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PUBLIC WRONGS, PRIVATE RIGHTS: PRIVATE ATTORNEYS GENERAL FOR CIVIL RIGHTS

GILBERT PAUL CARRASCO†

I. INTRODUCTION

PRESIDENT Clinton, in his second inaugural address, espoused the views of both liberals and conservatives alike when he stated that it was time for the American people to be given more power while the federal government downsizes.[1] One way to empower the American people is to recognize rights of action that enable the American people to act as "private attorneys general" for the enforcement of the civil rights laws.[2] The federal government's role is important, but, in many instances, the beneficiaries of the laws will be denied their rights if they are required to rely on the machinery of a federal agency for redress.[3]

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1. *See* Michael K. Frisby & Hilary Stout, *Clinton Espouses Smaller Government, Bipartisanship*, WALL ST. J., Jan. 21, 1997, at A20. Specifically, President Clinton made the following comments during his inaugural address:

> Today we can declare: Government is not the problem, and government is not the solution. We, the American people, we are the solution . . . . We need a new government for a new century, a government humble enough not to try to solve all of our problems for us, but strong enough to give us the tools to solve our problems for ourselves.

Id.

2. *See* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) (permitting prevailing plaintiff under Title II to collect attorneys' fees and observing that, if the plaintiff "obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority").

3. "The sluggishness of government, the multitude of matters that clamor for attention, and the relative ease with which men are persuaded to postpone troublesome decisions, all make inertia one of the most decisive powers in determining the course of our affairs and frequently gives to the established order of things a longevity and vitality much beyond its merits." Duckworth v. Arkansas, 314 U.S. 390, 400 (1941) (Jackson, J., concurring).

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A current example of this phenomenon is in the area of environmental justice.[4] In light of the lack of enforcement by the federal government of environmental and civil rights laws in communities of color, it has become increasingly necessary for private individuals and organizations to enlist in the war against environmental racism.[5] Indeed, augmentation of the enforcement effort is welcomed by the federal government.[6] In fact, in *Chester Residents Concerned for Quality Living v. Seif*[7] the United States filed an *amicus* brief arguing that the regulations of Title VI of the Civil Rights Act of 1964 (Title VI) can be enforced by private attorneys general.[8]

The Supreme Court has determined that Congress intended several civil rights statutes to be enforceable by private parties.[9] Incontrovertibly, federal agencies do not have the resources and cannot be expected to remedy every violation of civil rights in the United States. As a result, private attorneys general may be necessary to remedy civil rights violations in the United States.

The critical question explored by this Article is whether valid *regulations* that implement Title VI can be enforced by private parties.[10] Regulations are binding laws, and they are often intended to

4. For a discussion of the issue of public participation in effecting environmental justice, see Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3 (1998).

5. For a discussion of the importance of grassroots activism in this struggle, see Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 811-26 (1998).

6. *See* Brief for the United States as Amicus Curiae at 2, Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997) (No. 97-1125).

7. 132 F.3d 925 (3d Cir. 1997), *vacated as moot*, 67 U.S.L.W. 3129 (U.S. Aug. 17, 1998) (No. 97-1620).

8. *See* Brief for the United States as Amicus Curiae at 2, 132 F.3d 925 (3d Cir. 1997) (No. 97-1125). The United States argued the following in its brief filed in *Chester*:

> Because of the inherent limitations on administrative enforcement mechanisms and on the litigation resources of the United States, the United States has an interest in ensuring that both Title VI [of the Civil Rights Act of 1964] and its implementing regulations may be enforced in federal court by private parties acting as "private attorneys general." Such private suits are critical to ensuring optimal enforcement of the mandate of Title VI [of the Civil Rights Act of 1964] and the regulations.

Id.

9. *See, e.g.*, Cannon v. University of Chicago, 441 U.S. 677 (1979) (holding Title IX of Education Amendments of 1972 includes private right of action "despite the absence of any express authorization for it in the statute").

10. On June 8, 1998, the Supreme Court granted certiorari in response to the petition in *Chester*. The rhetorical question presented by the petitioner was whether Congress intended to create a private cause of action in federal court that bypasses a federal agency's review and enforcement process under section 602 of

provide additional protection of civil rights. Of course, regulations are only valid if they are consistent with the purposes underlying the enabling statute controlling the promulgation of such regulations. If a regulation is *ultra vires* the statute, it is nugatory.[11] Congressional intent is, therefore, of great importance in this context. The test of whether a private right of action exists to enforce regulations has various permutations that will be explored in this Article. Nevertheless, the essential syllogism for determining whether a private right of action exists is that if regulations are consistent with congressional intent, and if congressional intent dictates that private parties can sue to vindicate civil rights that flow from the enabling statute, it follows that private parties may also sue for vindication of civil rights that emanate from the regulations.

The area of civil rights law in which this issue has emerged with great importance is "environmental justice," a movement which focuses on ending environmental racism. Environmental racism has been defined as the disproportionate placement of waste treatment facilities in minority communities, the systematic exclusion of people of color from environmental planning and the planned destruction of many traditional communities.[12] Waste treatment facilities are often placed in minority communities because they pose far less

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Title VI simply by alleging discriminatory effect in the administration of programs and activities of a federally funded state or local agency. *See* Seif v. Chester Residents Concerned for Quality Living, 118 S. Ct. 2296 (1998). The Supreme Court remanded the case with instructions to dismiss on August 17, 1998 based on the suggestion of mootness filed by the respondents. *See Chester*, 67 U.S.L.W. 3129 (U.S. Aug. 17, 1998) (No. 97-1620). The case became moot after the petition for a writ of certiorari was filed when the Petitioner Pennsylvania Department of Environmental Protection revoked the waste facility permit that had been the underlying linchpin of the action.

To date, the Supreme Court has not articulated a specific test. Nevertheless, it has permitted private rights of action to enforce a variety of federal regulations as a matter of course. *See, e.g.*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975) ("Such a conclusion was, of course, entirely consistent with the Court's recognition in *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), that private enforcement of Commission rules may [provide] a necessary supplement to Commission action.").

11. *See* Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1973) (explaining agency's legislative regulations will be upheld if "reasonably related" to underlying purposes of enabling statute).

12. *See* Michelle Adams, *Separate and Unequal: Housing Choice, Mobility and Equalization in the Federally-Subsidized Housing Program*, 71 TUL. L. REV. 413, 486 (1996) (explaining need for group rights and disparity of living conditions for people living in poor communities). For a discussion of the evolution of the definitional rubric from "environmental racism" to "environmental equity" to "environmental justice," see Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 J. ENVTL. L. & LITIG. 121, 125-31 (1994).

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political obstacles than upper-class or middle-class white communities. "Environmental racism," therefore, refers to the most nefarious actions of environmental degradation that are intentionally directed toward communities of color. Proving intentional discrimination, however, is often difficult, if not impossible.[13] "Environmental justice" is thus distinguished as a term of art to refer to the legal redress of actions having discriminatory effects.

Claims for environmental justice have been asserted under a variety of theories, but the one that is emerging as the most promising is Title VI.[14] This statute prohibits discrimination in programs that receive funds from the federal government. Although assertion of rights continues to be problematic under the statute itself because of the difficulty of proving discriminatory intent, the Supreme Court has held that regulations that implement Title VI, which proscribe actions by federally funded programs having "discriminatory effects," are valid.

The question remains, however, whether private parties can enforce these valid civil rights regulations. If the answer is "yes," a private party needs to prove "discriminatory effect" to state a prima facie case against a federal funding recipient.[15] If not, private parties must sue under the statute itself, and thus be subject to the higher standard of disparate treatment. In other words, the party must prove intent to discriminate when proceeding pursuant to the statute.

This Article will examine, through the prism of environmental justice, whether a private right of action should exist to enforce valid regulations when the enabling statute already implies a private right of action. First, Section II will examine Title VI and its implementing regulations.[16] Second, Section III will examine Supreme

13. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-71 (1977) (holding intentional discrimination, necessary to prove Fourteenth Amendment violation, may be inferred from evidence concerning historical background of decision at issue, specific sequence of events leading up to challenged decision, departures from normal procedural sequence or departures from substantive norms by policymakers).

14. *See* Title VI of the Civil Rights Act of 1964 (Title VI) §§ 601-606, 42 U.S.C. §§ 2000d-2000d-4a (1994).

15. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 623 n.15 (1983) (Marshall, J., dissenting) ("Proof of the disproportionate racial impact of a program or activity is, of course, not the end of the case. Rather a prima facie showing of discriminatory impact shifts the burden to the recipient of federal funds to demonstrate a sufficient nondiscriminatory justification for the program or activity." (citing *Bryan v. Koch*, 627 F.2d 612, 623 (2d Cir. 1980))).

16. For a discussion of Title VI and its implementing regulations, see *infra* notes 20-24 and accompanying text.

Court jurisprudence concerning this issue.[17] Third, Section IV will analyze the differing approaches used by the United States Courts of Appeals to determine whether a preferred approach currently exists.[18] Finally, Section V will conclude with the proposition that private rights of action should be recognized to enforce regulations promulgated pursuant to privately enforceable civil rights statutes.[19]

II. THE GENERAL PARAMETERS OF TITLE VI

The first step in analyzing a regulation is to look to the words of the governing statute that confers power on the governmental agency to regulate. Title VI directs agencies to promulgate regulations to carry out the objectives of the statute. Section 601, the substantive component 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."[20] Section 602 of Title VI authorizes federal agencies that provide financial assistance "to effectuate the provisions of [section 601] of this title . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute . . . ."[21] Once the

17. For a discussion of Supreme Court jurisprudence concerning the availability of a private right of action under Title VI, see *infra* notes 25-36 and accompanying text.

18. For a discussion of federal appellate courts' approaches to the availability of private rights of action under Title VI, see *infra* notes 37-140 and accompanying text.

19. For a discussion of the proposition that private rights of action should be recognized to enforce regulations promulgated pursuant to privately enforceable civil rights statutes, see *infra* notes 141-53 and accompanying text.

20. Title VI § 601, 42 U.S.C. § 2000d (1994).

21. *Id.* § 602, 42 U.S.C. § 2000d-1 (1994). Section 602 of Title VI further provides that:

> No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law . . . .

Id. Section 602 also dictates that an agency may not affect rights under section 601 until the agency has provided appropriate notice to a recipient regarding its failure to comply with statutory requirements. *See id.*

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statute has been examined, the regulations themselves can be examined. Most agencies have implemented Title VI by issuing regulations that incorporate a discriminatory effect standard of proof, referred to as disparate impact. This standard of proof is much easier to meet than discriminatory intent, the standard used by Title VI itself. For example, the Environmental Protection Agency (EPA) has promulgated the following regulation pursuant to section 602 of Title VI:

> A recipient[22] [of federal financial assistance] 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.[23]

In addition, EPA requires applicants seeking federal assistance to submit statements with their applications assuring EPA that they will comply with these non-discrimination provisions.[24] It is regulations such as these that private attorneys general may use for the enforcement of civil rights.

III. THE SUPREME COURT TITLE VI JURISPRUDENCE

A. Disparate Impact Regulations Are Valid

The Supreme Court has clearly stated that regulations promulgated pursuant to Title VI that have an "effects" standard are valid. In *Guardians Association v. Civil Service Commission,* Justice White announced the judgment of the Court. He and the four justices who dissented from the judgment of the Court concluded that disparate

22. *See* 40 C.F.R. § 7.25 (1997) ("*Recipient* means, for the purposes of this regulation, any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.").

23. *Id.* § 7.35(b) (emphasis added).

24. *See id.* § 7.80(a). Specifically, EPA requires the following: Applicants for EPA assistance [must] submit an assurance with their applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of this part. *Id.* "EPA assistance [means] any grant or cooperative agreement, loan, contract . . . or any other arrangement by which EPA provides or otherwise makes available assistance in the form of . . . [f]unds . . . ." *Id.* § 5.3 (b)(iii).

impact regulations that implement Title VI are valid.[25] The four justices who concurred in the judgment with Justice White did not agree that disparate impact regulations that implement Title VI are valid.[26] Justice White and Justice Marshall, who wrote a dissenting opinion, concluded that discriminatory intent should not be required under Title VI, the statute itself, and that the regulations implementing Title VI are valid.[27] In a dissenting opinion, Justice Stevens, joined by Justices Brennan and Blackmun, reasoned that although Title VI itself requires proof of discriminatory intent, the administrative regulations incorporating a disparate impact standard are valid.[28]

The Supreme Court confirmed and clarified the holding of *Guardians* in *Alexander v. Choate*.[29] In *Alexander*, Justice Marshall, writing for a unanimous Court, explained *Guardians* by stating "the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI."[30] Therefore, based on the Court's definitive decisions in *Guardians* and *Alexander*, regulations prohibiting federal funding recipients from administering programs that have a discriminatory effect based on race are clearly valid and consistent with Title VI.

B. Title VI Can Be Enforced by an Implied Private Right of Action

Analogous to the Supreme Court decision in *Guardians*, *Cannon v. University of Chicago* held that an implied cause of action exists under Title IX.[31] *Guardians*, citing *Cannon*, stated that "[a]

25. 463 U.S. 582, 584 n.2 (1983).

26. *See id.* at 607-15.

27. *See id.* at 584 n.2. Justice White, in concluding that it is not necessary to prove discriminatory intent under Title VI, wrote: "I agree with Justice Marshall that discriminatory animus is not an essential element of a violation of Title VI." *Id.*

28. *See id.* Justice White, continuing with his belief that administrative regulations incorporating a disparate impact standard are valid, stated: "I also believe that the regulations are valid, even assuming, *arguendo*, that Title VI, in and of itself, does not proscribe disparate-impact discrimination." *Id.*

29. 469 U.S. 287 (1985).

30. *Id.* at 293 (footnote omitted). Justice Marshall further characterized the Court's decision in *Guardians*, stating that in *Guardians* "we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of federal grantees that had produced those impacts." *Id.* at 293-94.

31. 441 U.S. 677, 702-03 (1979) ("[T]he very persistence — before 1972 and since, among judges and executive officials, as well as among litigants and their

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major part of the analysis was that Title IX had been derived from Title VI, that Congress understood that private remedies were available under Title VI, and that Congress intended similar remedies to be available under Title IX."[32] Applying the four-part test from *Cort v. Ash*,[33] *Cannon* determined whether Title IX, which is modeled after Title VI, is enforceable by private parties. The Court in *Cannon* explained that "[w]e have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination."[34] Thus, in *Chester*,[35] the United States Court of Appeals for the Third Circuit observed that "[t]he Supreme Court has now made it undeniably clear that *Guardians* stands for at least two propositions: (1) a private right of action exists under section 601 of Title VI that requires plaintiffs to show intentional discrimination; and (2) discriminatory effect regulations promulgated by agencies pursuant to section 602 are valid exercises of their authority under that section."[36]

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counsel, and even implicit in decisions of this Court — of the assumption that both Title VI and Title IX created a private right of action for the victims of illegal discrimination and the absence of legislative action to change that assumption provide further evidence that Congress at least acquiesces in, and apparently affirms, that assumption.").

32. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 594 (1983) (White, J., joined by Rehnquist, J.) (finding "it was the unmistakable thrust of the *Cannon* Court's opinion that the congressional view was correct as to the availability of private actions to enforce Title VI").

33. 422 U.S. 66 (1975) (applying four-part test to evaluate whether Title VI can be utilized by private parties, and determining that corporation stockholders, in derivative action, did not have private right of action under Federal Elections Campaign Act of 1971). The four-part test laid out in *Cort* for determining whether a private right of action exists under a statute is as follows:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted).

34. *Cannon*, 441 U.S. at 703 (footnote omitted) (holding Title IX implied private right of action).

35. Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997), *vacated as moot*, 67 U.S.L.W. 3129 (U.S. Aug. 17, 1998) (No. 97-1620).

36. *Id.* at 929 (citing Alexander v. Choate, 469 U.S. 287, 292-94 (1985)).

IV. FEDERAL APPELLATE COURTS: IS THERE AN IMPLIED CAUSE OF ACTION TO ENFORCE REGULATIONS PROMULGATED PURSUANT TO TITLE VI?

A. Background: The Issue in the Appellate Courts

It is clear that an implied private cause of action furthers the purposes of Title VI. Also, it is clear that disparate impact regulations are consistent with the purposes of Title VI. Yet the question remains whether an implied private cause of action exists to enforce those validly promulgated *regulations*.[37] Simple logic suggests that, because both premises are consistent with the purposes of Title VI, it follows that a private cause of action is also available to enforce Title VI regulations.

This question of first impression was the issue posed to the Third Circuit in the *Chester* case.[38] There, the Third Circuit recognized an implied private right of action in an EPA regulation promulgated under Title VI.[39] The Third Circuit applied the following three-prong test, as originally articulated in *Angelastro v. Prudential-Bache Securities, Inc.*,[40] to determine whether it is appropriate to imply private rights of action to enforce regulations:

> (1) "[W]hether the agency rule is properly within the scope of the enabling statute"; (2) "whether the statute under which the agency rule was promulgated properly permits the implication of a private right of action"; and (3) "whether implying a private right of action will further the purposes of the enabling statute."[41]

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37. In *Alexander*, Justice Marshall, writing for a unanimous Court, made the following observation:

> *Guardians* . . . does not support petitioners' blanket proposition that federal law proscribes only intentional discrimination against the handicapped. Indeed, to the extent our holding in *Guardians* is relevant to the interpretation of § 504, [which is analogous to § 601 of Title VI], *Guardians* suggests *that the regulations implementing § 504 . . . could make actionable the disparate impact challenged in this case.*

469 U.S. at 294 (emphasis added) (footnote omitted).

38. *See Chester*, 132 F.3d at 927 ("This appeal presents the purely legal question of whether a private right of action exists under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964.").

39. *See id.* (concluding "[w]e agree with the overwhelming number of courts of appeals that have indicated, with varying degrees of analysis, that a private right of action exists under section 602 of Title VI and its implementing regulations").

40. 764 F.2d 939, 947 (3d Cir. 1985).

41. Polaroid Corp. v. Disney, 862 F.2d 987, 994 (3d Cir. 1988) (quoting *Angelastro*, 764 F.2d at 947). Additionally, the Third Circuit observed that a satisfactory finding that a private right of action does exist is only a precursor to the question of standing. *See id.* (assuming private right of action did exist, next step was to

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Recognition of a private right of action under the EPA regulation is, of course, critical to the substantive question of whether a private right of action stands under a disparate impact theory.

Disparate impact regulations clearly satisfy the first prong of the *Angelastro* test because the Supreme Court has found that these disparate impact rules are not only "within the scope" of Title VI, but also that these rules further the purposes of Title VI.[42] The second prong is satisfied because the Court in *Cannon* specifically found that, by the time "Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy."[43] In assessing whether the second prong was satisfied, the Third Circuit considered the four general factors for recognizing implied *statutory* rights of action as announced by the Supreme Court in *Cort*.[44] As to the first *Cort* factor, whether the plaintiff is "one of the class for whose *especial* benefit the statute was enacted,"[45] the Third Circuit concluded that plaintiffs "clearly" satisfied this part of the test.[46] The Third Circuit also concluded that the second *Cort* factor[47] was satisfied because the legislative history indicated "an intent to create a private right of action, in satisfaction of the *Cort* factors."[48] The Third Circuit then determined that "a private right of action [is] consistent with the legislative scheme of Title VI," thus satisfying the third *Cort* factor.[49] With respect to the fourth and final *Cort* factor, the Third Circuit opined that it "is

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"decide . . . whether a target corporation has standing to bring injunctive relief to vindicate the rights of shareholders").

42. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592-93 (1983) (observing that consistent judicial and administrative interpretations of Title VI allowed implementation of regulations that reach disparate impact discrimination "without interference by Congress"); *see also Guardians*, 463 U.S. at 620 (Marshall, J., dissenting) (observing that Congress, with full awareness of how agencies were interpreting Title VI, modeled later statutes after it, thus indicating approval of administrative definition).

43. Cannon v. University of Chicago, 441 U.S. 677, 696-98 (1979) (finding legislative history included recognition of private right of action under Title VI and, *a fortiori*, under Title IX).

44. For a discussion of the four *Cort* factors considered in determining the availability of an implied statutory right of action, see *supra* note 33 and accompanying text.

45. Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 933 n.10 (3d Cir. 1997), *vacated as moot*, 67 U.S.L.W. 3129 (U.S. Aug. 17, 1998) (No. 97-1620) (citing Cort v. Ash, 422 U.S. 66, 78 (1975)).

46. *See Chester*, 132 F.3d at 933 n.10.

47. For a discussion of the *Cort* factors, see *supra* note 33 and accompanying text.

48. *Chester*, 132 F.3d at 934.

49. *Id.* at 936.

irrelevant because Title VI is federal law."[50] Thus, in satisfying all four *Cort* factors, the Third Circuit determined that the second prong of the *Angelastro* test had been established.[51]

The Third Circuit held that the third prong of *Angelastro* was satisfied by relying on the Court's decision in *Cannon*, in which the Court noted that Congress "sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices."[52] The Third Circuit reasoned that allowing private rights of action increases the enforcement of Title VI, thus furthering the purposes of Title VI, and thereby satisfying the third prong of the *Angelastro* test.[53] Recognizing that all of the prongs of the *Angelastro* test were satisfied, the Third Circuit stated that "we hold that private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964."[54]

The Third Circuit adopted an analysis similar to that of *Cannon* in *Chowdhury v. Reading Hospital & Medical Center*.[55] The Third Circuit in *Chowdhury* found that, because an agency may appropriately decide not to investigate based on lack of agency resources rather than on the basis of its view of the merits of the case, a private right of action will provide a higher level of enforcement to deter violations of the law.[56] As has been stated, "disparate impacts upon minorities constitute[ ] sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that ha[ve] produced those impacts."[57]

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50. *Id.* at 933 n.10.

51. *See id.*

52. *See id.* at 936 (relying on Cannon v. University of Chicago, 441 U.S. 677, 704 (1979)). In *Cannon v. University of Chicago*, the Court indicated that private rights of action under Title VI and Title IX do not frustrate legislative purposes. *See Cannon*, 441 U.S. at 704.

53. *See Chester*, 132 F.3d at 936 (explaining dual purposes of Title VI are to: "(1) combat discrimination by entities who receive federal funds; and (2) provide citizens with effective protection against discrimination" (quoting *Cannon*, 441 U.S. at 704)).

54. *Chester*, 132 F.3d at 937.

55. 677 F.2d 317 (3d Cir. 1982) (holding that plaintiffs need not exhaust administrative remedies before filing suit).

56. *See id.* at 321-22.

57. Alexander v. Choate, 469 U.S. 287, 293-94 (1985) (characterizing Court's decision in *Guardians* as holding that disparate impact regulations implementing Title VI are valid).

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It is important to note, however, that before the Third Circuit's decision in *Chester*, the district court considered the case,[58] and, in doing so, misconstrued *Chowdhury*. The *Chester* plaintiffs alleged that between 1987 and 1996, the Pennsylvania Department of Environmental Protection had granted five waste facility permits for commercial facilities to be located within the City of Chester, thereby increasing the total permit waste capacity of Chester by over 2,000,000 tons per year.[59] Demographically, Chester is a predominately African-American city located in Delaware County, which is a predominately white county.[60] In contrast, during this same time period, only two permits for waste facilities were granted elsewhere in Delaware County.[61] Moreover, the permit capacity of each of these two waste facilities was only 700 tons per year.[62]

The district court in *Chester* held that a private individual has no private cause of action under the EPA civil rights regulations promulgated pursuant to section 602.[63] The court based its decision on the Third Circuit's decision in *Chowdhury*, which stated that "the complaint procedure adopted by [the agency] does not allow the complainant to participate in the investigation or subsequent enforcement proceedings."[64] However, this passage from *Chowdhury* relates to an administrative funding termination proceeding, not to federal court litigation.[65]

The district court in *Chester* failed to consider the essence of the Third Circuit's decision in *Chowdhury*, which noted that "'[b]ecause the individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time, it makes little sense to require ex-

58. 944 F. Supp. 413 (E.D. Pa. 1996), *rev'd*, 132 F.3d 925 (3d Cir. 1997), *vacated as moot*, 67 U.S.L.W. 3129 (U.S. Aug. 17, 1998) (No. 97-1620).

59. *See id.* at 415 (providing, according to plaintiff's brief, the DELCORA plant, operating in Chester, "had a permit for a sewage waste facility to treat 44,000,000 gallons of sewage a day and an air quality permit to incinerate 17,500 tons per year of sewage sludge").

60. *See id.* at 414 (stating that Delaware County's population is 86.5% white and 11.2% black).

61. *See id.* at 415.

62. *See id.*

63. *See Chester*, 944 F. Supp. at 417.

64. Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317, 321 (3d Cir. 1982) (quoting Cannon v. University of Chicago, 441 U.S. 677, 706-08 n.41 (1979)).

65. *See Chowdhury*, 677 F.2d at 318-20. "Section 602 and its implementing regulations were only relevant in *Chowdhury* to the extent that they, on their face, afforded private plaintiffs a peripheral role in administrative proceedings." Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997), *vacated as moot*, 67 U.S.L.W. 3129 (U.S. Aug. 17, 1998) (No. 97-1620).

haustion [of administrative remedies].'"[66] Even more important to the misconstruction in the district court's decision in *Chester* is the Third Circuit's further observation in *Chowdhury* that "[a]s the Supreme Court has noted, when there is a legal right without a legal remedy, the right has little meaning"[67] and it is quite clear "that Sections 602 and 603 are limits on agencies, and not on rights, [which] is repeatedly made clear in the legislative proceedings."[68]

The absence of a role for private plaintiffs in pursuing a remedy for a violation of their rights in the administrative proceeding is an important reason for allowing a private right of action to pursue relief elsewhere. The district court in *Chester* never addressed this language of *Chowdhury*. It also never addressed the Third Circuit's test for determining whether to imply a private right of action under regulations validly promulgated pursuant to a statute.[69]

In *Chester*, the Third Circuit clarified its earlier opinion in *Chowdhury* by finding that "*Chowdhury* does not hold that no private right of action exists under section 602 and its implementing regulations. It merely indicates that the regulations themselves do not expressly provide for a significant role for private parties [in fund termination administrative proceedings] . . . . *Chowdhury* says nothing about the appropriateness of implying a private right of action."[70] Thus, in *Chester*, the Third Circuit reversed the district court because of its misinterpretation of *Chowdhury*.

Although the Third Circuit recognized a private cause of action to enforce the EPA regulations in *Chester*, the Third Circuit "decline[d] to hold that a private right of action exists based on *Guardians* and *Alexander* alone."[71] Instead, after deciding that their own precedent did not answer the specific Title VI regulation right of action question presented, the Third Circuit applied the three-prong test[72] established in *Angelastro*, which it had later followed in *Polaroid Corp. v. Disney*.[73]

66. *Chowdhury*, 677 F.2d at 322 (quoting *Cannon*, 441 U.S. at 706-08 n.41) (citations omitted).

67. *Chowdhury*, 677 F.2d at 321 (quoting *NAACP v. Wilmington Med. Ctr., Inc.*, 599 F.2d 1247, 1254-55 (3d Cir. 1979) (footnotes and citations omitted)).

68. *Chowdhury*, 677 F.2d at 322.

69. For a discussion of the Third Circuit's test for determining whether a private right of action exists, see *infra* note 98 and accompanying text.

70. *Chester*, 132 F.3d at 932.

71. *Id.* at 931 (concluding that *Alexander* and *Guardians* do not themselves answer the question whether private rights of action exist to enforce regulations promulgated under Title VI).

72. *See id.* at 933.

73. For a discussion of the three-prong test established by *Polaroid* and *Angelastro*, see *infra* note 98 and accompanying text. *Angelastro v. Prudential-Bache Secs.*,

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The Third Circuit is not the only appellate court to address the general question of when to recognize a private right of action to enforce regulations. In *Robertson v. Dean Witter Reynolds, Inc.*,[74] the Ninth Circuit adopted the following test:

> The determination of whether a statute gives rise to an implied right of action is "basically a matter of statutory construction." In most cases, unlike the present case, the task of statutory construction which leads to finding an implied remedy will focus upon congressional intent. In such cases, the implied remedy will also be read into the accompanying administrative rule, in a straightforward way, because an agency drafting rules pursuant to a statute is restricted to the scope of authority granted by the legislature. *Therefore, if the rule in question is valid and furthers the substantive purposes of the enabling statute, and the statute provides a private right of action as a matter of congressional intent, we will imply the private right of action into the rule as well,* regardless of agency intent. To do otherwise might constitute an unwarranted frustration of Congress' desire to supplement agency action with private enforcement.[75]

When Title VI disparate impact regulations are considered in light of the Ninth Circuit test, the result is the same as under that of the Third Circuit. The disparate impact regulations further the substantive purposes of the enabling statute. The purposes of both

Inc. involved alleged misrepresentations and nondisclosures by a brokerage. *See* 764 F.2d 939, 941 (3d Cir. 1985). The Third Circuit in *Angelastro* supported its holding that rules promulgated by the Securities and Exchange Commission pursuant to the Securities and Exchange Act of 1934 were privately enforceable, by stating that "[w]here the enabling statute authorizes an implied right of action, courts should permit private suits under agency rules within the scope of the enabling statue." *Id.* at 947. The Third Circuit did emphasize, however, that every rule promulgated under a statute providing a private right of action will not automatically carry with it such a right. *See id.* at 947-48. Accordingly, the Third Circuit noted that the court must still follow a two-step inquiry of asking whether the statute implies a private right of action and whether this same implication should be made for the rule at issue. *See id.*; *see also* Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1284-87 (7th Cir. 1977) (holding that private right of action may be implied in Section 504 of Rehabilitation Act of 1973 and inferred in regulations promulgated pursuant thereto); Oklahoma Nursing Home Ass'n v. Demps, 792 F. Supp. 721, 724-27 (W.D. Okla. 1992) (holding that Medicaid public notice regulation could form basis for private cause of action under section 1983).

74. 749 F.2d 530 (9th Cir. 1984) (holding private right of action exists under rules promulgated pursuant to Securities and Exchange Act).

75. *Id.* at 536 (citations omitted) (emphasis added). *See also* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-19 (1978) (relying on longstanding judicial construction to imply private right of action under rules deemed reasonably related to statutory purpose).

sections 601 and 602 of Title VI[76] are consistent with the EPA disparate impact regulations.[77] Title VI also clearly provides for a private right of action as a matter of congressional intent.[78] As a result, the Ninth Circuit would have no choice but to recognize a private cause of action to enforce validly promulgated Title VI regulations. Indeed, a district court in the Ninth Circuit, applying the *Robertson* test,[79] reached this result in considering Title VI disparate impact regulations. In *Association of Mexican-American Educators v. California,*[80] the district court specifically held that there is a private right of action to enforce such regulations and that a disparate impact claim was, therefore, viable.[81]

The Fifth Circuit is the only other court that has actually addressed the issue of a private right of action under civil rights regulations analogous to those promulgated under Title VI. In analyzing regulations that were promulgated pursuant to Title IX (which is modeled on Title VI), the Fifth Circuit used the *Cort* test, as used in *Cannon,* but with slight modification.[82] In *Lowrey v. Texas A & M University System,*[83] an athletic coordinator lost her position and was denied the position of athletic director, in part, because the school was allegedly retaliating against her for claiming that the school was violating Title IX.[84] Regulations promulgated pursuant to Title IX, however, prohibited retaliation against persons who bring to light or allege violations of Title IX.[85] The Fifth Circuit in *Lowrey* stated

76. *See* Title VI § 601-602, 42 U.S.C. §§ 2000d-2000d-1 (1994) (granting authority to agencies to promulgate regulations protecting against discrimination).

77. *See* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592-93 n.14 (1983) (stating Congress has consistently "rebuffed efforts to overturn the Title VI disparate-impact regulations").

78. *See* Cannon v. University of Chicago, 441 U.S. 677, 696-703 (1979) (stating that "Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of prohibited discrimination"). For a discussion of the consistency between a private right of action and the congressional intent of Title VI, see *supra* notes 31-36 and accompanying text.

79. For a discussion of the *Robertson* test, see *supra* notes 74-75 and accompanying text.

80. 836 F. Supp. 1534 (N.D. Cal. 1993) (explaining weight of authority supports private right of action under Title VI).

81. *See id.* at 1548; *see also* Sandoval v. Hagan, 7 F. Supp. 2d 1234 (M.D. Ala. 1998) (following Third Circuit's analysis in *Chester*).

82. For a discussion of the *Cort* test, see *supra* note 33 and accompanying text.

83. 117 F.3d 242 (5th Cir. 1997) (holding that 34 C.F.R. § 100.7(e) creates implied private right of action for retaliation under Title IX).

84. *See id.* at 244.

85. *See id.* at 249-54 (observing that implied rights of action are available in certain circumstances under Title IX); *see also* 34 C.F.R. §§ 106.1, 100.7(e) (1997) (stating that "Title IX incorporates by reference the antiretaliation provisions of

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the issue by noting that "[j]ust as the Supreme Court has recognized an implied right of action to vindicate the provisions of title IX, Lowrey argues, this court likewise should recognize an implied private right of action to vindicate the anti-retaliation provisions of 34 C.F.R. § 100.7(e)."[86]

The Fifth Circuit in *Lowrey* used a modified version of the *Cort* test in determining whether to imply a private right of action to enforce regulations that implement Title IX.[87] First, the Fifth Circuit set forth the elements of the *Cort* test as follows:

> (1) Is this plaintiff a member of the class for whose "especial" benefit the statute was enacted? In other words, does the statute create a federal right for this plaintiff?
> (2) Is there any evidence of legislative intent, whether explicit or implicit, to create or deny a private remedy?
> (3) Is it consistent with the legislative scheme to imply a private remedy?
> (4) Is the cause of action one traditionally relegated to state law so that implying a federal right of action would be inappropriate?[88]

To answer the first prong, the Fifth Circuit modified the traditional analysis. Instead of looking to the words of the governing statute, the Fifth Circuit looked to the words of the regulation and held that "[t]he plain language of the regulations dictates the conclusion that Lowrey is an intended beneficiary of 34 C.F.R. § 100.7(e) and is a member of the special class for whom the regulations were enacted."[89]

The Fifth Circuit then analyzed the second prong of *Cort* by considering whether Congress intended to create a private remedy under the governing statute.[90] After observing that the Supreme Court had already ruled on this issue in *Cannon*, the Fifth Circuit stated that "we see no principled basis upon which to distinguish

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Title VI . . . which prohibits unlawful discrimination in programs receiving federal assistance").

86. *Lowrey*, 117 F.3d at 249-50.

87. *See id.* at 250-51 (applying the *Cort* test, as did the *Cannon* Court, in determining that private right of action for retaliation exists under Title IX regulations).

88. *Id.* at 250.

89. *Id.*

90. *See id.* at 253.

the implied private right of action recognized in *Cannon* . . . from the implied private right of action at issue in the instant case . . . ."[91]

In addressing the third prong of *Cort*, the Fifth Circuit in *Lowrey* further examined the Supreme Court's opinion in *Cannon*. With respect to whether implying a private cause of action to enforce the regulation would undermine the legislative scheme, the Fifth Circuit concluded that, "[t]o the contrary, the implication of a private right of action for retaliation would serve the dual purposes of title IX, by creating an incentive for individuals to expose violations of title IX and by protecting such whistleblowers from retaliation."[92] The Fifth Circuit continued by stating that "[i]ndeed, the Supreme Court has approved the implication of a private right of action under title IX 'when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose.'"[93]

The Fifth Circuit in *Lowrey* assumed that the fourth prong of *Cort* was met. In fact, the Supreme Court said as much in *Cannon*, when it noted that "[s]ince the Civil War, the Federal Government and the federal courts have been the '*primary* and powerful reliances' in protecting citizens against such discrimination."[94]

Applying *Lowrey*, it is clear that a private cause of action should be recognized to enforce disparate impact regulations that implement Title VI. The first prong as to whether the plaintiff is a member of the special class for whom the regulation has been enacted appears satisfied on the face of the EPA regulation. This regulation provides that "[a] recipient [of federal financial assistance] 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* . . . ."[95] The second prong of *Lowrey* has been recognized as being satisfied by *Cannon* and *Guardians*, in which the Court held that a private remedy is contemplated under the governing statute. Satisfaction of the third prong likewise follows from *Cannon*. *Cannon* states that Title VI desired "to accomplish two . . . objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection

91. *Id.*
92. *Lowrey*, 117 F.3d at 254 (footnote omitted).
93. *Id.* (citing Cannon v. University of Chicago, 441 U.S. 677, 703 (1979)).
94. *Cannon*, 441 U.S. at 708.
95. 40 C.F.R. § 7.35(b) (1997) (emphasis added).

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against those practices."[96] Thus, the underlying scheme or underlying purposes behind Title VI would be furthered by recognizing a private cause of action. Finally, according to the Third Circuit in *Chester*, the fourth prong of *Lowrey* "is irrelevant because Title VI is federal law."[97]

B. A Comparison: The Appellate Courts' Tests

By comparing the tests of the Third, Fifth and Ninth Circuits, it is apparent that common elements bind all three. The Third Circuit standard seems to be the most stringent and most difficult of judicial application, containing more elements than the other two circuits'. As noted, the Third Circuit sets forth the following three-prong test to determine whether a private right of action exists:

> (1) "[W]hether the agency rule is properly within the scope of the enabling statute"; (2) "whether the statute under which the agency rule was promulgated properly permits the implication of a private right of action"; and (3) "whether implying a private right of action will further the purposes of the enabling statute."[98]

In addition, the *Cort* four-part analysis must be considered in addressing the Third Circuit's second prong.[99] In *Chester*, the Third Circuit agreed that "[i]n addressing the second [prong of the Third Circuit test], a court will consider the factors set out by the Supreme Court in *Cort v. Ash* . . . ."[100] Moreover, the Third Circuit's three-prong test actually incorporates the modified *Cort* test as articulated by the Fifth Circuit in *Lowrey*.[101] Therefore, for the plaintiff seeking to assert a private right of action in the Third Circuit, there are many obstacles to overcome.

The Ninth Circuit test is the most straightforward, simplest in application, and seemingly most consistent with the objective of giving meaning to regulatory rights. Beyond that, this test is the most logical. Although on its face the test has three criteria, in fact the

96. *Cannon*, 441 U.S. at 704; *see also* Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925, 936 (3d Cir. 1997), *vacated as moot*, 67 U.S.L.W. 3129 (U.S. Aug. 17, 1998) (No. 97-1620).

97. *Chester*, 132 F.3d at 933 n.10.

98. Polaroid Corp. v. Disney, 862 F.2d 987, 994 (3d Cir. 1988) (quoting Angelastro v. Prudential-Bache Secs., Inc., 764 F.2d 939, 947 (3d Cir. 1985)).

99. For a discussion of the four-part analysis as detailed by the Court in *Cort*, see *supra* note 33 and accompanying text.

100. 132 F.3d at 933.

101. For a discussion of the modified *Cort* test as articulated by the Fifth Circuit, see *supra* notes 82-97 and accompanying text.

test reduces to two, namely, whether the regulation is valid, and whether the regulation furthers the substantive purposes of the enabling statute.[102] This reduction is because the question of implying a right of action under a regulation will arise only if the Ninth Circuit's third criterion, whether the enabling statute implies a right of action as a matter of congressional intent, has already been satisfied.[103] Additionally, although many of the elements considered in the Third and Fifth Circuits' tests will also be considered within the Ninth Circuit's test, the Ninth Circuit's test is simple to administer and whether the test has been satisfied is relatively easily ascertainable.[104]

C. Appellate Courts in Practice: Most Appellate Courts Have Assumed There Is an Implied Private Right of Action Under Title VI Regulations

Many courts have assumed that a private right of action exists without directly deciding the issue. It is not surprising, therefore, that five Circuit Courts of Appeals have recognized that *Guardians* allows for a private cause of action based on regulations implementing section 601 of Title VI.[105] In *Villanueva v. Carere*,[106] private litigants, a class of Latino-American parents and children, brought an action to enjoin the closure of two schools.[107] The Tenth Circuit, while interpreting *Guardians*, stated that "[a]lthough Title VI itself proscribes only intentional discrimination, certain regulations promulgated pursuant to Title VI prohibit actions that have a disparate impact on groups protected by the act, even in the absence of

102. For a discussion of the Ninth Circuit's *Robertson* test, see *supra* notes 74-75 and accompanying text.

103. For a discussion of the application of the Ninth Circuit's *Robertson* test, see *supra* notes 76-81 and accompanying text.

104. For a discussion of the Third, Fifth and Ninth Circuits' tests to determine whether a private right of action exists, see *supra* notes 98-103 and accompanying text.

105. Regulations implementing section 601 of Title VI are promulgated pursuant to section 602 of Title VI. For the text of sections 601 and 602 of Title VI, see *supra* notes 20-24 and accompanying text. The longstanding practice of the courts recognizing a private right of action to enforce Title VI and Title IX regulations has not resulted in a flood of litigation. Indeed, as the cases in this section of the Article demonstrate, recognition of a right of action does not necessarily result in success on the merits of a case.

106. 85 F.3d 481 (10th Cir. 1996).

107. *See id.* at 482. Ultimately, the Tenth Circuit held that the private litigants failed to show discriminatory intent in the school board's decision to close neighborhood schools and open charter schools. *See id.* at 486. Furthermore, the Tenth Circuit held that the private litigants failed to show discriminatory impact on Hispanic students as a result of the closings. *See id.* at 486-87.

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discriminatory intent."[108]

Similarly, in *Roberts v. Colorado State Board of Agriculture*,[109] private litigants were successful in obtaining an injunction under Title IX, reinstating a state university softball team.[110] There, the Tenth Circuit stated in dictum that the administrative regulations incorporating a disparate impact standard were valid,[111] ultimately concluding that "the district court did not err here in failing to require proof of discriminatory intent."[112] Thus, it is apparent that the Tenth Circuit permits private litigants to enforce regulations implementing Title VI by proving disparate impact.

In *New York Urban League, Inc. v. New York*,[113] the Second Circuit recognized a private cause of action under regulations implementing Title VI.[114] Private litigants brought an action to enforce a United States Department of Transportation regulation promulgated pursuant to Title VI.[115] There, the Second Circuit implicitly recognized a private right of action by allowing plaintiffs to "make a prima facie showing that the alleged conduct has a disparate impact" to shift the burden of proof to the funding recipient.[116]

Furthermore, the Seventh Circuit has made the same assump-

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108. *Id.* at 486 (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 584 n.2 (1983)).

109. 998 F.2d 824 (10th Cir. 1993).

110. *See id.* at 826. *Roberts* involved Colorado State University students and former members of the University's fast pitch softball team who brought individual actions after the University and the State Board of Agriculture discontinued the varsity fast pitch softball program. *See id.* Specifically, the plaintiffs contended that the defendants violated Title IX. *See id.* The district court found that the defendants had violated Title IX and ordered an injunction reinstating the softball program. *See id.*

111. *See id.* at 832 (citing *Guardians*, 463 U.S. at 584 n.2). Specifically, the Tenth Circuit noted that the "[d]efendants neglect[ed] to consider the additional holding of *Guardians*, that 'although Title VI itself requires proof of discriminatory intent, the administrative regulations [under Title VI] incorporating a disparate-impact standard are valid.'" *Id.*

112. *Roberts*, 998 F.2d at 833.

113. 71 F.3d 1031 (2d Cir. 1995).

114. *See id.* at 1035. Although the Second Circuit recognized the cause of action, it held that the plaintiffs were not entitled to an injunction under Title VI to stop the transportation authority from increasing city transportation rates. *See id.* at 1040.

115. *See id.* at 1033-34. The regulation provided, in pertinent part:

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program . . . may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin . . . .

Id. at 1036 (citing 49 C.F.R. § 21.5 (b)(2) (1996)).

116. *New York Urban League*, 71 F.3d at 1036. The Second Circuit concluded

tion as other circuits. In *Chicago v. Lindley*,[117] the City of Chicago challenged the distribution of funds within a program administered under Title VI, basing its challenge on a regulation stating that a federal funds recipient may not redistribute the funds in ways that "have the effect of subjecting individuals to discrimination because of their race, color, or national origin."[118] After citing *Guardians* and *Alexander*, the Seventh Circuit considered the disparate impact claim,[119] ultimately concluding that "the City's challenges do not have a disparate impact on the State's minority older individuals . . . ."[120] Additionally, in *David K. v. Lane*,[121] private litigants sought to enjoin a prison policy concerning gang membership.[122] Although the case was dismissed on other grounds, the Seventh Circuit stated:

> It is clear that plaintiffs may maintain a private cause of action to enforce the regulations promulgated under Title VI of the Civil Rights Act. . . . Moreover, plaintiffs need not show intentional discriminatory conduct to prevail on a claim brought under these administrative regulations. Evidence of a discriminatory effect is sufficient.[123]

The Seventh Circuit again assumed the existence of a plaintiff's right to make a prima facie showing of disparate impact. These two decisions are consistent with the Seventh Circuit's holding in *Gomez v. Illinois State Board of Education*.[124] In *Gomez*, private litigants, a group of bilingual children, brought an action seeking injunctive and declaratory relief.[125] There, the Seventh Circuit held "that the portion of plaintiffs' Title VI claim based on the implementing reg-

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that claims under Title VI regulations must follow the burden shifting guidelines established in Title VII disparate impact cases. *See id.* at 1037.

117. 66 F.3d 819, 827 (7th Cir. 1995) (holding that cities could not challenge Department of Aging distribution formula in section 1983 action).

118. *Id.* at 827. This regulation was nearly identical to the EPA's civil rights regulation at issue in *Chester*. For the text of the *Chester* regulation, see *supra* notes 22-23 and accompanying text.

119. *See id.* at 828-30 (holding that disparate impact claim was without merit).

120. *Id.* at 830.

121. 839 F.2d 1265 (7th Cir. 1988).

122. *See id.* at 1267-68. Ultimately, the Seventh Circuit held that the prison inmates' Fourteenth Amendment equal protection rights were not violated by regulations limiting gang activity. *See id.* at 1273-74.

123. *Id.* at 1274 (citations omitted).

124. 811 F.2d 1030 (7th Cir. 1987).

125. *See id.* at 1034. The plaintiffs alleged that the school district had violated the Equal Educational Opportunities Act by failing to test them for English language proficiency, and had not provided bilingual instruction or compensatory instruction. *See id.* at 1032-33.

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ulations survives the defendant's 12(b)(6) challenge, even though there was no allegation in the complaint that the defendants acted with discriminatory intent."[126]

Similarly, in *Castaneda v. Pickard*,[127] the Fifth Circuit addressed a claim brought by Mexican-Americans alleging intentional discrimination in the practice of hiring teachers.[128] There, the Fifth Circuit noted that because of the *Guardians* decision, "a Title VI action can now be maintained . . . in the guise of a disparate impact case, involving employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another."[129] The Fifth Circuit concluded that "[t]he plaintiff must show that 'a facially neutral employment practice has the result of producing a significantly adverse impact on one race.'"[130]

The Eleventh Circuit also has determined that regulations promulgated pursuant to Title VI permit a private cause of action based on a disparate impact claim. In *Georgia State Conference of Branches of NAACP v. Georgia*,[131] private litigants, African-American schoolchildren, alleged violations of the regulations implementing Title VI and the Rehabilitation Act.[132] After finding that *Guardians* validated regulations using a disparate impact standard,[133] the Eleventh Circuit stated that "[t]here is no doubt that the plaintiffs predicated this cause of action on the regulations. As a result, the district court correctly applied disparate impact analysis to their Title VI claim."[134]

The First Circuit continued this interpretive trend in *Cohen v. Brown University*,[135] where it construed a regulation implementing

126. *Id.* at 1045; *cf.* Craft v. Board of Trustees, 793 F.2d 140 (7th Cir. 1986) (per curiam) (holding proof of discriminatory intent was essential element of claim that medical opportunity program at university's college of medicine violated statutory prohibition against exclusion from federally assisted program on ground of race, color, or national origin, and, in absence of such proof, award of compensatory damages was not warranted).

127. 781 F.2d 456 (5th Cir. 1986).

128. *See id.*

129. *Id.* at 465 n.11.

130. *Id.* (quoting Page v. U.S. Indus., Inc., 726 F.2d 1038, 1045 (5th Cir. 1984)).

131. 775 F.2d 1403 (11th Cir. 1985).

132. *See id.* at 1407-08 (addressing claim that African-American students were assigned to regular classes and special education programs in certain school districts in a discriminatory manner).

133. *See id.* at 1417.

134. *Id.* at 1417 (footnote omitted).

135. 991 F.2d 888 (1st Cir. 1993). In *Cohen*, members of Brown University's gymnastics and volleyball teams brought an action alleging Title IX violations. *See*

Title IX, a parallel civil rights statute.[136] The regulation read that "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient."[137] Basing its decision on this regulation, the First Circuit found in favor of the private litigants.[138] Relying on *Cannon*, the First Circuit concluded that Title IX and Title VI are to be interpreted similarly because Title IX is nearly identical to Title VI except for the substitution of the word "sex" for the phrase "race, color, or national origin," and, moreover, both statutes use the same administrative mechanism.[139] The First Circuit found that the three-prong test incorporated in the regulation was valid and noted that "[w]hile any single element of this tripartite test, in isolation, might not achieve the goal set by the statute, the test as a whole is reasonably constructed to implement the statute."[140] Therefore, interpretations of regulations implementing Title IX are relevant to the interpretation of Title VI as to whether a private cause of action should be recognized under the regulations.

Clearly, civil rights have been protected through private enforcement of regulations promulgated pursuant to civil rights statutes. Thus far, courts have acknowledged the existence of private rights of action under both Title VI and Title IX regulations. Such acknowledgment is principled and essential to the full protection of rights such regulations validly confer.

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id. at 892. The First Circuit ordered an injunction against demotion of their sports from varsity teams to club teams. *See id.* at 893.

136. *See id.* at 896.

137. *Id.* at 895-96 n.8 (quoting 34 C.F.R. § 106.41(a)(1992)).

138. *See id.* at 899-91.

139. *See id.* at 893-900. The Court observed in *Cannon* "[t]hat the drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." Cannon v. University of Chicago, 441 U.S. 677, 696 (1979). The Court further stated:

> In 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy . . . . It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

Id. at 696-98.

140. Cohen v. Brown Univ., 991 F.2d 888, 900 (1st Cir. 1993).

V. CONCLUSION: A RIGHT WITHOUT A REMEDY IS NO RIGHT AT ALL

Justice Marshall, while dissenting in *Guardians*, wrote that "[a] right without an effective remedy has little meaning."[141] In *Chester*, the Commonwealth of Pennsylvania argued that the disparate impact EPA regulations were not enforceable by private parties, but only by EPA in administrative funding termination proceedings.[142] Indeed, the district court essentially agreed with the Commonwealth's argument.[143] Where rights are created in favor of a class, however, requiring the exhaustion of administrative remedies is not appropriate when those remedies consist only of filing a grievance with the agency.[144] If the court of appeals' decision had been reversed, the mere filing of a grievance is precisely what the Chester Residents' remedy would have been.[145]

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141. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 626 (1983) (Marshall, J., dissenting) (arguing that denying compensatory relief under Title VI frustrates its fundamental purpose); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) (Marshall, C.J.) (stating "[b]ut where a specific duty is assigned by law, and individual rights depend on the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy").

142. *See* Brief for Appellees at 19-22, Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997) (No. 97-1125).

143. *See* Chester Residents Concerned For Quality Living v. Seif, 944 F. Supp. 413 (E.D. Pa. 1996), *rev'd*, 132 F.3d 925 (3d Cir. 1997), *vacated as moot*, 67 U.S.L.W. 3129 (U.S. Aug. 17, 1998) (No. 97-1620). Specifically, the district court stated:

> We agree with defendant that "[p]laintiffs would have this court turn the holdings of *Medical Center* and *Chowdhury* — which found a private right of action under section 601 because of a complainant's limited role under Section 602 regulations — on their head[s] and hold that because there is a private right of action under Section 601 there is also such a right under regulations promulgated to Section 602." We decline plaintiffs' invitation to engage in this sort of judicial gymnastics in the face of what we regard as controlling authority.

Id. at 417 (citations omitted). Thereafter, the district court found that "there is no private cause of action under the EPA civil rights regulations promulgated pursuant to § 602 of Title VI." *Id.*

144. *See* Cannon v. University of Chicago, 441 U.S. 677, 704-05 (1979). In *Cannon*, the Supreme Court stated:

> Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide citizens effective protection against those practices . . . . The first purpose is generally served by the statutory procedure for the termination of federal financial support for institutions engaged in discriminatory practices. That remedy is, however, severe and often may not provide an appropriate means of accomplishing the second purpose if merely an isolated violation has occurred.

Id. (footnote omitted).

145. The Supreme Court's vacatur of the Third Circuit's judgment should not be construed as a decision on the merits. It was based on mootness and, therefore,

In the Supreme Court's decision of *Chrysler Corp. v. Brown*,[146] Chief Justice Rehnquist explained the nature of rights created by regulations by stating that "[w]e described a substantive rule — or a 'legislative-type rule,'. . . as one 'affecting individual rights and obligations'. . . . This characteristic is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.'"[147] For example, defendants in *Chester* were required to sign an agreement stating that EPA's civil rights regulations implementing an "effects test" would be complied with as a condition of receiving federal financial assistance. Therefore, the state incurred a "binding obligation" by contract as well as by regulation. Regula-

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means merely that a "case or controversy" no longer existed for the Court to adjudicate. A misapprehension of the result in *Chester* is apparent from the colloquy between counsel and the court in *South Bronx Coalition for Clean Air, Inc. v. Conroy*, with most unfortunate consequences. *See* (No. 98-4404), 1998 U.S. Dist. LEXIS 13978, at *8 (S.D.N.Y. Sept. 8, 1998).

146. 441 U.S. 281 (1979) (holding agency's rule allowing private right of action was impermissible because "Trade Secrets Act does not afford a private right of action").

147. *Id.* at 302. In *Chrysler*, the Court explained how a regulation would have the "force and effect of law," by stating:

> In order for a regulation to have the 'force and effect of law,' it must be a 'substantive' or 'legislative-type' rule affecting individual rights and obligations and it must be the product of a congressional grant of legislative authority, promulgated in conformity with any procedural requirements imposed by Congress.

Id. at 302. Disparate impact regulations implementing Title VI were held consistent with the congressional grant of legislative authority to the agencies in *Guardians* and *Alexander*. Therefore, it is clearly established that regulations can have the force of law and can create rights in persons.

The Court in *Chrysler* also defined substantive rules which give rise to rights, by contrasting them with interpretive rules as follows:

> In prior cases, we have given some weight to the Attorney General's Manual on the Administrative Procedure Act (1947), since the Justice Department was heavily involved in the legislative process that resulted in the Act's enactment in 1946. . . . The Manual refers to substantive rules as rules that "implement" the statute. "Such rules have the force and effect of law." In contrast it suggests that "interpretive rules" and "general statements of policy" do not have the force and effect of law. Interpretive rules are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." General statements of policy are "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."

Id. at 302 n.31 (citations omitted). EPA civil rights regulations implement Title VI. Also, the regulations were clearly intended to be mandatory for the funding recipients and not merely advisory to the public. Moreover, these regulations are "substantive," affect the rights of individuals, and impose obligations on the recipients of federal funds to end disparate impact discrimination against those who are affected by their programs. Through section 602 of Title VI, Congress explicitly authorized federal agencies to promulgate regulations to implement the statute.

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tions can clearly create rights in persons.[148] These are rights, created by regulations, held by persons of color who are disparately impacted by the state program.

But, where rights are created there must be an effective remedy. The Supreme Court recognized this in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[149] when it stated "'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.'"[150] One way to protect these rights is for EPA to institute funding termination for the state program involved in the violation. However, the Supreme Court, in *Cannon*, went to great lengths to explain that the administrative process is not an effective remedy to redress violations of such rights.[151] Specifically, the Supreme Court stated the following:

> [T]he complaint procedure . . . does not allow the complainant to participate in the investigation or subsequent enforcement proceedings. Moreover, even if those proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant . . . . Furthermore, the agency may simply decide not to investigate a decision that will often be based on enforcement resources, rather than on any conclusion on the merits of the complaint . . . . Because the individual complainants cannot assure themselves that the administrative process will reach a decision on their complaints within a reasonable time, it makes little sense to require exhaustion.[152]

If regulations create rights in persons, yet the administrative process is not an effective way to remedy a violation of those rights, then it is essential that the victims of such violations be able to bring a private suit to obtain a remedy. Limiting victims' remedies to the administrative procedure would frustrate their own attempts to vin-

148. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 613 (1979) (stating that "[i]n that sense all federal rights, whether created by treaty, by statute, or by regulation, are 'secured' by the Supremacy Clause").

149. 403 U.S. 388 (1971) (holding that individual stated claim to enforce Fourth Amendment).

150. *Id.* at 392 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946) (footnote omitted)).

151. *See* Cannon v. University of Chicago, 441 U.S. 677, 707-08 (1979).

152. *Id.*; *see also* Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317, 321-22 (3d Cir. 1982).

dicate their rights.[153]

An implied private right of action clearly should be recognized to enforce civil rights regulations promulgated pursuant to statutes that are privately enforceable. In the context of statutes like Title IX and Title VI, where the Supreme Court has explicitly recognized an implied cause of action to enforce the statute and held that disparate impact regulations are valid, it would frustrate the intent of Congress not to allow private plaintiffs redress for harm that they have suffered. It is clear that there is a need for "private attorneys general" to ensure that our civil rights laws are obeyed. Environmental justice is one of many worthy objectives that will be advanced by the recognition of private rights of action under civil rights statutes. Perhaps too slowly, but nevertheless surely, we are making progress toward that end.

153. *See generally* Rosado v. Wyman, 397 U.S. 405 (1970) (subjecting to judicial review question of whether states were properly allocating federal funds to welfare recipients).