohibited state agencies from making environmental decisions—such as the issuance of air pollution permits—that have an adverse impact on a person's health or environment based on their race, color, or national origin.[35] Some residents of South Camden, New Jersey joined together and filed a Title VI action against the New Jersey Department of Environmental Protection (NJDEP) for issuing certain air pollution permits without considering the racial or ethnic composition of the neighborhood where the permits would be used.[36] The plaintiffs argued, and the district court agreed, that the NJDEP's failure to consider the racial composition of the town, and the possible environmental and health effects that the new pollution permit might have on its residents, was a violation of the EPA disparate impact regulations.[37] The NJDEP issued the pollution permits for an area already saturated with industrial plants and environmental clean-up sites, and the additional permits produced an adverse effect on the largely minority population of South Camden, New Jersey.[38] This case illustrates environmental justice principles at work through the use of disparate impact regulations. It also sets the framework for the legal debate on whether disparate impact regulations issued under section 602 of Title VI can be used to advance environmental justice.

In an attempt to address some of the growing environmental justice concerns, President William J. Clinton issued Executive Order No. 12,898 on February 11, 1994, ensuring that disparate impact regulations would be implemented throughout federal agencies to protect environmental justice claimants.[39] The executive order, entitled "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations," required federal agencies to make achieving environmental justice part of their mission.[40] Under this order, each federal agency must conduct any program that substantially affects human health or the environment in such a manner as to ensure that the program does not intentionally discriminate *or*

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decided *Alexander v. Sandoval.* The second opinion addresses the holding in *Sandoval* and upholds the injunctive order granted prior to *Sandoval,* but on a § 1983 claim rather than under Title VI. S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 509 (D.N.J. 2001) (SCCIA II).

34 *See infra* notes 126–85 and accompanying text.

35 *S. Camden Citizens in Action,* 145 F. Supp. 2d at 451–52 (SCCIA I).

36 *Id.* at 450–52.

37 *Id.*

38 *Id.* at 459.

39 Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

40 *Id.* at 7629, § 1-101.

have a discriminatory effect based on a person's race, color, or national origin.[41] Pursuant to the executive order, all federal agencies must promulgate rules or regulations to prohibit federally funded state programs from engaging in conduct that merely has an adverse environmental effect on people based on their income, race, color, or national origin.[42]

In ordering these disparate impact regulations, President Clinton used the executive power derived from section 602 of Title VI of the Civil Rights Act of 1964. Title VI generally prohibits discrimination by state entities in state programs receiving federal funds.[43] Because intentional discrimination is difficult to prove in regard to the decision-making of federally funded state agencies, President Clinton likely issued the executive order to satisfy a perceived need to protect individuals from state and local decisions that result in a disparate impact on the environment or the health of individuals.[44]

After the executive order was implemented, the question remained whether individuals affected by the decisions and programs of the federally funded state agencies could enforce these disparate impact regulations through the courts under Title VI. In other words, how effective could disparate impact regulations issued pursuant to section 602 of Title VI be for environmental justice plaintiffs? The issue was whether plaintiffs could file a direct action against the state or its officials for failure to comply with disparate impact regulations, or whether plaintiffs would have to petition the issuing federal agency to exercise its power to invoke the statutory funding repeal proce-

41 *Id.* at 7630–31, § 2-2.

42 *See id.*

43 42 U.S.C. § 2000d-1 (1994).

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d 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 . . . .

Id. Section 602 of Title VI creates executive authorization for regulations to *effectuate* the general prohibition found in section 601 of Title VI. President Clinton's Order was intended to supplement, but not supercede, Executive Order No. 12,250. *See* Exec. Order No. 12,898, 59 Fed. Reg. at 7632, § 6-602. President James E. Carter had previously delegated his presidential power to approve rules and regulations under section 602. *See* Exec. Order No. 12,250, 45 Fed. Reg. 72,995, § 1-101 (Nov. 4, 1980).

44 *See* Exec. Order No. 12,898, 59 Fed. Reg. at 7603–31, § 2-2.

dures found in Title VI itself.[45] Civil rights plaintiffs, specifically environmental justice advocates, were seeking a statutory source to provide an individual private cause of action for enforcement of these disparate impact regulations. Without one, plaintiffs would be forced to petition and rely on the issuing federal agency to enforce the disparate impact regulations under section 602's funding revocation procedures.

Section 601 of Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[46] The Supreme Court has interpreted this section to require proof of intentional discrimination in order to establish a violation under this section of Title VI.[47] Additionally, section 602 of Title VI authorizes federal agencies to implement regulations to "effectuate" the provisions of section 601.[48] Title VI also provides a specific remedial procedure for a federal agency seeking to revoke federal funding as a means to enforce its regulations issued under its section 602 authority.[49]

The Supreme Court has interpreted Title VI to provide an implied private cause of action for individuals under section 601, but only for actions of intentional discrimination.[50] Prior to *Alexander v.*

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45 Title VI specifically outlines a procedure that must be followed prior to revoking state funding. *See* 42 U.S.C. § 2000d-1. The revocation procedure includes an

> express finding on the record, after opportunity for hearing, of a [state's] failure to comply with such requirement . . . [p]rovided, [h]owever, [t]hat no such action [revocation of funds] shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply . . . and has determined that compliance cannot be secured by voluntary means.

Id. (emphasis omitted). The head of the federal agency revoking the funds must also file reports with congressional committees having legislative jurisdiction over the program or activity. *Id.*

46 42 U.S.C. § 2000d.

47 *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 280 (2001) ("[I]t is similarly beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination.").

48 42 U.S.C. § 2000d-1.

49 *Id.*; *see also supra* note 45.

50 *See Sandoval*, 532 U.S. at 284 ("We do not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section."); Guardians Ass'n. v. Civil Serv. Comm'n of N.Y. City, 463 U.S. 582, 610–11 (1983) (Powell, J., concurring, with Burger, C.J., and Rehnquist, J., joining) (agreeing with the Second Circuit's determination that a showing of intentional discrimination is a prerequisite to a successful Title VI claim).

Sandoval, however, the federal courts were split on whether an individual could bring a private cause of action for violations of regulations issued by federal agencies under section 602 of Title VI. In other words, it was unclear whether Congress, in passing Title VI, intended to create a private cause of action for individuals for violations of section 602 regulations.[51]

The divided Court decision in *Sandoval*, however, settled the issue by determining that private individuals do not have a private cause of action for violations of disparate impact regulations under section 602.[52] In *Sandoval*, the Court reviewed a challenge to an Alabama state procedure requiring all drivers' license examinations to be issued and taken in English.[53] Non-English speaking citizens filed a claim under Title VI, alleging that the Alabama policy violated regulations issued by the U.S. Department of Justice that prohibited state policies resulting in a discriminatory effect based on a person's national origin.[54] The Court held that Congress did not intend—and the Court itself refused to imply—a private cause of action under Title VI for the enforcement of section 602 disparate impact regulations.[55] Although *Sandoval* did not specifically address an environmental justice issue, its holding essentially eliminated private actions under Title VI for any federal disparate impact regulations issued in accordance with Executive Order 12,898.[56]

In deciding *Sandoval*, the Court not only resolved a split among the circuits as to whether Title VI supplied a private right of action for regulations issued under section 602, but also created widespread disappointment among civil rights advocates.[57] Their disappointment stems from a perceived lack of remedy on the part of private individu-

51 *See* Bradford C. Mank, *Using § 1983 To Enforce Title VI's Section 602 Regulations*, 49 KAN. L. REV. 321, 321–23 (2001) (predicting the Supreme Court's rejection of an implied private right of action under Title VI for section 602 regulations and advocating the use of § 1983 for their enforcement). *Compare* Powell v. Ridge, 189 F.3d 387, 397–400 (3d Cir. 1999) (rejecting the defendants' argument that a private right of action does not exist under Title VI to enforce section 602 regulations), *with* Jackson v. Katy Indep. Sch. Dist., 951 F. Supp. 1293, 1298–99 (S.D. Tex. 1996) (holding that implied actions under Title VI are limited to intentional discrimination).

52 *Sandoval*, 532 U.S. at 293 (5-4 decision).

53 *Id.* at 279.

54 *Id.*; *see also* Department of Justice Nondiscrimination in Federally Assisted Programs, 28 C.F.R. § 42.104(b)(2) (2001).

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

56 Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

57 *See* Shannon P. Duffy, *"Environmental Racism" Ruling*, N.J. L.J., Oct. 1, 2001 at 11, 11 (describing the decision as racist); Charles Toutant, *Civil Rights Lawyers Commiserate over Roadblocks Erected by Court*, N.J. L.J., Oct. 8, 2001, at 87.

als who are harmed when a federally funded state agency violates disparate impact regulations issued by a federal agency under section 602.[58] The Court, however, did not eliminate all remedies under Title VI, rather it recognized congressional intent not to provide a private cause of action for violations of section 602 regulations.[59]

Fearing that the procedural remedy available to federal agencies would be too slow and ineffective, environmental justice plaintiffs have devised a new strategy. This strategy seeks enforcement of section 602 disparate impact regulations under 42 U.S.C. § 1983.[60] This new theory contends that federal regulations would provide enforceable federal rights under § 1983, and at least one federal district court has bought this argument and recognized that private individuals can enforce Title VI disparate impact regulations under § 1983.[61]

Additionally, despite the Third Circuit's recent opinion foreclosing such use of § 1983, four justices of the Supreme Court appear to support the use of § 1983 to enforce Title VI disparate impact regulations, as evidenced by the dissent in *Sandoval*.[62] This new use of § 1983 is likely to gain the attention of the Supreme Court because recognition of a § 1983 cause of action would essentially circumvent the Court's recent holding in *Sandoval*. The issue has also revived an older dispute on whether federal regulations, in general, can create enforceable rights under § 1983.[63] The Court first touched upon this more general issue in Justice Stevens's dissenting opinion in *Guardians Ass'n v. Civil Service Commission of New York*,[64] and the issue reemerged briefly in the Court's decision in *Wright v. City of Roanoke*

58 *All Things Considered: Environmental Law* (National Public Radio broadcast, May 7, 2001).

59 *See Sandoval*, 532 U.S. at 293.

60 *See, e.g.*, S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 509 (D.N.J. 2001) (SCCIA II) (granting a continuance of a preliminary injunction sought using this strategy); Woellert, *supra* note 5, at 120.

61 *S. Camden Citizens in Action*, 145 F. Supp. 2d at 509 (SCCIA II).

62 *See Sandoval*, 532 U.S. at 299–300 (Stevens, J., dissenting, with Souter, J., Ginsberg, J., and Breyer, J., joining). Justice Stevens stated,

> [T]o the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim, this case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief . . . .

Id. Justice Stevens's dissent in *Sandoval* clearly suggests that the plaintiffs would be able to re-file the action under § 1983. *See id.* at 300.

63 Using § 1983 to enforce disparate impact regulations issued under section 602 of Title VI raises a question that has been treated differently by the federal courts. *See* Pettys, *supra* note 21, at 53 (discussing the circuit split).

64 463 U.S. 582, 645 (1983) (Stevens, J., dissenting).

Redevelopment and Housing Authority.[65] These two decisions have helped lead to the current confusion and split among the circuit courts as to whether federal regulations alone can provide enforceable rights under § 1983.[66]

The validity of section 602 disparate impact regulations as proper regulations under principles of administrative law has also been questioned.[67] In fact, the majority opinion in *Sandoval* assumes the validity of the section 602 regulations at issue, but only for the purposes of deciding the case.[68] The presumed validity of the regulations, although not fully addressed here, is coupled with a strong argument that disparate impact regulations could be "reasonably related" to the purposes of Title VI. This indicates that the regulations could be authorized—that is, at least valid to the extent that they would be enforceable under Title VI's specific revocation remedy found in section 602.[69]

Assuming the validity of section 602 disparate impact regulations, the use of § 1983 to enforce these regulations still raises important issues with regard to statutory interpretation[70] and the legitimacy of their enforcement, especially in light of the fact that the regulations are authorized pursuant to Congress's Article I spending power.[71] Enforcing section 602 disparate impact regulations by using § 1983, when the regulations are only authorized pursuant to the Spending Clause power, raises concerns with regard to the legitimacy of the federal government's authority in forcing state conduct without state consent though Title VI's conditional grant of financial assistance. Although Title VI contains a condition specifically requiring a state to

65 479 U.S. 418 (1987).

66 Pettys, *supra* note 21, at 52, 76–82 (describing and commenting on the three basic views taken by the circuit courts as to whether federal regulations can create enforceable rights under § 1983).

67 *See Guardians*, 463 U.S. at 612–15 (O'Connor, J., concurring in the judgment) ("[I]t is difficult to fathom how the Court could uphold administrative regulations that would proscribe conduct by the recipient having only a discriminatory *effect*. Such regulations do not simply 'further' the purpose of the Title VI; they go well *beyond* that purpose.").

68 Alexander v. Sandoval, 532 U.S. 275, 281 (2001).

69 *See Guardians*, 463 U.S. at 643 (Stevens, J., dissenting) (arguing that the regulations would reasonably relate to the purposes of Title VI and would thus be authorized under *Morning v. Family Publications Services, Inc.*, 411 U.S. 356, 369 (1973)).

70 Pettys, *supra* note 21, at 51–52, 82–99 (arguing that a review of the historical record demonstrates that Congress did not intend to provide a remedy for federal regulations by using the words "and laws" in passing the legislation now known as § 1983).

71 *Guardians*, 463 U.S. at 598–99 (stating that the legislative history "clearly shows" that Title VI is Spending Clause legislation).

cede its sovereign immunity under the Eleventh Amendment[72] in order to receive federal funds,[73] 42 U.S.C § 1983 does not.[74] Furthermore, there is recent case law recognizing that the *Ex parte Young*[75] fiction, which was adopted by the Court to allow plaintiffs to obtain prospective relief by suing state officials as defendants in their official capacity, may not apply in actions seeking to enforce regulations under Spending Clause legislation absent a state's consent to individual legal enforcement of such regulations.[76]

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72 This Note describes state sovereign immunity in terms of "Eleventh Amendment immunity." This description is meant as shorthand for the immunity that states have under the history and the structure of the Constitution. *See* Alden v. Maine, 527 U.S. 706, 713 (1999).

> The phrase [Eleventh Amendment immunity] is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . .

Id.

73 *See* 42 U.S.C. § 2000d-7(a)(1) (1994) ("A State shall not be immune under the Eleventh Amendment of the Constitution . . . from suit in Federal court for a violation of . . . title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." (citation omitted)).

74 In fact, Congress could have abrogated Eleventh Amendment immunity under its enforcement power in section 5 of the Fourteenth Amendment, but it did not. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that Congress can override state immunity through its power to enforce the Civil War amendments). The Court has also held that § 1983 was not intended to abrogate state immunity. Edelman v. Jordan, 415 U.S. 651, 675–77 (1974). Congress, however, cannot abrogate immunity under its Article I powers. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999) (noting that *Seminole Tribe v. Florida*, 517 U.S. 44, 72–73 (1996), "makes clear" that Congress cannot unilaterally abrogate state sovereign immunity under Article I powers).

75 209 U.S. 123, 159–60 (1908) (holding that officers of a state may be enjoined from conduct in a § 1983 suit and that the Eleventh Amendment is not a bar to such an action—essentially allowing for a state official to be sued in an official capacity under § 1983 for prospective relief).

76 *See, e.g.*, Westside Mothers v. Haveman, 133 F. Supp. 2d 549 (E.D. Mich. 2001) (questioning the application of *Ex parte Young*'s legal fiction in a case where the state has not consented to private enforcement of rights created in federal Spending Clause legislation), *rev'd*, 289 F.3d 852 (6th Cir. 2002).

II. THE SUPREME COURT'S INTERPRETATION OF "AND LAWS" AND THE CIRCUIT SPLIT

A. The Court's Adoption of Plain Meaning Interpretation

Initially, § 1983 came onto the books as section 1 of the Ku Klux Klan Act of April 20, 1871, or what is often called the Civil Rights Act of 1871.[77] It is commonly accepted that Congress enacted this legislation to alleviate the state-sanctioned discrimination occurring in the southern states following the adoption of the Civil War amendments.[78] As originally enacted, the Civil Rights Act of 1871 provided a cause of action only for deprivations of constitutional rights, and the phrase "and laws" was added in 1874.[79] Despite the debate surrounding the legislative history of Congress's addition of "and laws," the Court has interpreted this phrase according to its plain meaning when determining the scope of federal rights that are enforceable under § 1983.[80]

In *Maine v. Thiboutot*, the Court ignored the "scanty" legislative history and expanded the coverage of § 1983 to include statutory rights.[81] Although this expansion of federal rights was significant and gave rise to serious concerns about excessive federal litigation and infringement of state sovereignty,[82] the Court's interpretation, absent clear legislative intent to the contrary, can be somewhat justified. Few would argue that the word "laws" does not include laws, statutes, or other legislative acts within the word's plain meaning. The word "laws" may not, however, plainly mean "regulations," and further expansion of § 1983 to include actions for violations of federal regula-

77 Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1994)).

78 Monroe v. Pape, 365 U.S. 167, 171 (1961) (noting that § 1983 was enacted pursuant to section 5 of the Fourteenth Amendment to "enforce the provisions of that Amendment"); Pettys, *supra* note 21, at 54–56 & n.37 ("[T]he Ku Klux Klan, aided by the inaction or outright complicity of state and local officials, remained a dominant force in the South.").

79 *See* Rev. Stat. 1979 (1874) (current version at 42 U.S.C. § 1983 (1994)); *see also* Maine v. Thiboutot, 448 U.S. 1, 15–16 (1980) (Powell, J., dissenting) (discussing the legislative history of the Civil Rights Act of 1874).

80 *Thiboutot*, 448 U.S. at 6–8 (refusing to rely on the "scanty legislative history" and turning instead to the plain meaning of the language used).

81 *See id.* ("In short, Congress was aware of what it was doing, and the legislative history does not demonstrate that the plain language was not intended.").

82 Justice Lewis F. Powell expressed these concerns in his dissenting opinion: "No one can predict the extent to which litigation arising from today's decision will harass state and local officials; nor can one foresee the number of new filings in our already overburdened courts." *Id.* at 23 (Powell, J., dissenting).

tions alone may go well beyond plain meaning interpretation by the Court.

In conjunction with the plain meaning of the language, federal courts have relied on the notion that Congress passed § 1983 to provide a remedy for a broad array of constitutional and statutory violations.[83] This broad remedial purpose has been incorporated as a dominant factor used by some federal judges in recognizing that federal regulations can create federal rights under § 1983,[84] while other judges have construed the plain meaning of "and laws" to exclude "regulations." These latter judges have recognized that regulations *alone* are probably not "laws" under the meaning of § 1983 and do not create federally enforceable § 1983 rights.[85]

There is a strong case that, historically, Congress did not intend for federal agencies to promulgate rules or regulations that give private individuals a right of action under the "and laws" language of § 1983.[86] The further expansion of the Court's interpretation of "and laws" under § 1983 to include the creation of enforceable rights based on regulations without a close nexus to a statutory right, would likely create volumes of new rights with their substantive determination left to the ever-changing will of federal executive agencies. Congress can intend for the executive branch to enforce federal law through promulgation of regulations, but it is not clear that § 1983 would support enforceable rights based on those regulations alone. Not only is it unlikely that Congress intended "and laws" to include regulations, but the Court's expansion of that language to include federal regulations will likely open the floodgates for more federal litigation.

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83 *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 649 (1980) (stating that § 1983 is a means of insuring that municipalities conform to constitutional and statutory requirements).

84 *See, e.g.*, Loschiavo v. City of Dearborn, 33 F.3d 548, 551 (6th Cir. 1994) (reasoning that because "federal regulations have the force of law, they likewise may create enforceable rights"); W. Va. Univ. Hosps., Inc. v. Casey, 885 F.2d 11, 17, 22 (3d Cir. 1989) (permitting the plaintiff to assert a cause of action under § 1983 for an "alleged violation of a federal medical statute, the Medicaid Act").

85 *See* Harris v. James, 127 F.3d 993, 1005–09 (11th Cir. 1997) (concluding that *Wright v. City of Roanoke Redevelopment and Housing Authority* did not stand for the general proposition that federal regulations could create enforceable rights under § 1983 on their own force); Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987) ("An administrative regulation . . . cannot create an enforceable § 1983 interest not already implicit in the enforcing statute.").

86 *See generally* Pettys, *supra* note 21 (arguing that the language of § 1983 and the historical context in which Congress passed the statute establish that Congress did not intend "and laws" to include regulations).

B. Early Treatment of the § 1983 Law/Regulation Distinction

The law versus regulation issue first emerged in Justice Stevens's dissenting opinion in *Guardians.*[87] The plaintiffs in this case filed actions based on both Title VI and Title VII of the Civil Rights Act of 1964,[88] as well as under § 1983.[89] The class action suit was filed after New York City administered entry-level police officer examinations that had a discriminatory effect on black and Hispanic applicants.[90] After their first judgment was vacated, the plaintiffs ultimately obtained relief in the district court on Title VI and Title VII grounds, but only the Title VII basis for relief was upheld by the court of appeals.[91] The Title VI and § 1983 claims were rejected by the circuit court.[92] A plurality of the Supreme Court affirmed the judgment on Title VII grounds, with disagreement on the issue of whether Title VI was a proper basis for the claim.[93] Because of the Title VII issues, the Court did not need to decide the scope of Title VI's implied cause of action or whether section 602 regulations could create enforceable § 1983 rights.

In dissent, Justice Stevens argued that the plain meaning interpretation of "and laws" applied by the Court in *Thibotout* should be applied to § 1983 actions for the "deprivation of rights secured by all valid federal laws, including statutes and regulations having the force of law," and that the circuit court decision should be reversed.[94] A regulation is said to have the force and effect of law when it meets the test set forth in the Supreme Court's decision in *Chrysler Corp. v. Brown.*[95] The plurality in *Guardians,* consisting of only three justices recognizing that federal regulations alone could create federal rights enforceable under § 1983, affirmed the lower court's decision on other grounds and did not provide a definitive answer on whether

87 Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 639–45 (1983).

88 42 U.S.C. §§ 2000d to 2000d-7 (1994); *id.* §§ 2000e to 2000e-17.

89 *Guardians,* 463 U.S. at 586.

90 *Id.* at 585.

91 *Id.* at 587–88.

92 *Id.* at 588–89.

93 *Id.* at 584 & n.2.

94 *Id.* at 638 & n.6 (Stevens, J., dissenting).

95 441 U.S. 281, 301–06 (1979). The three-part test to determine if a *statute* creates rights enforceable under § 1983 could apply to a regulation that meets the *Chrysler* test. This three-part test is discussed in Part II.C. *See infra* notes 115–17 and accompanying text.

regulations could create enforceable rights under § 1983, leaving the issue for another day.[96]

The issue of whether regulations could create federal rights under § 1983 was more directly implicated in *Wright v. City of Roanoke Redevelopment and Housing Authority*.[97] In *Wright*, the plaintiffs alleged a violation of the Brooke Amendment of the Housing Act of 1937.[98] Public housing tenants claimed that they had been overcharged for rent in violation of federal law because the public housing authority did not take account of their utility costs.[99] The Brooke Amendment imposed a statutory limit on rent charged to low-income public housing tenants.[100] The Department of Housing and Urban Development had consistently promulgated regulations defining the term "rent" to include reasonable utility costs.[101] The plaintiff-tenants filed a § 1983 action alleging a violation of their statutory rights for the over-billing that occurred when their utility expenses were not considered in their rent.[102] The district court granted summary judgment for the defendant, and the court of appeals affirmed recognizing that although the tenants had federal rights under the Brooke Amendment, those rights were only enforceable by the Housing Authority.[103]

The Supreme Court reversed, holding that the Housing Act and the Brooke Amendment did not provide a sufficiently comprehensive and effective remedial scheme to demonstrate that Congress intended to foreclose the use of § 1983.[104] While most of the majority's decision was dedicated to determining whether the statute foreclosed the use of § 1983,[105] little discussion is found on whether the Court held

96 *Id.* at 584. Justice Stevens, joined by Justice William J. Brennan and Justice Harry A. Blackmun would have expanded § 1983 to allow federal regulations to create enforceable rights. "It is clear that the § 1983 remedy is intended to redress the deprivation of rights secured by all valid federal laws, including statutes and regulations having the force of law." *Id.* at 638.

97 479 U.S. 418 (1987).

98 *Id.* at 419.

99 *Id.*

100 *Id.* at 420 & n.2; *see* 42 U.S.C. § 1437a (1994).

101 *Wright*, 479 U.S. at 420–21.

102 *Id.* at 419.

103 *Id.* at 422.

104 *Id.* at 424–25.

105 The federal courts generally use a two-step analysis for determining if a statute creates a federal right for § 1983 purposes. *See* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981). First, courts determine if a federal right exists. *See id.* To make this determination, the court applies the three-part test outlined in *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997). *See infra* notes 115–17 and accompanying text. Second, the court determines if Congress has expressly or impliedly foreclosed a § 1983 remedy under the statute. *See Middlesex County Sewerage*

that the right enforceable under § 1983 was derived from the *statutory* limit on the term "rent," or whether the right was derived from the regulations adopted to define the meaning of "rent."[106]

The unclear reasoning found in the Court's split decision in *Wright*, coupled with a strong dissent suggesting that regulations alone could not give rise to enforceable rights under § 1983, suggests that federal regulations would only create enforceable rights under § 1983 when the regulations are *consistent* with the existing statutory rights.[107] Justice Sandra Day O'Connor best expresses this in her dissenting opinion:

> I am concerned, however, that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, *any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result. Thus, HUD's frequently changing views on how best to administer the provision of utilities . . . becomes the focal point for the creation and extinguishment of federal "rights." Such a result, where determination of § 1983 "rights" has been unleashed from any connection to congressional intent, is troubling indeed.[108]

Section 601 of Title VI allows conduct that section 602 forbids in the form of disparate impact regulations, and therefore the regulations are not inherently consistent with section 601.[109] If federal agencies create regulations that forbid intentional discrimination, those regulations would be actionable under § 1983 not because a right would derive from the regulation, but because such regulations would mirror the statutory rights—in particular, Title VI creates a statutory right to be free from intentional discrimination, but not from any and all unintentional discriminatory effects.[110] The *Wright* majority's unclear reasoning and incomplete analysis surrounding the source of

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Auth., 453 U.S. at 20. In *Wright*, the Court's reasoning as to the source of the federal right resulted in confusion among lower courts on whether regulations can create enforceable rights under § 1983.

106 *See Middlesex County Sewarage Auth.*, 453 U.S. at 20; Pettys, *supra* note 21, at 73–75 (commenting on the Court's "slippery" analysis in *Wright* regarding the meaning of the term "rent").

107 *Wright*, 479 U.S. at 438 (O'Connor, J., dissenting).

108 *Id.* (O'Connor, J., dissenting).

109 *See* Alexander v. Sandoval, 532 U.S. 275, 276 (2001) (suggesting that section 602 disparate impact regulations may not be consistent with Title IV's intentional discrimination prohibition).

110 *See id.*

the enforceable right at issue has lead to the current circuit court split described next.[111]

C. *Current Circuit Court Split*

The federal courts of appeals are currently split as to whether federal regulations can supply a statutory right under § 1983, and their approaches to resolve the issue are threefold.[112] The first approach taken by the Sixth and, until recently, the Third Circuit,[113] simply applies the same test that courts would apply to statutes in determining if federal regulations can create enforceable § 1983 rights.[114] The test applied to determine if a statute creates federal rights enforceable under § 1983 is the three-part test enumerated in *Blessing v. Freestone.*[115] A federally enforceable right exists under *Blessing* if: (1) the statute was intended to benefit the plaintiffs; (2) the right protected is not so vague or amorphous that is strains judicial competence to enforce; and (3) the statute unambiguously imposes a

111 Pettys, *supra* note 21, at 73 (stating that *Wright* "has not provided the guidance that the lower courts plainly need").

112 *Id.* at 76.

113 The Third Circuit's most recent opinion on this issue distinguishes prior cases that were seemingly in support of the first approach discussed, *see* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 783–85, 788 (3d Cir. 2001) (holding that the section 602 disparate impact regulations issued by the EPA cannot create federal rights on their own), *cert. denied*, 70 U.S.L.W. 3669 (U.S. June 24, 2002) (No. 01-1547), and specifically adopts the second approach discussed which is the same approach taken by the Fourth and Eleventh Circuits. *See* Harris v. James, 127 F.3d 993, 1005–09 (11th Cir. 1997) (concluding that *Wright v. City of Roanoke Redevelopment & Housing Authority* did not stand for the general proposition that federal regulations could create enforceable rights under § 1983 on their own force); Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987) ("An administrative regulation . . . cannot create an enforceable § 1983 interest not already implicit in the enforcing statute."). Note, however, that this Third Circuit decision had a split panel and that the dissenting judge sharply criticized the majority for overruling precedent without an en banc hearing. *Id.* at 792 (McKee, J., dissenting). The entire court has refused a petition for rehearing en banc. Duffy, *supra* note 14, at 15.

114 *See* Pettys, *supra* note 21, at 76; *see also* Levin v. Childers, 101 F.3d 44, 47 (6th Cir. 1996) (stating that the Sixth Circuit uses the three-part rights test to determine if a federal regulation can be enforced under § 1983, but dismissing the claim on qualified immunity grounds); Loschiavo v. City of Dearborn, 33 F.3d 548, 550–51 (6th Cir. 1994) (holding that FCC regulations prohibiting the enforcement of local zoning ordinances created federal rights enforceable under § 1983 for plaintiffs claiming constitutional violations when a local ordinance required removal of a ten-foot diameter backyard satellite dish antenna); Alexander v. Polk, 750 F.2d 250, 259–60 (3d Cir. 1984) (holding that federal regulation requiring notification of hearings for WIC recipients gave rise to federal rights enforceable under § 1983).

115 520 U.S. 329 (1997).

binding obligation on the governmental unit.[116] Relying on the Supreme Court's decision in *Wright*, the Third and the Sixth Circuits have issued opinions that arguably support the position that federal regulations can create federal § 1983 rights under a plain meaning interpretation of § 1983's "and laws" language, and the Sixth Circuit has specifically applied the three-part *Blessing* test to regulations to determine if such regulations provide federal rights.[117]

A second position, adopted by the Courts of Appeals for the Fourth, Eleventh, and most recently the Third Circuit,[118] holds that regulations simply cannot supply an enforceable right under § 1983 without clear legislative intent.[119] This view correctly requires that Congress, manifested through a legislative act, intentionally create the source of the right. It rejects the idea that federal regulations could create § 1983 rights by their own force. As a more restrictive approach, it only permits federal agencies to "define" an existing statutory right, and any such definition cannot subsequently affect a substantive change in a congressionally created statutory right.[120]

A third view, adopted by the D.C. Circuit, merely asks whether the regulations have the "force and effect" of law under the test set forth in *Chrysler Corp. v. Brown*, and if the regulations pass this test, they create an enforceable federal right under § 1983.[121] This view is unique in that it assumes that if a regulation has the force and effect of law, then the three-part *Blessing* test is presumptively met.[122] This approach is effectively subsumed by the first approach recognizing that federal regulations can potentially create federal rights enforceable under § 1983.

If the Court recognizes that federal regulations can create enforceable § 1983 rights, it could require a two-step process: essentially

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116 *See id.* at 340–41; Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 (1990).

117 *See Loschiavo*, 33 F.3d at 551; *Polk*, 750 F.2d at 259–60.

118 *S. Camden Citizens in Action*, 274 F.3d at 783–85; *see supra* note 113 and accompanying text.

119 *See, e.g.*, Harris v. James, 127 F.3d 993, 1005–09 (11th Cir. 1997) (concluding that *Wright* did not stand for the general proposition that federal regulations could create enforceable rights under § 1983 on their own force); Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987) ("An administrative regulation . . . cannot create an enforceable § 1983 interest not already implicit in the enforcing statute.").

120 *See Smith*, 821 F.2d at 984; *see also* Mank, *supra* note 51, at 325.

121 Samuels v. District of Columbia, 770 F.2d 184, 199–200 (D.C. Cir. 1985) (holding that federal housing regulations requiring an administrative grievance procedure had the force and effect of law and thus were covered by the plain meaning of "and laws" under § 1983).

122 *See* Pettys, *supra* note 21, at 81.

combining the first and third views discussed[123] by asking if the federal regulation has the force and effect of law, and then applying the statutory analysis required to determine if a federal right exists under the three-part *Blessing* test.[124] This is the approach that the federal district court recently used to grant an injunction in favor of the South Camden Citizens in Action in its § 1983 action against the NJDEP.[125]

III. *SOUTH CAMDEN CITIZENS IN ACTION V. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION*

The effects of the Court's decision in *Alexander v. Sandoval* were immediate, and it did not take long for plaintiffs to assert their new § 1983 legal theory in attempting to enforce section 602 disparate impact regulations under Title VI. This is evidenced by the U.S. District Court for the District of New Jersey's recent decisions in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection* (SCCIA I and SCCIA II).[126] On April 19, 2001, prior to the Supreme Court's decision in *Sandoval*, the U.S. District Court for the District of New Jersey issued a decision, in which it enjoined the NJDEP from issuing air pollution permits to a company set to open a new cement plant in South Camden (SCCIA I).[127] The initial injunction was granted after the plaintiffs filed an action under Title VI alleging that the NJDEP had violated certain federal EPA regulations forbidding conduct having a discriminatory effect on people of low-income or color.[128] Five days later on April 24, 2001, the Supreme Court issued its decision in *Sandoval*, eliminating an implied private cause of action under Title VI for section 602 regulations.[129] Subsequently, on May 10, 2001, prompted by the *Sandoval* decision and after allowing South

123 *See supra* notes 113–16, 121–22 and accompanying text.

124 *See* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 509 (D.N.J. 2001) (SCCIA II), *rev'd*, S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 70 U.S.L.W. 3669 (U.S. June 24, 2002) (No. 01-1547); *see also* Pettys, *supra* note 21, at 81. ("No court, however, has applied both analyses. Yet if courts are ever to permit regulations to create section 1983 rights, some variation of both analyses is surely required.").

125 The district court did not formally provide that both steps of the approach were advanced, but both steps can be inferred. *See S. Camden Citizens in Action*, 145 F. Supp. 2d at 509 (SCCIA II).

126 *See* S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446 (D.N.J. 2001) (SCCIA I); *S. Camden Citizens in Action*, 145 F. Supp. 2d at 505 (SCCIA II).

127 *S. Camden Citizens in Action*, 145 F. Supp. 2d at 452 (SCCIA I).

128 *Id.* at 450–51.

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

Camden Citizens in Action to amend its complaint, the district court issued a second decision upholding the injunction based on a violation of § 1983 (SCCIA II).[130] This Part first examines the factual background surrounding the district court's first opinion, and then examines the legal argument advanced in favor of allowing plaintiffs to use § 1983 to enforce disparate impact regulations issued pursuant to section 602. Finally, it discusses the Third Circuit's recent split panel decision reversing the district court's grant of the injunction.

A. South Camden Citizens in Action I *(SCCIA I)*

In SCCIA I, a group of citizens from the Waterfront South neighborhood in South Camden filed suit against the NJDEP, its chief officer, and the Saint Lawrence Cement Company under Title VI of the Civil Rights Act of 1964.[131] The plaintiffs alleged that the NJDEP issued pollution permits for a new cement factory proposed by Saint Lawrence Cement in violation of certain federal EPA regulations.[132] The federal regulations implicated in the case prohibit federally funded state entities from taking action that results in a discriminatory effect on individuals based on their race, color, or national origin.[133] The EPA regulations on which the plaintiffs relied specifically prohibit recipients of federal funds from utilizing "criteria and methods" which have the "purpose or effect" of discriminating against individuals on the basis of race, color, or national origin.[134]

Approximately ninety percent of Waterfront South's residents were persons of color.[135] Numerous industrial plants had already existed in the neighborhood, including two "Superfund" sites, a sewage treatment plant, and a trash-to-steam incinerator plant.[136] The federal EPA was also investigating four industrial sites in Waterfront

130 *S. Camden Citizens in Action*, 145 F. Supp. 2d at 549 (SCCIA II).

131 *S. Camden Citizens in Action*, 145 F. Supp. 2d at 450 (SCCIA I).

132 *Id.* at 450–51.

133 *See* Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency, 40 C.F.R. §§ 7.30, 7.35(b) (2001).

134 *Id.* § 7.35(b).

> A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

Id.

135 *S. Camden Citizens in Action*, 145 F. Supp. 2d at 459 (SCCIA I).

136 *Id.*

South for possible pollution violations.[137] The citizens claimed that the NJDEP's decision to issue air pollution permits to the new cement plant without considering the discriminatory effect on the health and the environment of the neighborhood's residents violated the federal regulations issued under section 602 of Title VI.[138]

The district court held that the EPA regulations imposed an affirmative obligation on the NJDEP—as a recipient of federal funds—to consider the totality of the effects that its permitting decision would have on the personal health and environment of the citizens of Waterfront South.[139] The NJDEP granted the pollution permits after concluding that the factory's emissions would not exceed the regulatory standards for the specific pollutants in question.[140] The district court held that consideration of the National Ambient Air Quality Standards alone was not sufficient to fulfill the NJDEP's obligation under the EPA regulations.[141] The NJDEP failed to consider the preexisting poor health of the residents, the cumulative environmental burden already borne by the community, and the racial and ethnic composition of the neighborhood where the permits would be issued.[142] Holding that the NJDEP did not meet its obligation under the regulations, and relying on Supreme Court and Third Circuit precedent recognizing that an implied cause of action existed under Title VI, the district court enjoined issuance of the pollution permits and prohibited the cement company from beginning construction on its new plant.[143]

B. South Camden Citizens in Action II *(SCCIA II) and the § 1983 Argument*

After considering the impact of the *Sandoval* decision and after permitting the plaintiffs to amend their complaint to include a § 1983 claim against the NJDEP, the district court issued a second opinion in the *South Camden Citizens in Action* case upholding the previously

137 *Id.*
138 *Id.* at 450.
139 *Id.* at 451–52.
140 *See id.* at 458.
141 *Id.*
142 *Id.* at 490–91.
143 *Id.* at 504–05; *see* Lau v. Nichols, 414 U.S. 563, 569 (1974) (applying Title VII disparate impact analysis to a Title VI claim without discussion—essentially overruled by the Court's recent decision in *Sandoval*); Powell v. Ridge, 189 F.3d 387, 397–400 (3d Cir. 1999) (applying factors from *Cort v. Ash*, 422 U.S. 66 (1975), and determining that Title VI provided an implied private cause of action for disparate impact regulations).

granted injunction.[144] The district court's opinion determined that the EPA regulations in question had the "force and effect of law" and that the section 602 disparate impact regulations also satisfied the three-part *Blessing* test used to establish a federal right for § 1983 purposes.[145] In its second opinion, the court held that the decision in *Sandoval* did not preclude the citizens of Waterfront South from pursuing a claim of disparate impact discrimination in violation of the EPA regulation under § 1983.[146]

The district court noted that the Supreme Court had not invalidated the EPA's disparate impact regulations issued under section 602 in *Sandoval* and, without significant discussion, went on to hold that the regulations before it were valid.[147] The district court reasoned that because the Supreme Court assumed the validity of the regulations in *Sandoval*, and limited the issue to whether Congress intended a private right of action, the section 602 disparate impact regulations were not invalidated.[148] Without addressing the validity of section 602 disparate impact regulations, the district court presumed the regulations to be valid and determined that the inquiry on whether an action may be brought under § 1983 is "separate and distinct" from the inquiry applied by the Court to determine if Congress intended to create a private cause of action in Title VI for section 602 regulations.[149] Congress has clearly supplied a private right of action for individuals under § 1983. The central issue is whether section 602 regulations create enforceable federal rights under § 1983.

In an action filed under § 1983, a plaintiff must demonstrate that she has asserted a claim against a "person" who "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia," deprived the plaintiff of "rights, privileges, or immunities secured by the Constitution and laws" of the United States.[150] Courts apply a two-step inquiry in determining if

144 S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 509 (D.N.J. 2001) (SCCIA II), *rev'd*, 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 70 U.S.L.W. 3669 (U.S. June 24, 2002) (No. 01-1547).

145 *Id.* at 528–29, 535–42.

146 *Id.* at 516–17.

147 *Id.*

148 *Id.*

149 *Id.* at 520–21 (holding that the congressional intent analysis required for an implied private cause of action is not required under § 1983 because Congress specifically provided a statutory basis for the private cause of action); *see also* Cort v. Ash, 422 U.S. 66, 78 (1975) (identifying four factors for consideration by federal courts in determining if Congress intended to imply a private cause of action under a federal statute).

150 42 U.S.C. § 1983 (1994).

§ 1983 is available to remedy a constitutional or statutory violation: (1) the plaintiff must meet all statutory requirements including the assertion of a federal right; and (2) even if a federal right is asserted, the defendant has an opportunity to show that either Congress expressly or implicitly foreclosed § 1983 remedies by providing a sufficiently comprehensive enforcement mechanism for protection of the federal right within the statute itself.[151] The first step requires a violation of a federal right, not merely a violation of federal law, and this is determined by applying the three-part *Blessing* test.[152]

South Camden Citizens in Action sued the NJDEP as well as its commissioner, Robert Shinn, as "persons" under § 1983. While state officials sued in their official capacities are not proper defendants in a § 1983 action, state officials sued in their official capacities for injunctive or prospective relief have been held to be proper defendants under § 1983.[153] The plaintiffs sought prospective injunctive relief, and thus the district court held that the NJDEP Commissioner was not shielded by the state's sovereign immunity.[154] Having established a proper defendant in the action, the court next turned to the question of whether or not the EPA disparate impact regulations issued pursuant to the authority found in section 602 of Title VI could establish federal rights enforceable under § 1983.

The court relied on Third Circuit precedent and mistakenly determined that the decision in *Wright v. City of Roanoke Redevelopment and Housing Authority* had conclusively established that federal regulations could create enforceable rights under § 1983.[155] The district court proceeded to apply the two approaches taken by different circuits on this issue. First, it applied the *Chrysler* test to determine if the EPA regulations had the force and effect of law.[156] Second, after establishing that the regulations in question satisfied this test, the court turned to the three-part *Blessing* test to determine if the EPA regulations having the force and effect of law created a federal right enforce-

151 *See* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981) (providing that § 1983 claims can be precluded if the underlying statute provides a comprehensive remedial scheme); Mank, *supra* note 51, at 335. Congressional express or implied foreclosure of § 1983 actions for Title VI is not at issue. Title VI does not contain an express foreclosure of such a remedy and it also allows for compliance with section 602 regulations to be achieved by "other means authorized by law." 42 U.S.C. § 2000d-7 (1994).

152 Blessing v. Freestone, 520 U.S. 329, 340 (1997); *see also supra* notes 115–17.

153 *Ex parte* Young, 209 U.S. 123, 159–60 (1908).

154 *S. Camden Citizens in Action*, 145 F. Supp. 2d at 525 (SCCIA II).

155 *Id.* at 526–27.

156 *Id.* at 528–29.

able under § 1983.[157] The court concluded that the EPA disparate impact regulations satisfied the three-part test and that the plaintiffs were entitled to relief under § 1983.[158] The district court concluded its analysis by holding that the specific remedy provided in section 602, revocation of federal funds, did not provide a comprehensive remedial scheme indicating congressional intent to rebut the presumption of enforceability under § 1983.[159]

C. The Third Circuit's Reversal of SCCIA II

The Third Circuit overruled the district court's decision to grant a preliminary injunction because the plaintiffs' "legally insufficient" case foreclosed any finding of a likelihood of success on the merits.[160] The court specifically focused on the issue of "whether a regulation can create a right enforceable through section 1983 where the alleged right does not appear explicitly in the statute, but only . . . in the regulation."[161] The court resolved the issue in the negative, relying heavily on the *Wright* dissenters and the approaches taken by the Fourth and Eleventh Circuits.[162]

The panel majority specifically addressed and distinguished three prior circuit opinions that seemingly supported an affirmative answer to the issue as stated by the court—a view that would parallel the Sixth Circuit's approach, as discussed above.[163] First, in *Alexander v. Polk*,[164] the court had previously held that federal regulations governing the Supplemental Food Program for Women, Infants, and Children (WIC) created rights enforceable under § 1983.[165] The current court, while admitting that the previous decision had not expressly identified the federal WIC rights as stemming from the statute, noted that the decision did not specifically address the issue of whether a federal regulation could itself create a federal right enforceable under § 1983.[166]

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157 *Id.*

158 *Id.* at 535–42.

159 *Id.* at 544 (noting that the Supreme Court has only twice found a remedial statutory scheme sufficiently comprehensive to supplant a § 1983 remedy); *see also* Blessing v. Freestone, 520 U.S. 329, 347 (1997) (citing Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981)).

160 S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 777 (3d Cir. 2001), *cert. denied*, 70 U.S.L.W. 3669 (U.S. June 24, 2002) (No. 01-1547).

161 *Id.* at 781.

162 *Id.* at 781–88.

163 *See* discussion *supra* Part II.C.

164 750 F.2d 250 (3d Cir. 1984).

165 *Id.* at 261.

166 *S. Camden Citizens in Action*, 274 F.3d at 783–84.

Second, the majority further held that the underlying issue in *West Virginia University Hospitals, Inc. v. Casey*,[167] was whether the federal Medicaid statute, not its implementing regulations, created enforceable federal rights for § 1983 enforcement purposes.[168] The court dismissed the statements that "valid federal regulations as well as federal statutes may create rights enforceable under section 1983,"[169] as broad dicta in light of the specific issue in the case.[170]

Third, the court was forced to deal with the decision in *Powell v. Ridge*.[171] In *Powell*, the court had specifically allowed the enforcement of disparate impact regulations issued pursuant to section 602 of Title VI under § 1983.[172] The plaintiffs in *Powell* filed a claim against Pennsylvania that challenged the state's practices in funding public education.[173] The plaintiffs claimed that Pennsylvania's public education funding scheme had a racially discriminatory effect.[174] The *Powell* court held that a private cause of action existed under Title VI itself for the enforcement of section 602 disparate impact regulations, and that a plaintiff could also maintain an action under § 1983 to enforce that right.[175] Because, in the court's view, a statutory-based cause of action existed under Title VI, the *Powell* decision merely begged the question of whether the regulations could support a § 1983 action on their own merit. The court noted that *Powell* did not expressly address the specific issue of whether federal regulations could support enforceable § 1983 rights on their own and rejected the idea that federal regulations could support enforceable § 1983 rights without a clear legislative intent to create such rights.[176]

The New Jersey federal district court followed what was perceived to be binding precedent by holding that federal regulations can create federal rights under § 1983. However, as evidenced by the *Wright* dissenters, the recent split panel decision by the Third Circuit, and the unclear reasoning by the *Wright* majority, *Wright* probably does

167 885 F.2d 11 (3d Cir. 1989).

168 *S. Camden Citizens in Action*, 274 F.3d at 784 (quoting *W. Va. Univ. Hosps.*, 885 F.2d at 17).

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

170 *S. Camden Citizens in Action*, 274 F.3d at 784.

171 189 F.3d 387 (3d Cir. 1999).

172 *Id.* at 397–400.

173 *Id.* at 391.

174 *Id.*

175 *Id.* at 399–400, 403.

176 S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 784–85 (3d Cir. 2001), *cert. denied*, 70 U.S.L.W. 3669 (U.S. June 24, 2002) (No. 01-1547).

not stand for this proposition.[177] In *Wright*, the federal regulation in question defined the term "rent," but the statutory prohibition on charging excessive rent was the source of the federal right.[178] The same cannot be said of the EPA's section 602 disparate impact regulations. The statutory right under Title VI has been interpreted to only include a prohibition of intentional discrimination.[179] These regulations do not define intentional discrimination but rather ignore any requirement of intent and simply disregard the subjective mindset of state and local decision makers.[180] These regulations may not be *consistent* with the source of a statutory right under Title VI and probably do not give rise to enforceable § 1983 rights.[181] The question of the validity of section 602 disparate impact regulations as a means to "effectuate"[182] the intentional prohibition of discrimination found in section 601 is unresolved,[183] but it will likely prove extremely important for the purposes of enforcement of the disparate impact regulations.[184]

The Third Circuit initial panel correctly reversed the lower court's decision and, despite a strong dissent in the split three judge panel, the full court rejected a petition for rehearing en banc.[185] The district court's reasoning, as well as the Third Circuit opinion, ignores the fact that Title VI was enacted under Congress's Spending Clause power—a vital issue that precludes the use of § 1983 actions against states without their consent, even if the Supreme Court were to recognize the use of § 1983 to enforce federal rights arising from Title VI's disparate impact regulations.

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177 *See* Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418, 419 (1987); *id.* at 438 (O'Connor, J., dissenting); *S. Camden Citizens in Action*, 274 F.3d at 788.

178 *See Wright*, 479 U.S. at 419; *id.* at 438 (O'Connor, J., dissenting).

179 Alexander v. Sandoval, 532 U.S. 275, 279–80 (2001).

180 *See* Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency, 40 C.F.R. § 7.35(b) (2001) (prohibiting actions that merely have an adverse effect).

181 *See S. Camden Citizens in Action*, 274 F.3d at 788–89.

182 42 U.S.C. § 2000d-1 (1994).

183 *See Sandoval*, 532 U.S. at 281.

184 If section 602 disparate impact regulations are held to be valid under Title VI, then the question of what enforcement mechanisms can be used against states becomes a significant issue. While it is clear that Title VI would permit federal agencies issuing section 602 disparate impact regulations to initiate fund revocation procedures in accordance with the statute, it is less clear whether plaintiffs could obtain prospective relief under § 1983. This issue is discussed *infra* Part IV.B.

185 Duffy, *supra* note 14, at 15.

IV. State Immunity for § 1983 Actions To Enforce Title VI Disparate Impact Regulations

Assuming that the Court construes § 1983's "and laws" language to include regulations and that section 602 disparate impact regulations are valid exercises of federal agency power, the use of § 1983 to enforce these regulations against a state would still be precluded. This Part examines why, under § 1983 actions to enforce section 602 disparate impact regulations, states cannot be sued for damages, why state officials should not be subject to suit in their official capacity for prospective relief, and why state officials may not be subject to § 1983 liability when sued in their individual or personal capacities.

First, a state cannot be sued for damages under a § 1983 action attempting to enforce section 602 disparate impact regulations. Congress passed Title VI pursuant to its Article I spending power,[186] and although Title VI includes a specific condition requiring a state to waive its Eleventh Amendment sovereign immunity,[187] § 1983 does not itself contain such a provision. Because Congress cannot abrogate Eleventh Amendment immunity under its Article I powers[188] and because a waiver of sovereign immunity can only be effective in Spending Clause legislation when a state voluntarily assents to a clear and unambiguous term or provision waiving immunity, states receiving federal funds have only waived this immunity for actions consistent with the terms of the Spending Clause legislation itself—and not for outside statutory schemes like § 1983.[189] Thus, a state would not lose its Eleventh Amendment protection with regard to suits for damage filed under § 1983 that allege violations of section 602 disparate impact regulations.

Second, a state official cannot be sued in her official capacity because the application of the *Ex parte Young* fiction allowing state officials to be sued for prospective relief is questionable in the context of

186 Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 598 (1983) (noting that Title VI is spending power legislation).

187 42 U.S.C. § 2000d-7(a) ("A State shall not be immune under the Eleventh Amendment . . . for a violation of . . . title VI of the Civil Rights Act . . . .").

188 Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000) (recognizing the holding from *Seminole Tribe* that Congress cannot abrogate sovereign immunity under Article I powers); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999) ("*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers.").

189 *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 678 (1999) (requiring an express waiver of Eleventh Amendment immunity by a state and refusing to apply a doctrine of constructive waiver); South Dakota v. Dole, 483 U.S. 203, 207 (1987).

Spending Clause legislation. Recognizing a § 1983 action to enforce section 602 disparate impact regulations would essentially force states to comply with conditions external to the clear terms found in the Spending Clause legislation.[190] This Part examines the new developments in federal case law recognizing that the *Ex parte Young* fiction cannot apply in Spending Clause cases because Spending Clause legislation only binds the state as the supreme law of the land when a state voluntarily consents to the terms of the spending legislation in a contractual-like manner.[191] Thus, Spending Clause legislation, such as Title VI, is only the supreme law of the land and only becomes binding on the states because the states consent to clear and unambiguous terms as a condition of receiving federal funds.

Third, this Part will briefly examine the applicability of § 1983 actions to enforce federal disparate impact regulations issued pursuant to section 602 with regard to suits against individual state officials sued in their personal or individual capacities. Individual officials are typically afforded a qualified immunity defense in such actions and are not generally required to predict the future development of the law.[192] If the federal right is not "clearly established," then a reasonable official is likely to escape with immunity from suit.[193] The only "clearly established" rights that states agreed to as a condition of receiving federal funds under Title VI include rights for federal agencies to invoke funding repeal procedures for violations of disparate impact regulations. Title VI disparate impact regulations could only

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190 *See, e.g.*, Westside Mothers v. Haveman, 133 F. Supp. 2d 549, 588 (E.D. Mich. 2001), *rev'd*, 289 F.3d 852 (6th Cir. 2002).

> [B]y its terms, § 1983 appears not to protect rights under Spending Power programs that are "secured" by state, rather than federal law. Finally, events outside the statute, such as a State's past voluntary submission to suit, legislative history, or congressional inaction, cannot be used to manufacture a "clear statement" within a Spending Power program statute to create an obligation upon a State not expressly contained in the statutory language. Simply put, § 1983 does not operate as a "clear statement" imposing the obligation upon a State that it submit to private enforcement actions for violations of federal-state contract terms.

Id. It is recognized that this district court decision in not without opposition, but its logic must not be discounted. *See* Markva v. Haveman, 168 F. Supp. 2d 695, 704 (E.D. Mich. 2001) (describing the opinion as "ponderous," yet permitting the parties to stipulate that the defendant could later raise the same arguments as the defendant in *Westside Mothers* if it is upheld on appeal). The Sixth Circuit has recently reversed. *See* Westside Mothers v. Haveman, 289 F.3d 852 (6th Cir. 2002).

191 *Westside Mothers*, 133 F. Supp. 2d at 561–62.

192 *See* Crawford-El v. Britton, 523 U.S. 574, 588 (1998).

193 *Id.* at 589.

support clearly established rights if states consented to their private enforcement under Title VI, something that states have not done.

Additionally, the burden and infringement on state sovereignty of recognizing § 1983 rights for disparate impact regulations without state consent is quite remarkable in the context of suing state officials. Federal regulations prohibiting any conduct, decision, or policy that would have a discriminatory effect would almost always be unclear.[194] We should not expect state officials to predict whether there might be some unintentional discriminatory effect for every decision they make. Allowing federal agencies to create, destroy, and modify federally enforceable rights at will based upon what the agencies determine to constitute "discriminatory effect" would essentially handcuff local decisionmaking in fear that a decision might disparately affect some small group and thus trigger federal liability under § 1983.

A. State Sovereign Immunity for Damages

The Eleventh Amendment generally provides states with immunity from suit[195] unless a state clearly waives this protection[196] or unless Congress specifically abrogates the protection through the

194 The EPA has issued various complicated studies and reports to aid officials in conforming with environmental justice disparate impact regulations. *See generally* U.S. Envtl. Prot. Agency Office of Enforcement and Compliance Assistance, EPA Homepage, *at* http://www.es.epa.gov/oeca/main/ej/index.html (last visited Apr. 20, 2002) (periodically providing published reports and other forms of guidance for compliance). These reports and studies help illustrate the depth of infringement by the federal government that such unclear, unpredictable, and constantly changing regulations would have on a state executive official's ability to act within an area of traditional expertise. The level of detail, and whether these regulations actually require a state to conduct its environmental programs in a *specific manner*, would bear on the outcome of whether the regulations implicate the Tenth Amendment and overstep federalism limits. *See* Printz v. United States, 521 U.S. 898, 919 (1997) (holding that there is no constitutional provision that permits the federal government to force the states or their officers to become "instruments of federal governance"); New York v. United States, 505 U.S. 144, 162 (1992) (holding that the Constitution gives Congress the power to regulate the nation directly, but has "never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions").

195 *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000) (noting that Congress lacks power to abrogate state sovereign immunity under Article I); Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996) ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against non-consenting States."); *see also* Hans v. Louisiana, 134 U.S. 1, 13 (1890).

196 Lane v. Pena, 518 U.S. 187, 200 (1996) (requiring an "unambiguous" waiver of state sovereign immunity).

exercise of its power to enforce the reconstruction amendments, the Thirteenth, Fourteenth, and Fifteenth Amendments.[197] Congress, however, cannot abrogate a state's Eleventh Amendment immunity in conjunction with the exercise of its Article I powers.[198] Because Title VI is derived from Congress's spending power, the relevant inquiry becomes whether states have clearly waived their Eleventh Amendment immunity from suits seeking damages by accepting federal funds. This question has been answered in the affirmative. A state accepting federal funds under Title VI consents and clearly waives its sovereign immunity to suit by accepting federal financial assistance under 42 U.S.C. § 2000d-7.[199]

Although Title VI's waiver of immunity condition applies to states with regard to suits brought under "title VI . . . or the provisions of *any other Federal statute prohibiting discrimination* by recipients of Federal financial assistance,"[200] § 1983 would not be within the scope of this waiver, and the Supreme Court has held that § 1983 itself does not abrogate a state's Eleventh Amendment immunity.[201] Section 1983 is not a statute enacted by Congress to prohibit discrimination by recipients of federal funds. In fact, it does not create any statutory rights; it merely provides a vehicle to enforce violations of constitutional and some federal statutory rights.[202] To stretch the language of Title VI found in 42 U.S.C. § 2000d-7 to include § 1983 as part of the waiver

197 *See Seminole Tribe*, 517 U.S. at 59 (recognizing prior holdings that determined Congress possessed authority to abrogate Eleventh Amendment immunity pursuant to its enforcement powers of the Fourteenth Amendment); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (holding that Congress could use its powers under section 5 of the Fourteenth Amendment to abrogate state sovereign immunity).

198 *See Seminole Tribe*, 517 U.S. at 72–73 (holding that Congress could not use its Article I powers to circumvent the jurisdictional restrictions of the Eleventh Amendment to abrogate state sovereign immunity).

199 *See Lane*, 518 U.S. at 198 (noting that Congress passed 42 U.S.C. § 2000d-7 to respond to case law that required a clear and unambiguous waiver of sovereign immunity by the states).

200 42 U.S.C. § 2000d-7(a)(1) (1994) (emphasis added).

201 *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989). "[I]n enacting § 1983, Congress did not intend to override well-established immunities or defenses under the common law." *Id.* at 67. The Court recognized that Congress could not sue a state without its consent at the time § 1983 was enacted and that state immunity from suit continued to exist absent a clear statutory abrogation. *Id.*

202 Although § 1983 provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," it does not create rights. *See* 42 U.S.C. § 1983 (1994).

would violate the requirement that a state's waiver of immunity be clear and unambiguous.[203]

Plaintiffs, such as the South Camden Citizens in Action, cannot sue states for damages under § 1983 for violations of section 602 disparate impact regulations. First, a state is not a proper "person" under § 1983 and is therefore immune from damages under § 1983 itself.[204] Second, under Title VI, there is no waiver of immunity through an implied private right of action for section 602 regulations.[205] States consenting to this statute by accepting federal funds do not agree to a clear and unambiguous condition that they can be sued for violations of the section 602 disparate impact regulations. Quite the contrary, states only clearly consent to allowing a federal agency issuing section 602 regulations to initiate procedures to revoke funds. These revocation procedures can only proceed after the appropriate federal agency notifies the state of its failure to comply and concludes that voluntary compliance is not possible.[206] Although Title VI permits federal agencies to "effectuate" regulations,[207] the Court has held that those regulations do not provide a private cause of action.[208] Thus, a state does not waive its sovereign immunity for private enforcement of section 602 regulations under Title VI.

The disparate impact regulations could be valid under Title VI,[209] but, if so, they would only be enforceable to the extent that Title VI permits. If the validity of the section 602 disparate impact regulations is presumed, then the scope of enforcement under Title VI becomes paramount. Title VI permits enforcement through the issuing federal agencies by use of its fund revocation procedures,[210] but its condition for accepting federal funds that requires a waiver of sovereign immunity is not implicated for violations of section 602 disparate impact regulations because disparate impact regulations do not fall within the

203 *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 678 (1999) (requiring an express waiver of Eleventh Amendment immunity by a state and refusing to apply a doctrine of constructive waiver).

204 *See Will*, 491 U.S. at 64.

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

206 *See* 42 U.S.C. § 2000d-1.

207 *See id.*

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

209 The validity of section 602 disparate impact regulations as a matter of administrative law has been questioned. Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 612–14 (1983) (O'Connor, J., concurring). The Court has assumed validity of the regulations but has never decided the issue. *See, e.g., Sandoval*, 532 U.S. at 281.

210 Title VI specifically outlines a procedure that must be followed prior to revoking state funding. *See* 42 U.S.C. § 2000d-1.

scope of Title VI's Eleventh Amendment immunity waiver.[211] The *Sandoval* Court has held that section 602 disparate impact regulations are not enforceable through a private cause of action under Title VI itself.[212] Had the Court recognized an implied private right of action under section 602, the waiver of immunity under Title VI would likely have applied.[213] Because there is no consent to private actions or waiver of immunity for § 1983 claims brought to enforce section 602 disparate impact regulations, a state cannot be sued for damages. The relief sought and granted by the New Jersey federal district court was prospective injunctive relief halting the issuance of the air permits.[214] It is therefore appropriate to determine if § 1983 could be used to enforce section 602 disparate impact regulations against state officials to obtain prospective relief under the theory first advanced in *Ex parte Young*.[215]

B. *Prospective Relief Under § 1983 and Why* Ex Parte Young *Does Not Apply*

As discussed above,[216] § 1983 plaintiffs seeking to enforce disparate impact regulations issued pursuant to section 602 of Title VI cannot sue states for damages. The South Camden Citizens, however, were merely seeking injunctive relief and relied upon the *Ex parte Young* legal fiction[217] in arguing that the NJDEP state official sued is a proper "person" under § 1983.[218] The Supreme Court adopted the legal fiction announced in *Ex parte Young* in order to provide for the prevention and vindication of constitutional violations committed by

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211 The statute provides,

> A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, *title VI of the Civil Rights Act of 1964*, or the provisions of *any other Federal Statute prohibiting discrimination* by recipients of Federal financial assistance.

42 U.S.C. §2000d-7(a)(1) (citations omitted) (emphasis added).

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

213 *See* 42 U.S.C. § 2000d-7(a)(1).

214 S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 509 (D.N.J. 2001), *rev'd*, 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 70 U.S.L.W. 3669 (U.S. June 24, 2002) (No. 01-1547).

215 209 U.S. 123 (1908).

216 *See* discussion *supra* Part IV.A.

217 *Ex parte Young*, 209 U.S. at 123.

218 *S. Camden Citizens in Action*, 145 F. Supp. 2d at 525.

states.[219] The legal fiction arises from the notion that when a state official acts in an official capacity and that action would violate the Constitution, that official is no longer clothed in the immunity of the state.[220] The state official is no longer acting on the state's behalf because the act would violate the Constitution—something no state has authority to do.[221] While the *Ex parte Young* legal fiction has been applied in § 1983 cases to allow plaintiffs to sue a state official in an official capacity to obtain prospective relief,[222] application of the fiction in cases involving Spending Clause legislation is suspect.[223]

Recently, a federal district court recognized that the *Ex parte Young* legal fiction does not apply in the context of private actions filed to enforce spending clause conditions against state officials acting in their official capacity.[224] In *Westside Mothers v. Haveman*,[225] the Federal District Court for the Eastern District of Michigan recognized longstanding Supreme Court precedent identifying Spending Clause legislation as inherently contractual in nature and that such legislation only becomes the supreme law of the land after voluntary consent by the states.[226] In *Westside Mothers*, the plaintiffs filed a § 1983 action against a Michigan state official alleging that the State of Michigan failed to provide certain periodic screening, diagnosis, and treatment services as required by the Social Security Act—a Spending Clause program.[227] The court held that the plaintiffs could not recover because Michigan had not waived its Eleventh Amendment immunity and that the *Ex parte Young* doctrine did not apply to the Spending Clause legislation.[228] Behind the *Westside Mothers* decision was the idea that enforcement of Spending Clause legislation by private indi-

219 *Ex parte Young*, 209 U.S. at 159–60; *see also* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102–03 (1984).

220 *Ex parte Young*, 209 U.S. at 159–60.

221 *Id.*

222 *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281 (1997); *Ex parte Young*, 209 U.S. at 159–60.

223 *See* Westside Mothers v. Haveman, 133 F. Supp. 2d 549, 562 (E.D. Mich. 2001) (holding that the *Ex parte Young* fiction did not apply in the context of Spending Clause legislation), *rev'd*, 289 F.3d 852 (6th Cir. 2002).

224 *Id.* at 561.

225 133 F. Supp. 2d 549.

226 *Id.* at 557, 562. In other words, because state consent is a limit on the valid exercise of congressional power under the Spending Clause, its absence would render the legislation unenforceable and less than the *supreme law of the land*. *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987).

227 *Westside Mothers*, 133 F. Supp. 2d at 552.

228 *Id.* at 587–88.

viduals could only be legitimate if a state agreed to a private enforcement condition.[229]

After holding that the *Ex parte Young* fiction did not permit enforcement of the Spending Clause legislation at issue, the court went further to determine whether § 1983 itself provides a blanket cause of action for Spending Clause measures.[230] Because a state could not be sued at the time § 1983 was enacted and Congress did not clearly express an intent to alter the federal balance,[231] and because states were immune from suits based on agency and third party beneficiary claims at the time § 1983 was enacted,[232] the court concluded that § 1983 did not create a blanket cause of action for the Spending Clause legislation.[233] This reasoning applies to Title VI and states maintain their Eleventh Amendment immunity with regard to § 1983 actions to enforce section 602 disparate impact regulations.

Title VI is an exercise of Congress's spending power, so it is necessarily contractual in nature.[234] It is essentially akin to a contractual

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229 *Id.* at 588.

> Strong democratic, federalism and federalism policy concerns undergird these strictures. Congress is presumed to say what it means in the language of a statute. When courts are forced to guess at legislative intent, it increases the risk of laws being created that the people as ultimate sovereign had no intention of enacting. The risk doubles where two sovereigns are concerned. Here, it is not only the people of the United States as represented in the Federal Government, but the people of each individual State as represented by their legislatures and executive branches, whose consent is required.

Id. (discussing why § 1983 does not provide a private cause of action for the Federal Medicaid program (footnote omitted)); *see also Dole*, 483 U.S. at 207 (holding that Congress's spending power under Article I is limited by several conditions, one being that Congress must provide "unambiguous" conditions so that a state can know the consequences of choosing to receive federal funds).

230 *Westside Mothers*, 133 F. Supp. 2d at 575–76. The court in *Westside Mothers* provides a very detailed, thorough, and logical explanation for its holding. This Note only touches upon its reasoning for the purposes of discussing the issue of using § 1983 as a legal strategy to enforce Title VI disparate impact regulations.

231 Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989).

232 *See Westside Mothers*, 133 F. Supp. 2d at 577–82.

233 *Id.* at 575–76.

234 *See* Blessing v. Freestone, 520 U.S. 329, 349 (1997) (Scalia, J., concurring); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1980). The *Pennhurst* Court stated,

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course be no

relationship between the state and the federal government. The federal government can revoke funds in accordance with the remedy for federal agencies found in Title VI[235] because states consent to Title VI's enforcement terms found in 42 U.S.C. § 2000d-7 by accepting federal funds. Undoubtedly, Congress could condition a private right of action to enforce disparate impact regulations under its spending power, but only if a state clearly agreed to such an action.[236]

The Court in *Sandoval* has determined, however, that Congress did not intend a private cause of action for individuals for violations of section 602 regulations.[237] If no private action exists for enforcement of Title VI regulations in Title VI itself, states accepting federal financial assistance have not consented to any actions outside of the "contract" found in Title VI, and any other private federal statutory cause of action must rely on the exercise of congressional power other than the spending power.

Despite the Court's recognition that Congress did not abrogate state immunity in passing § 1983[238] and the obvious relationship between a state and its officials acting in an official capacity, the Court has adopted the *Ex parte Young* fiction and constructed a way for § 1983 plaintiffs to sue state officials acting in their official capacity for prospective relief.[239] *Ex parte Young* adopted a unique legal fiction in that it allows an exception to a state's Eleventh Amendment immunity when plaintiffs sue a state official acting in his official capacity, but on the other hand, that same state official's conduct that is "stripped" of

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knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.

Id. (citations omitted).

235 *See* 42 U.S.C. § 2000d-7 (1994).

236 *See* South Dakota v. Dole, 483 U.S. 203, 207 (1987).

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

238 Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989).

239 *See Ex parte* Young, 209 U.S. 123, 159–60 (1908).

> The act [of the state official] to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official . . . . If the act which the state . . . seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Id. This legal fiction has generally been adopted to allow § 1983 plaintiffs to sue state officials in their official capacity to gain prospective relief—while suits for damages against a state are barred by the Eleventh Amendment. *See id.*

any state "character" is still traditionally considered State action under the Fourteenth Amendment and therefore the conduct that is "stripped" in the *Ex parte Young* sense can still trigger a violation of constitutional rights by a state.[240] Additionally, it is important to note that although *Ex parte Young* itself dealt with a constitutional violation, its reasoning also applies to violations of some federal statutes.[241]

The most important characteristic of understanding why the legal fiction adopted by the Court in *Ex parte Young* does not apply in § 1983 actions brought to enforce Spending Clause measures, is that the fiction was adopted to "give life" to the Supremacy Clause.[242] The idea is that remedies are required to vindicate the federal interest in the supremacy of the federal law.[243] State officials are stripped of their state authority when acting in violation of supreme federal law. In other words, "the [*Ex parte Young*] doctrine is available only where plaintiffs can demonstrate not only that a state official is violating federal law, but that the law in question is the supreme law of the land."[244]

Because Title VI is a Spending Clause enactment, the law only becomes supreme federal law after a state voluntarily consents to the conditions of receiving the federal funds.[245] The law is, however, only supreme and binding on states with regard to conditions that were clearly established and voluntarily assented to when the state decided to accept federal funds. States consent to the terms of Title VI by accepting federal funds. In this context, the assumed issue of the va-

240 *See* JOHN C. JEFFRIES, JR. ET AL., CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 11 (2000).

241 *See, e.g.*, Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281 (1997) ("[A]n allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction.").

242 Westside Mothers v. Haveman, 133 F. Supp. 2d 549, 560 (E.D. Mich. 2001) (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)), *rev'd*, 289 F.3d 852 (6th Cir. 2002).

243 *See id.* at 560–61.

244 *Id.* at 560.

245 *See* Alden v. Maine, 527 U.S. 706, 731 (1999) ("[T]he Supremacy Clause enshrines as 'the supreme Law of the land' only those Federal Acts that accord with the constitutional design. Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power." (citations omitted)); Printz v. United States, 521 U.S. 898, 924–25 (1997) (holding that relying on the Supremacy Clause returns to the question of whether Congress had the authority to act).

lidity of section 602 disparate impact regulations[246] becomes significant.

If the disparate impact regulations are held to be invalid as matter of administrative law, then the inquiry under *Ex parte Young* becomes moot because there would be no violation of Title VI. Assuming that the disparate impact regulations are valid, however—as this Note and the courts have done[247]—raises an interesting problem. If the disparate impact regulations are a valid exercise of executive authority derived from Title VI, then § 1983 plaintiffs seeking prospective relief against a state official under the *Ex parte Young* fiction can argue that the states do consent to the validity of the *substance* of the regulations by accepting federal funds. The ultimate issue to be resolved if section 602 disparate impact regulations are valid as a means to "effectuate" the provisions of section 601 under the statute, is whether the state's consent to the substance of those regulations can be divorced from the state's consent to the manner of enforcement of such regulations. In other words, can the consent of a state be severable with regard to different sections of Title VI? In theory, if the consent can be divorced, then the substantive aspect of the disparate impact regulations could be the supreme law, and thus the *Ex parte Young* doctrine could supply a vehicle for prospective relief. The idea is that states consent to the substantive determination made by the federal agencies. This view is problematic, and it must be examined in light of what triggers the supremacy of Spending Clause legislation. It is the state's consent to *clear and unambiguous* conditions that matters.

Spending Clause legislation can only become *supreme* federal law and trigger the justified application of the *Ex parte Young* doctrine when a state voluntarily agrees to clear and unambiguous conditions.[248] In the case under Title VI, states definitely consent to the entire statutory scheme of Title VI including remedial procedures,[249]

246 The validity of section 602 disparate impact regulations has been questioned. *See, e.g.*, Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 612–14 (1983) (O'Connor, J., concurring).

247 *Id.*

248 South Dakota v. Dole, 483 U.S. 203, 207 (1987). By requiring clear and unambiguous terms to provide sufficient notice to what the states agree to, the Court has limited the Spending Clause power, and thus state consent is required.

249 *See* Alexander v. Sandoval, 532 U.S. 275, 304 (2001) (Stevens, J., dissenting). Justice Stevens notes that "[s]ection 601 does not stand in isolation, but rather as part of an integrated remedial scheme." *Id.* Although advancing a different point about the relationship between section 601 and section 602, the idea that Title VI is a nonseverable remedial scheme can be inferred to support that a State consents to the "integrated remedial scheme." *See id.*

and thus are bound by the clear conditions imposed by Title VI. As previously discussed,[250] when a state accepts federal funds under Title VI, it clearly waives its immunity to suits arising under Title VI, and it also agrees to be bound by a specific revocation procedure that can be initiated by federal agencies.[251] The Court has foreclosed private enforcement of section 602 disparate impact regulations under Title VI itself.[252] The only remaining enforcement mechanism that states have clearly consented to is the funds revocation procedure vested in federal agencies.

A state's consent to the substance and enforcement of Spending Clause legislation conditions should not be severed because the state's consent to the entire scheme is what gives the Spending Clause *supreme effect* as a valid exercise of constitutional power under Article I.[253] Because the *Ex parte Young* fiction is applied to "give life to the Supremacy Clause," a court should not apply the legal fiction in a manner that would dissect a state's consent to a statutory scheme into sub-parts that are convenient to achieve a desired judicial outcome. The law should only become supreme and trigger application of the *Ex parte Young* fiction when the state consents to all the clear terms of the *entire* Spending Clause legislation. Absent specific language indicating that its consent to substantive law is separate and distinct from its consent to enforcement of that substantive law, a state could hardly foresee such judicial application of the legal fiction as a clear condition of accepting federal funds. The use of the *Ex parte Young* doctrine in such a way would likely run afoul of the original basis for its adoption and of the constitutional limits of the Spending Clause power because Congress has not provided the states with clear notice as to what conditions will become authoritative.[254]

Additionally, the *Ex parte Young* fiction and its "stripping" notion may be much more appropriate when applying it as originally intended—to vindicate the Constitution.[255] When the federal government issues a prohibition or regulates according to a legitimate enumerated power—other than the spending power—the federal

250 *See* discussion *supra* Part IV.A.

251 *See* 42 U.S.C. § 2000d-1; *see also* Lane v. Pena, 518 U.S. 187, 200 (1996).

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

253 *See id.* at 304 (Stevens, J., dissenting).

254 *See Dole*, 483 U.S. at 207.

255 *See Ex parte* Young, 209 U.S. 123, 159–60 (1908) ("If the act which the state . . . seeks to enforce be *a violation of the Federal Constitution*, the officer in proceeding under such enactment comes into conflict with the *superior* authority of that Constitution, and he is *in that case stripped* of his official or representative character . . . ." (emphasis added)).

law's supremacy is independent of state consent.[256] The *Ex parte Young* doctrine best accomplishes its important goal of vindicating federal interests by "giving life" to the Supremacy Clause when the federal government acts pursuant to a power other than the spending power.[257] The use of this fiction to avoid the Eleventh Amendment by "stripping" the authority of a state official to allow for prospective injunctive relief to prevent future violations of the Constitution or federal law is more persuasive than using the fiction to circumvent obtaining state consent in the spending power context. This is because the state voluntarily agrees to be bound by the spending legislation—especially in light of the fact that Congress has the power to determine the conditions of the Spending Clause legislation.

Vindication of the federal right or interest is less important in Spending Clause legislation. Because Congress possesses the power to control the terms, it can ensure vindication of federal interests by clearly identifying and establishing the conditions to which the states must agree. Therefore, in Spending Clause statutes, the need to resort to a judicially created legal fiction to protect federal interests is alleviated. These additional reasons support avoiding the temptation to divorce a state's consent to the substance of assumed valid section 602 disparate impact regulations from a state's consent to enforcement of those regulations. The severability of state consent with regard to different sections of Spending Clause legislation is an intriguing issue that could arise if the Court were to uphold the validity of section 602 disparate impact regulations.[258]

256 *See* Westside Mothers v. Haveman, 133 F. Supp. 2d 549, 587 (E.D. Mich. 2001), *rev'd*, 289 F.3d 852 (6th Cir. 2002).

257 *See id.* at 560 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)) ("[T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to *vindicate the federal interest in assuring the supremacy of that law.*" (emphasis added)).

258 If indeed the Court upheld the validity of section 602 regulations and applied the *Ex parte Young* doctrine to allow individuals to use § 1983 to obtain prospective relief by suing state officials in their official capacity, an issue regarding the Tenth Amendment and limits of federalism may be implicated. Because a state does not consent to the private enforcement of disparate impact regulations, the federal agencies would essentially be adopting regulations that govern how a state makes its environmental decisions. The regulations could potentially require state officials, subject to the threat of federal enforcement by private action under § 1983, to become "instruments of federal governance." Printz v. United States, 521 U.S. 898, 919 (1997) (holding that there are no constitutional provisions that permit the federal government to force the states or their officers to become "instruments of federal policy"). On the other hand, if the regulations adopted and implemented by the federal agencies under section 602 merely regulate state activity as opposed to the manner of the

By foreclosing private action claims for violations of disparate impact regulations under Title VI,[259] the Court has essentially determined that section 602 disparate impact regulations are only enforceable through the express remedy available to the federal agencies under the issuing of those regulations to initiate fund revocation procedures. Because a state likely consents to the entire Title VI statutory scheme, the only conditions for enforcement of section 602 disparate impact regulations that states assent to upon acceptance of federal funds are those designed to allow the federal agencies to revoke funds in order to achieve compliance.

Another counterargument in favor of using § 1983, is that Title VI provides that compliance with any requirement adopted pursuant to section 602 may be achieved by the express funds revocation procedure or "by any other means authorized by law."[260] This provision has effect, but only when other methods of compliance are authorized by law. When a state consents to the conditions of Title VI, which prohibit intentional discrimination,[261] there is little doubt that a section 602 regulation prohibiting intentional discrimination could be enforced by a private action under Title VI and this would essentially ensure compliance by "other means . . . authorized by law." "Law" in this portion of the statute also refers to supreme law, and only that which a state consents to under Spending Clause legislation becomes supreme—states do not consent to private enforcement of disparate impact regulations under Title VI, so this would not be a form of compliance "authorized by law."

C. State Officials Sued as Individuals and Qualified Immunity

Because there is no waiver of Eleventh Amendment immunity, and because the *Ex parte Young* fiction should not apply for plaintiffs using § 1983 to enforce Spending Clause legislation, the plaintiffs' last resort is to use the option of suing the state official in his individual or personal capacity. Suits against state officials are recognized under § 1983 because state officials satisfy the "person" requirement and because their position leads to the possibility that their actions are

activity, the *Printz* issue could be avoided. *See* Reno v. Condon, 528 U.S. 141, 150–51 (2000) (holding that the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721–2725 (1994 & Supp. IV 2000), did not violate the federalism principles established in *Printz*, 521 U.S. at 919, and *New York v. United States*, 505 U.S. 144, 162 (1992)).

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

260 42 U.S.C. § 2000d-1 (1994).

261 *Sandoval*, 532 U.S. at 279–81.

"under color of [law]."[262] Additionally, an executive officer is usually entitled to a privilege of qualified immunity—that is, liability may not attach unless the official violates a clearly established constitutional or statutory right.[263]

State officials, such as the head of the NJDEP, should not be subject to liability under § 1983 for violations of Title VI disparate impact for two reasons. First, the federal right under Title VI disparate impact regulations could not be derived without consent to such private enforcement by the state under Title VI. Title VI is only binding on states and state officials to the extent that the statute applies, and Title VI does not provide a private cause of action for disparate impact regulations issued under section 602 of Title VI.[264]

Second, officials would likely be protected by qualified immunity.[265] Because the federal disparate impact regulations are so vague and indeterminate, state officials would probably not realize their violation[266]—in fact their violation would almost inevitably turn on whether the action taken has some unforeseeable result or upon a federal agency's interpretation. Although some trends could eventually establish some "clearly established rights,"[267] the policy concerns of handicapping our state and local officials with numerous volumes of federal regulations requiring compliance are strong. Interference with local officials absent constitutional and statutory authority is dangerous indeed. One can imagine the constant training sessions that would be required for all executive officers throughout all of the states on the proper way to avoid a disparate impact in making deci-

262 *See* 42 U.S.C. § 1983; *see also* Wilson v. Layne, 526 U.S. 603, 609, 614–15 (1999) (requiring a violation of a clearly established right for liability to attach to an executive official and holding that defendants had not violated a clearly established right under the Fourth Amendment when they brought media personnel along during an execution of a search warrant); Crawford-El v. Britton, 523 U.S. 574, 588 (1998); Monroe v. Pape, 365 U.S. 167, 186 (1961) (taking a broad approach to the interpretation of "under color of [law]").

263 *Crawford-El*, 523 U.S. at 588–89.

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

265 *See Wilson*, 526 U.S. at 615 (noting that "clearly established" for purposes of qualified immunity means that in light of pre-existing law, the unlawfulness of the official's act must be apparent to a reasonable official).

266 The disparate impact regulations prohibit conduct that merely has a discriminatory adverse impact. *See* Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency, 40 C.F.R. § 7.35(b) (2001).

267 *See Wilson*, 526 U.S. at 609 (stating that in addressing the qualified immunity issue, the Court would first establish whether a constitutional right exists and then determine if that right was clearly established at the time of the conduct in question and stating that proceeding in this manner might provide notice of the previously unclear rights to executive officials).

sions—all of this while federal agencies conjure up new regulations and publicly advance how progressive and helpful their efforts are to the environment of the whole nation. States must voluntarily accept this federal mandate of policy distributed through regulations—or Congress must use another power to achieve its goals.

CONCLUSION

Using § 1983 to enforce Title VI disparate impact regulations in the name of environmental justice has not prevailed in the past, nor should it prevail in the future. Although protecting individuals against racial and ethnic discrimination in the environmental decisionmaking process is a just cause, the judiciary would exceed its proper role in allowing § 1983 to be used to enforce Title VI disparate impact regulations. First, the Court has relied on an unclear legislative history to expand § 1983 to cover violations of federal statutes, and any further expansion beyond the plain meaning of "and laws" to include federal regulations would stretch the plain meaning—one that the Court admits is uncertain—and substitute its will for that of the legislature. Neither the plain meaning, nor the legislative history supports this further expansion—even when plaintiffs seek vindication of a worthy cause. Second, even if the Court did expand § 1983 to allow for vindication of federal regulatory rights, there remain doubts about whether Title VI's section 602 disparate impact regulations would be a valid exercise of executive authority under the statute.

Despite these threshold obstacles, using § 1983 to enforce Title VI disparate impact regulations is also foreclosed because states have not voluntarily agreed to private enforcement of these disparate impact regulations as part of Title VI's "strings" for receiving federal funds. Allowing plaintiffs access to the federal courts to enforce conditions on the states that never became the supreme law of the land pursuant to the required consent under the spending power would ignore the underlying reasons for adopting the *Ex parte Young* legal fiction and would exceed the limits of Congress's Article I spending power. Allowing federal agencies to establish ever-changing, unclear federal rights would expose state officials to tremendous potential liability and indirectly curtail state autonomy in areas where the federal government has not exercised an enumerated and constitutionally justified power. Allowing the environmental justice plaintiffs from South Camden, New Jersey, to succeed on their § 1983 legal theory would circumvent the holding in *Alexander v. Sandoval*, would circumvent the legislative will, and would unconstitutionally force federal compulsion

of state and local officials to follow regulations not validly issued under an enumerated power. Congress could amend Title VI to achieve this result, and at least then, states could voluntarily choose to submit to federal policymaking on local issues when deciding to accept federal funds. Although the current reality of state financial dependence on the federal government could ultimately make state consent to private enforcement of disparate impact regulations inevitable, obtaining such consent for individual private enforcement of section 601 disparate impact regulations would comport with the constitutionally defined and limited powers of Congress.