Environmental Racism and the Broader Persistence of State-Sanctioned Discrimination in the Wake of *Alexander v. Sandoval*

*James Priest**

Introduction

What comes to mind when you hear the phrase, "environmental racism?" For some, this phrase alludes to the broader social justice movement and signifies a specific concern for the environmental health of communities-of-color.[1] For others, it is semantically nonsensical.[2] This phraseology, regardless of which side you agree with, is counterintuitive. It suggests that the environment—which is void of any political, social, or religious allegiance—may be manipulated by finite beings to benefit some and hurt others. Yet, that is precisely what has occurred in the United States. Currently, no constitutional right to a healthy environment has been recognized in the United States.[3] In the context of for-profit, industrial capitalism, this lack of a recognized right incentivizes cost-minimizing industrial facilities to entrench in—and disparately impact—socioeconomically destitute areas, many of which are identifiable along racial lines.[4] Environmental racism is not necessarily an

* George Mason University Antonin Scalia Law School, J.D. expected, 2023. I would like to thank Rick Priest, Wendy Priest, Heidi Priest, Matthew Marmolejo, Olivia Cordero, Naomi King, Keanu Heydari, Brandon Smith, Ben Webby, and my many siblings for their support. I would also like to thank my grandparents: Betty and Joe Silva, Glenda Priest, and Ricky Guerra. And, finally, I would like to thank my notes editor, Patti McChesney Lozano, for her guidance throughout this process; Professors Caroline Cecot and Adam White for their willingness to answer any legal questions I had; and UCLA Professor Mark Johnson, whose classes truly taught me how to write.

1 *See* Lindsay Heck, *When Environmental Racism, A Public Health Crisis, and an Educational Emergency Collide*, 46 Hum. Rts. 18, 19 (2021).

2 *See* Donald Trump, Jr. (@DonaldJTrumpJr), Twitter (Mar. 13, 2019, 8:14 A.M.), https://twitter.com/DonaldJTrumpJr/status/1105804248380465152.

3 *See* Janelle P. Eurick, *The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions*, 11 Int'l Legal Persp. 185, 185 (1999).

4 *See* Rick Jervis & Alan Gomez, *Racism Turned Their Neighborhood into 'Cancer Alley'. Now They're Dying from Covid-19*, USA Today News (Oct. 12, 2020, 7:45 P.M.), https://www.usatoday.com/in-depth/news/nation/2020/10/12/covid-racism-kills-black-americans-living-near-toxic-plants/3498180001/.

act of intentional discrimination. Rather, economic incentivization and judicial activism have empowered industrial corporations to target communities-of-color for their operation.[5]

For instance, in mid-2020, Louisiana-native Karen Wilson was informed that her brother—who had been fighting Covid-19 on an air ventilator—had died.[6] This was not uncommon in St. John the Baptist Parish, which ranked among the top thirty United States counties with the highest Covid-19 death rates at the time.[7] As of October 12, 2020—seven months into the pandemic—the Parish had recorded 105 deaths compared to a population of 43,446 residents.[8] That was nearly double the state's overall death rate.[9] Nearly 60 percent of those victims were African American, many of whom had resided in Reserve, Louisiana.[10] Even a year later, in October 2021, the Covid-19 data in St. John the Baptist Parish was overwhelming. The Parish still averaged seventeen positive cases per 100,000 people and had a test positivity rate of over ten percent.[11] One might be tempted to merely dismiss these numbers for what they appear to be—an awful health effect suffered by an unfortunate community. But that approach would obscure the root cause of those numbers. An in-depth analysis of the data reveals that environmental racism has left this small Louisiana community more vulnerable to health threats, like Covid-19.[12]

The small, unincorporated community of Reserve, Louisiana, is predominantly African American and is in the midst of "Cancer Alley."[13] This moniker derives from the fact that multiple chemical plants have so polluted the air surrounding Reserve that the town's residents are fifty times

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5 *See Yale Experts Explain Environmental Justice*, YALE SUSTAINABILITY (Oct. 1, 2020), https://sustainability.yale.edu/explainers/yale-experts-explain-environmental-justice (explaining the economic incentivization to engage in activity which disporportionatly affects communities of color); Richard E. Levy & Robert L. Glicksman, *Judicial Activism and Restraint in the Supreme Court's Environmental Law Decisions*, 42 VAND. L. REV. 343, 346 (1989) (concluding that the Supreme Court has veered into judicial activism on the side of corporations).

6 Jervis & Gomez, *supra* note 4.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Tracking Coronavirus in St. John the Baptist Parish, La.: Latest Map and Case Count*, N.Y. TIMES, https://www.nytimes.com/interactive/2021/us/st-john-the-baptist-parish-louisiana-covid-cases.html (Mar. 23, 2023).

12 *See* Jervis & Gomez, *supra* note 4.

13 *See id.*

more at risk for cancer than the national average.[14] According to the EPA, the primary cause of this risk level is the chemical chloroprene,[15] which is most commonly used to make synthetic rubber. Studies have shown that exposure to chloroprene is associated with lung cancer.[16] Further, the atmospheric presence of this substance has made Reserve residents more vulnerable to Covid-19 fatality.[17] As the Covid-19 pandemic has raged on, data has shown that lung cancer "predicts a worse outcome on SARS-CoV-2 infection, as described by a higher rate of hospitalization and ARDS and a significantly higher mortality rate."[18] Logically, this implies that the higher cancer risk for residents in communities like Reserve, leaves them more vulnerable to fatal transmittable diseases, like Covid-19.

Reserve, Louisiana, is hardly the only community-of-color to face increased health risks because of nearby environmental pollution. Studies show that African Americans are 75% more likely to live near chemical facilities than the national population,[19] are exposed to 1.5 times more fine particulate matter than white people,[20] and that ethnic minorities are disproportionately affected by flooding nationwide.[21] These are but a few metrics that demonstrate the environmental tyranny imposed on communities-of-color by industrial facilities and infrastructural neglect. Environmental activists have engaged in political advocacy to address these disparities but have run into a nearly

14 Jamiles Lartey & Oliver Laughland, *Cancer and Chemicals in Reserve, Louisiana: The Science Explained*, THE GUARDIAN (May 6, 2019, 6:00 P.M.), https://www.theguardian.com/us-news/2019/may/06/cancertown-chemicals-reserve-louisiana-science.

15 UNIV. NETWORK FOR HUM. RTS., "WAITING TO DIE:" TOXIC EMISSIONS AND DISEASE NEAR THE LOUISIANA DENKA/DUPONT PLANT 5 (2019).

16 *See* THE NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, DHHS (NIOSH) PUB. NO. 78-127, CURRENT INTELLIGENCE BULLETIN 1: CHLOROPRENE (1975).

17 *See* Annette Rickert et al., *A Fatal Intoxication by Chloroprene*, 215 FORENSIC SCI. INT'L 110, 110, 112 (2012).

18 Antonio Passaro et al., *Severity of Covid-19 in Patients with Lung Cancer: Evidence and Challenges*, J. FOR IMMUNOTHERAPY OF CANCER, Jan. 26, 2021, at 5.

19 *See* PAUL ORUM ET AL., WHO'S IN DANGER?: RACE, POVERTY, AND CHEMICAL DISASTERS: A DEMOGRAPHIC ANALYSIS OF CHEMICAL DISASTER VULNERABILITY ZONES 3 (2014).

20 Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480, 480 (2018).

21 COMM. ON URB. FLOODING IN THE U.S., THE NAT'L ACADS. OF SCIS., ENG'G, MED., FRAMING THE CHALLENGE OF URBAN FLOODING IN THE UNITED STATES 26 (2019).

impenetrable constitutional wall, erected by the Supreme Court twenty years ago in *Alexander v. Sandoval*.[22]

The Supreme Court held in *Sandoval* that private parties, such as Karen Wilson, may only sue to prevent intentional discrimination.[23] Apart from reversing long-standing precedent, this decision left communities-of-color incredibly vulnerable. In a pre-pandemic setting, these communities face increased risks of cancer, birth defects, miscarriages, and disease outbreaks.[24] In the era of Covid-19, these risks have become even more dangerous as pre-existing conditions—like lung cancer caused by chemical pollutants—exacerbate the effects of Covid-19 on an individual and lead to a higher morbidity rate.[25] Environmental racism's reach extends beyond immediate health effects.

This paper aims to demonstrate that, contrary to the majority's decision in *Sandoval*, individuals should have a private right of action under Title VI of the Civil Rights Act. Part I of this Comment discusses the statutory background and Supreme Court precedent that preceded *Sandoval*. Part II analyzes Justice Scalia's opinion within the context of various interpretational canons of construction and questions his conclusions. Part III then argues that a penumbral analysis establishes that United States citizens have a constitutional right to a healthy environment. Absent Supreme Court recognition of this right, however, this Comment will propose in Part IV that Congress adopt an amendment to Title VI of the Civil Rights Act of 1964 to prohibit disparate-impact discrimination.

BACKGROUND

Before the decision in *Sandoval* was issued, the United States adopted the Civil Rights Act. Title VI of the Act prohibits federally funded programs and activities from discriminating on the basis of race, color, or national origin.[26] Title VI also empowers federal executive

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22 *See* Lisa S. Core, Alexander v. Sandoval*: Why a Supreme Court Case About Driver's Licenses Matters to Environmental Justice Advocates*, 30 B.C. ENV'T AFFS. L. REV. 191, 191 (2002).

23 Alexander v. Sandoval, 532 U.S. 275, 284, 293 (2001).

24 Philip J. Landrigan et al., *Environmental Justice and the Health of Children*, 77 MOUNT SINAI J. MED. 178, 179 (2010).

25 *See* Edwin Rios & Sinduja Rangarajan, *COVID-19 Has Infected and Killed Black People at Alarming Rates: This Data Proves It*, MOTHER JONES (Apr. 17, 2020), https://www.motherjones.com/coronavirus-updates/2020/04/covid-19-has-infected-and-killed-black-people-at-alarming-rates-this-data-proves-it/.

26 42 U.S.C. § 2000d.

agencies, like the Environmental Protection Agency (EPA), to effectuate those provisions and formulate their own civil rights compliance requirements.[27] The EPA External Civil Rights Compliance Office (ECRCO), for example, theoretically prohibits both federal and federally-contracted facilities from engaging in both intentional and disparate racial discrimination.[28] But to understand *Sandoval* or the Civil Rights Act, an analysis should be made of the history that preceded them.

I. THE CIVIL RIGHTS ACT OF 1964: ADDRESSING RACIAL DISCRIMINATION

"In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny . . . and I say . . . segregation now . . . segregation tomorrow . . . segregation forever."[29] Alabama governor George C. Wallace of Alabama delivered these remarks on January 14, 1963 at his inaugural gubernatorial address.[30] The same month this speech was delivered, just forty miles away, a lawsuit was filed to compel the admission of African American students to an all-white high school.[31] The court eventually ordered that a plan be submitted to desegregate the Macon County public schools.[32] In opposition to attempts by Governor Wallace to prevent desegregation, President John F. Kennedy federalized the National Guard to ensure that African American students could attend Tuskegee High School in the Fall of 1963.[33] Although racism was not a new phenomenon, the state-led school segregation effort in Alabama ultimately culminated in President Kennedy introducing the Civil Rights Act of 1964.[34] In addressing racial discrimination, that Act would also provide a path for individuals to pursue legal action against environmental discrimination.

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27 *See* 42 U.S.C. § 2000d-1.

28 U.S. ENV'T PROT. AGENCY, U.S. EPA'S EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE COMPLIANCE TOOLKIT 1-2 (2017).

29 George C. Wallace, Governor of Ala., The Inaugural Address of Governor George C. Wallace (Jan. 14, 1963).

30 *Id.*

31 Lee v. Macon Cty. Bd. of Educ., 231 F. Supp. 743, 744 (M.D. Ala. 1964).

32 *Id.* at 745.

33 Wendy Parker, *Why Alabama School Desegregation Succeeded (and Failed)*, 67 CASE W. RSRV. L. REV. 1091, 1099 (2017).

34 John F. Kennedy, President, U.S.A, Radio and Television Report to the American People on Civil Rights (June 11, 1963).

A. *Why the Civil Rights Act Was Necessary*

In 1863, a little over a century before the Civil Rights Act of 1964 was passed, President Abraham Lincoln issued the Emancipation Proclamation, announcing that all slaves in Confederate states were free.[35] The Proclamation, however, was more of a strategic move than one of liberation. The Proclamation did not abolish slavery universally as it did not apply to states loyal to the Union.[36] Slavery would not be abolished in the United States until two years later with the passage of the Thirteenth Amendment.[37] Immediately preceding the final vote, House Representative James Ashley, a sponsor of the proposed Amendment, delivered a speech wherein he articulated the broader moral purpose of the Amendment. He argued that the Amendment was a "constitutional guarantee of the Government to protect the rights of all, and secure the liberty and equality of its people."[38] But it took little time for the government to fail to live up to this goal.

Following the passage of the Thirteenth Amendment, African Americans continued to face discrimination. Southern states passed "black codes" by which the freedom of movement, privacy, and property rights of African Americans were severely restricted.[39] Congress responded by ratifying the Fourteenth Amendment, which reserved powers to the federal government to enforce the equal protection of the laws and to ensure that all Americans, including African Americans, were afforded due process.[40] The Fifteenth Amendment, ratified in 1870, guaranteed equal voting rights for African Americans.[41] The aim of this Amendment was to void explicit discrimination based on race.[42]

These amendments were subsequently undercut by the judiciary. The Supreme Court ruled that the Fifteenth Amendment did not grant the right of suffrage but, rather, prohibited discrimination from the

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35 Proclamation No. 95 (Emancipation Proclamation), 12 Stat. 1268 (Jan. 1, 1863).

36 Rebecca E. Zietlow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393, 407 (2012).

37 U.S. CONST. amend. XIII, § 1.

38 CONG. GLOBE, 38th Cong., 2d Sess. 141 (1865).

39 *See* Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709, 747 (1999).

40 U.S. CONST. amend. XIV, § 1.

41 U.S. CONST. amend. XV, § 1.

42 *See* E. Earl Parson & Monique McLaughlin, *The Persistence of Racial Bias in Voting: Voter ID, the New Battleground for Pretextual Race Neutrality*, 8 J.L. SOC'Y 75, 77-78 (2007).

exercise of the franchise on account of their "race, color, or previous condition of servitude."[43] Essentially, the Court narrowed actionable discrimination to *intentional* discrimination. Naturally, southern state governments took advantage of this by imposing facially "race-neutral" obstacles to prevent African Americans' equal access to the polls.[44] Such obstacles included poll taxes, secret ballots, and multi-box systems meant to confuse new African American voters into disqualification.[45] The "unspoken" racial separation this created in the United States was solidified by a "separate but equal" doctrine affirmed by the Supreme Court.[46] In *Plessy v. Ferguson*, the Court articulated that the assumption that "social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races" was unacceptable,[47] and that separating races in public was not unreasonable.[48] The "separate but equal" doctrine was eventually overturned in 1954[49] but the ideology itself would not die so easily in the South.

Today, Governor George Wallace's embrace of segregation is ignominious, but at the time, was excessively popular.[50] The Civil Rights Act was necessary because, despite the Union's victory in the Civil War and the enactment of three Amendments directed at rectifying racial inequality, racist policy efforts persisted. The Court eventually rectified its mistake in *United States v. Reese* by overturning the constitutionality of "separate but equal" policies through their decision in *Brown v. Board of Education*,[51] but by then it was arguably too late. *Plessy* had already paved the way for discrimination by obfuscation through which actors sought to discriminate with plausible deniability.[52] Like then, the passage of the Civil Rights Act of 1964 has been met with persistent

43 United States v. Reese, 92 U.S. 214, 218 (1875).

44 *See* Parson & McLaughlin, *supra* note 42, at 78.

45 *Id.*

46 Plessy v. Ferguson, 163 U.S. 537, 551-52 (1896).

47 *Id.* at 550.

48 *Id.* at 550-51.

49 *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

50 *See Alabama Governor*, OUR CAMPAIGNS, https://www.ourcampaigns.com/RaceDetail.html?RaceID=79513 (last visited Apr. 4, 2023).

51 *See Brown*, 347 U.S. at 494-95.

52 Parson & McLaughlin, *supra* note 42, at 79.

plausibly deniable racial discrimination,[53] which extends to unequal environmental protection.

B. *A Brief Overview of Environmental Racism in the United States*

The term "environmental racism" was not coined until 1987, more than two decades after Congress passed the Civil Rights Act.[54] Evironmental racism includes any "practice[], polic[y], [or] directive that disparately impact[s] (whether intended or unintended) people of color."[55] But environmental racism did not magically appear in the late 1980s. One of the first documented cases of environmental racism post-Civil Rights Act enactment was brought to light nearly a decade earlier.[56] In 1979, an African American homeowners association in Houston sought to prevent the Whispering Pines Sanitary Landfill from being placed within 1,700 feet of a local public school arguing that there was a racially discriminatory purpose behind choosing the site.[57] The court ruled that the Texas Department of Health's decision to place the waste site in that area was "insensitive and illogical" but found that there was no proven racial discriminatory purpose in its selection.[58] How did the court come to that conclusion? There were two waste sites approved by the Texas Department of Health, one of which was in a minority-dominant community and the other in a majority-white neighborhood.[59] This guise of equality was enough for the court. And the fact that the waste site in the majority-white neighborhood was placed near an African American community, Riceville, Texas, was not enough to sway the court's opinion.[60] Shortly thereafter, Dr. Robert Bullard led a study on the location of waste disposal facilities in Houston, Texas, which found that between

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53 *See id.* at 76, 104.

54 *See* Tara Ulezalka, *Race and Waste: The Quest for Environmental Justice*, 26 TEMP. J. SCI., TECH. & ENV'T L. 51, 52 (2007).

55 Robert D. Bullard, *Unequal Environmental Protection: Incorporating Environmental Justice in Decision Making*, WORST THINGS FIRST?: THE DEBATE OVER RISK-BASED NATIONAL ENVIRONMENTAL PRIORITIES 241 (Adam M. Finkel & Dominic Golding eds., 1994).

56 *See* Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 674-75 (S.D. Tex. 1979) (describing the plaintiffs' argument that waste management sites were disproportionately placed in minority neighborhoods); Robert D. Bullard, *Solid Waste Sites and the Black Houston Community*, 53 SOC. INQUIRY 273, 275 (1983) (describing the increasing attention paid to waste dispotal policies after 1976).

57 *Bean*, 482 F. Supp. at 674-75, 677.

58 *Id.* at 681.

59 *Id.* at 678.

60 *Id.* at 680.

1953 and 1978, the Texas Department of Health had sited and operated municipal waste sites primarily in black neighborhoods.[61]

A few years later, in 1982, African American residents in Warren County, North Carolina, organized a protest against state-led efforts to site a polychlorinated biphenyl disposal facility outside a predominantly black neighborhood.[62] After their injunction request was denied, hundreds of African Americans were arrested for protesting the landfill.[63] The United States General Accounting Office[64] led a study in response wherein they found that the majority of the population surrounding the nation's four largest landfills were black.[65] The study also found that the most of the African American population in those areas was poverty-stricken.[66] An easy argument to make is that these facilities were sited in these locations not because of their racial makeup, but because it was more financially beneficial for these facilities to operate in those locations. The fact remains, however, that minorities and African Americans in particular, are on the undesirable end of a massive wealth gap wherein the median young African American family possesses $600 in net worth and the median young Caucasian family possesses $25,400 in net worth.[67]

Sadly, these arguments are still present today. In 2016, Michigan's then-Governor Rick Snyder never mentioned race in his internal discussions regarding the state response to the lead water crisis in Flint, Michigan.[68] Rather, his discussions focused on the costs associated with responding.[69] That did not change the fact that the water crisis predominantly impacted minority communities.

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61 Bullard, *supra* note 55, at 277, 282.

62 Maura Lynn Tierney, *Environmental Justice and Title VI Challenges to Permit Decisions: The EPA's Interim Guidance*, 48 CATH. U. L. REV. 1277, 1278 (1999).

63 *Id.* at 1278-79; Associated Press, *150 PCB Protestors Arrested*, N.Y. TIMES (Sept. 21, 1982), https://www.nytimes.com/1982/09/21/us/150-pcb-protesters-arrested.html.

64 This agency is known today as the U.S. Government Accountability Office.

65 U.S. GEN. ACCT. OFF., GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 3 (1983).

66 *Id.*

67 *See* Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RESERVE. SYS. (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm.

68 John Eligon, *A Question of Environmental Racism in Flint*, N.Y. TIMES (Jan. 21, 2016), https://www.nytimes.com/2016/01/22/us/a-question-of-environmental-racism-in-flint.html.

69 *Id.*

Since the early 1980s, various studies[70] and incidents have only emphasized the realities of environmental racism. African American communities have been plagued by sewer flies resulting from Wastewater Treatment Plant pollution;[71] Native American tribes have had their water supply threatened by proposed oil pipelines;[72] and Hispanic populations have been forced to relocate in favor of nuclear testing.[73] Books could be filled with these incidents of environmental racism in the United States and the issue would still remain. But that issue is not whether private actors, operating various plants and facilities in minority-dominant areas, can be compelled to cease operation. Rather, the issue here lies in whether companies that take federal funds—into which Americans of all racial demographics pay—from the EPA may be compelled to stop operating in these areas. Through Title VI, the Civil Rights Act initially offered minority communities a legal tool to combat this form of discrimination.

C. *Title VI: A Vehicle for Combatting Environmental Racism—Case History*

"Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination."[74]

Title VI of the Civil Rights Act was enacted to prohibit discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance.[75] Section 601 of Title VI states: "No person in the United States shall, on the ground of

70 *See* Robert H. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All These Years*, 38 ENV'T L. 371 (2008); COMM'N FOR RACIAL JUSTICE, UNITED CHURGH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987) (finding that race was the strongest variable for predicting location of waste facilities).

71 *See* Kristen Lombardi et al., *Environmental Racism Still Persists, and the EPA is One Reason Why*, CTR. FOR PUB. INTEGRITY (Aug. 3, 2015), https://publicintegrity.org/environment/environmental-racism-persists-and-the-epa-is-one-reason-why/.

72 *See* Ramon Jacobs-Shaw, *What Standing Rock Teaches Us About Environmental Racism and Justice*, HEALTH AFFS. (Apr. 17, 2017), https://www.healthaffairs.org/do/10.1377/hblog20170417.059659/full/.

73 *See* Victoria Peña-Parr, *The Complicated History of Environmental Racism*, UNIV. N.M. NEWSROOM (Aug. 4, 2020), http://news.unm.edu/news/the-complicated-history-of-environmental-racism.

74 John F. Kennedy, President, U.S.A., Special Message to the Congress on Civil Rights and Job Opportunities (Jun. 19, 1963).

75 *See Title VI of the Civil Rights Act of 1964*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/fcs/TitleVI (last visited Apr. 6, 2023).

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."[76] Section 602 of Title VI states: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is . . . directed to effectuate the provisions of [Section 601]."[77] In other words, Section 602 instructs Federal agencies to enforce the anti-discrimination requirements of Section 601 when distributing federal funds. Compliance may be enforced by an internal compliance office, such as the ECRCO in the EPA.[78] In the context of the EPA, a complainant must file a complaint in writing, identify the entity which committed discrimination, allege an act of discrimination prohibited by a law enforced by the ECRCO, and file the complaint within 180 days of the last alleged discriminatory act.[79] The main legal issue that prefaced the ruling in *Sandoval* was not procedural. Rather, it was that the Civil Rights Act did not specify whether intentional or unintentional discrimination was prohibited.[80] Instead, the act merely established what protected classes may not be discriminated against.

The ambiguity present in Title VI was first debated in *Lau v. Nichols*.[81] Prior to the *Lau* decision, the Supreme Court had approved the desegregation of the San Francisco Unified School District.[82] Three years later in *Lau*, the Court held that disparate impact violated Title VI.[83] The plaintiffs were non-English-speaking, Chinese students who brought an action against San Francisco Unified School District officials for the district's neglect in teaching roughly 1,800 such students English.[84] The Court articulated that because the Department of Health, Education, and Welfare received federal financial assistance, they were obligated to prohibit discrimination in accordance with Title VI, Section

76 42 U.S.C. § 2000d.

77 42 U.S.C. § 2000d-1.

78 *See* EXTERNAL CIV. RTS. COMPLIANCE OFF., ENVT'L PROT. AGENCY., EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE (ECRCO) PROCESS AND CRITERIA FOR PRIORITIZING AND SELECTING AFFIRMATIVE COMPLIANCE REVIEWS 1 (2022).

79 EXTERNAL CIV. RTS. COMPLIANCE OFF., ENVT'L PROT. AGENCY., HOW TO FILE A COMPLAINT OF DISCRIMINATION 1 (2017).

80 42 U.S.C. § 2000d; Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (holding that the Civil Rights Act only refers to intentional discrimination).

81 Lau v. Nichols, 414 U.S. 563 (1974).

82 Lee v. Johnson, 404 U.S. 1215, 1217-18 (1971).

83 *Lau*, 414 U.S. at 568.

84 *Id.* at 564.

601.[85] In its holding, the Court stated: "Discrimination is barred which has that effect [of discriminating on account of race or national origin] even though no purposeful design is present."[86] Thus, the Court read the lack of discrimination specification in the Civil Rights Act as implying that *any* form of discrimination is prohibited under Title VI.

Just four years later, the five-Justice majority on the *Lau* Court thought differently.[87] Utilizing legislative history, the majority concluded that the refusal of Civil Rights Act supporters in Congress to define the term "discrimination" was predicated on an understanding that the meaning of "discrimination" would be made clear by reference to the Constitution.[88] Thus, the majority argued that Title VI "must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."[89] To buttress their conclusion, the majority cited then-Senator Hubert Humphrey, a sponsor of Title VI.[90] Senator Humphrey stated that the purpose of Title VI was:

> To insure that Federal funds [were] spent in accordance with the Constitution and the moral sense of the Nation . . . . [T]he bill has a simple purpose . . . to give fellow citizens—Negroes—the same rights and opportunities that white people take for granted . . . . It is no more than what our Constitution guarantees.[91]

Shortly thereafter, a member of that majority, Justice Byron White, clarified what Senator Humphrey had implied. In *Guardians Association v. Civil Service Commission of New York*, Justice White stated that the issue in *Bakke* was whether Title VI forbids intentional discrimination in affirmative action cases meant to remedy past discrimination, even though affirmative action was permitted by the Constitution.[92] In his view, the Court's opinion on Title VI in *Bakke* not only did not overturn *Lau* but, rather, was entirely consistent with *Lau*.[93] The issue

85 *Id.* at 566.

86 *Id.* at 567.

87 *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978).

88 *Id.* at 286.

89 *Id.*

90 *Id.* at 286.

91 *Id.* at 287.

92 Guardians Ass'n v. Civ. Serv. Comm'n, 463 U.S. 582, 590 (1983).

93 *Id.*

presented in *Guardians Association* concerned minority police officers who were disparately impacted by the New York City Police Department's hiring and firing process.[94] The Department would appoint police officers based on their exam scores, from highest score to lowest score, and would fire police officers on a "last hired, first fired" basis.[95] Because minorities had achieved the lowest scores, they were disproportionately affected by department layoffs.[96]

Justice White ultimately held for the plurality that discriminatory intent was not an essential element of a Title VI violation but that a private plaintiff should only be able to obtain injunctive relief for unintentional discrimination in violation of Title VI.[97] Specifically, for a private right of action to exist it is not necessary that discrimination be intentional but, in the view of the majority, only injunctive relief should be offered if the discrimination was unintentional. A few years later, the Court further clarified that Title VI delegated to federal agencies, like the EPA, the authority to determine what kind of disparate impacts were sufficiently significant and remediable to warrant altering the practices of the federal grantees who produced those impacts.[98]

D. *When Does a Statute Contain an Implied Private Right of Action?*

A private right of action exists if it is expressly stated. In the absence of an express statement, however, there are instances in which a private right of action may be implied.[99] In *Cort v. Ash*, the Court established a four-part test to determine whether a statute contained a private right of action.[100] Under this test, the Court considers whether (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) there is any indication of legislative intent to create or deny a remedy; (3) implying such a remedy would be consistent with

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94 *Id.* at 585-86.

95 *Id.* at 585.

96 *Id.*

97 *Id.* at 607.

98 Alexander v. Choate, 469 U.S. 287, 293-94 (1985).

99 *See* Caroline Bermeo Newcombe, *Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute*, 49 LOY. L.J. 117, 120 (2017) (discussing various Court-affirmed express private rights of action).

100 Cort v. Ash, 422 U.S. 66, 78 (1975).

the legislative scheme's underlying purposes; and (4) the cause of action is traditionally governed by state law.[101]

A few years after this test was established, the Court applied the four-part *Cort* test in *Cannon v. University of Chicago* to conclude that Congress had intended a private right of action in Title IX of the Civil Rights Act of 1964.[102] In *Cannon*, the plaintiff alleged that she was denied admission to two private medical schools on the basis of her sex and that she had a cause of action under Title IX, which barred sex discrimination by federally funded institutions.[103] The Court ruled that her lawsuit could proceed.[104] In his dissent, Justice Lewis Powell articulated what the *Sandoval* Court would come to recognize as a proper implied private right of action analysis two decades later: "[W]e should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist."[105]

Another way in which an implied right of action may exist is if a plaintiff's guaranteed constitutional rights have been violated and there exists no federal remedy to address that injury.[106] But, even when a constitutional injury occurs, an implied cuase of action does not exist if Congress provided a remedy, regardless of the remedy's adequacy.[107]

E. *Title VI Defanged: Private Right of Action Eliminated by the Court*

The elimination of a private right of action for disparate impact under Title VI began in 1990 with the Supreme Court's holding in *Alexander v. Sandoval*.[108] Alabama had amended its state constitution to make English the official language of the state.[109] This led the Alabama Department of Public Safety to administer state driver's license

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101 *Id.* at 778-84.

102 Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979).

103 *Id.* at 680.

104 *Id.* at 717.

105 *Id.* at 749; *see* Alexander v. Sandoval, 532 U.S. 275, 288 (2001).

106 Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

107 *See* Schweiker v. Chilicky, 487 U.S. 412, 427-28 (1988).

108 *Sandoval*, 532 U.S. at 278, 289.

109 *Id.* at 278-79.

examinations in English only.[110] The problem with this policy was that the Alabama Department of Public Safety was subjected to Title VI of the Civil Rights Act because it had accepted financial grants from both the United States Department of Justice and the Department of Transportation.[111] Sandoval, the respondent in *Sandoval*, brought suit arguing that this policy had a discriminatory effect on individuals of a different national origin.[112]

In his majority opinion, Justice Scalia observed that *Lau* had established that Section 601 of Title VI prohibited disparate impact discrimination.[113] He then stated that subsequent holdings had essentially overruled *Lau*.[114] Relying on *Cannon*, he held that while private individuals may sue to enforce Section 601, only intentional discrimination is actionable.[115] What justified that determination? In Scalia's view, Section 601 contained "rights-creating" language.[116] By stating that "[n]o person . . . shall . . . be subjected to discrimination," the statute implied that if an individual was discriminated against then they would have legal recourse.[117] Alternatively, Section 602, which applied to federal agencies, was viewed by the Court as being directed specifically at regulating agencies and, therefore, did not infer a private remedy for individual persons.[118] Because Section 601 only prevented intentional discrimination, in Scalia's view, any private right of action against disparate impact discrimination must originate from Section 602.[119]

The majority then conducted an analysis to determine when a private right of action to enforce federal law exists. Utilizing precedent, the Court held that only Congress possessed the power to create a private right of action.[120] Additionally, no private right of action could exist without a Congressionally created private remedy.[121] The Court

110 *Id.* at 279.
111 *Id.* at 278.
112 *Id.* at 279.
113 *Id.* at 285.
114 Alexander v. Sandoval, 532 U.S. 275, 285 (2001).
115 *Id.* at 279; *see* Cannon v. Univ. of Chi., 441 U.S. 677 (1979).
116 *Sandoval*, 532 U.S. at 288.
117 *Id.*
118 *Id.* at 289.
119 *See id.* at 286.
120 *Id.* (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979)).
121 *Sandoval*, 532 U.S. at 286 (citing Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1102 (1991)).

also refused to give any weight to Congressional intent behind Title VI, arguing that legal context should only be used if it clarifies the text.[122]

In analyzing whether Section 602 contained a private right of action, the Court turned to the remedies provided. In the event that a federal fund grantee violates Section 601, Section 602 authorizes the agency-grantor to terminate funding or enforce their regulations through other means provided by the law.[123] But the agency-grantor is required to inform the grantee-violator of there violation and allow them to correct their action.[124] Additionally, under Section 603 of Title VI, any enforcement action taken by an agency-grantor is subject to judicial review and any termination of funding may not be done until a written report is filed with the House and Senate committees exercising legislative jurisdiction over the subject-area and thirty days have elapsed since such filing.[125] Using the negative-implication canon, Justice Scalia articulated that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."[126] For that reason, according to the *Sandoval* Court, no private right of action was authorized by Title VI to address unintentional discrimination.[127]

ANALYSIS

II. INCONSISTENCIES IN INTERPRETATIONAL CANON USAGE

The canons of construction are interpretational approaches, or rules, that are utilized by courts to interpret the law.[128] When utilized by a new textualist like Justice Scalia, they are used in conjunction with a more "constrained" focus on the text itself.[129] Justice Scalia's new textualist approach seeks to "adhere to the *fair meaning* of the text" rather

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122 *Sandoval*, 532 U.S. at 288.

123 *See* 42 U.S.C. § 2000d-1.

124 *Id.*

125 42 U.S.C. § 2000d; 42 U.S.C. § 2000d-2.

126 *Sandoval*, 532 U.S. at 290.

127 *Id.* at 293.

128 *See* Andrew C. Spiropoulos, *A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915, 918 (2001).

129 *See* Charlie D. Stewart, *The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem*, 116 MICH. L. REV. 1485, 1486 (2018) (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2011)).

than give way to judicial activism.[130] This approach mirrored his concern that "the more the interpretive process strays outside a law's text, the greater the interpreter's discretion."[131] Through this lens, his opinion in *Sandoval* becomes clearer. In *Sandoval*, Justice Scalia invoked several canons of construction to aid him in reaching his judicial conclusion. However, his use of the negative-implication canon, mandatory-permissive canon, and constitutional avoidance canon is what brings his conclusion into question.

A. *The Negative-Implication Canon*

In his *Sandoval* opinion, Justice Scalia utilized various canons of construction as interpretational tools.[132] In doing this, however, he misconstrued and neglected precedent which effectually led him to apply various canons incorrectly. The primary canon Justice Scalia relied on was the the "negative-implication canon," which is used when a term or provision is left out of a list of enumerated items or provisions associated with each other.[133] The enumeration of specific provisions in a statute logically implies the exclusion of others.[134] When applied to Title VI, as Justice Scalia explained, this canon shows that "[s]ometimes the suggestion [by Congress] is so strong that it precludes a finding of congressional intent to create a private right of action, even though other aspects of the statute . . . suggest the contrary."[135] Simply put, a statute's remedial scheme may so obviously preclude certain methods of enforcement that no congressional intent could reasonably be read into it.

Applying that reasoning to *Sandoval*, Justice Scalia and the majority confronted specific methods of enforcement. Section 602 of Title VI of the Civil Rights Act[136] allows executive agencies to enforce their own regulations by either "terminating funding to the particular program, or part thereof that has violated the regulation or by any other

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130 *Id.* at 1491 (cleaned up).

131 *Id.*

132 *See* Alexander v. Sandoval, 532 U.S. 275, 284, 288.

133 *See* SCALIA & GARNER, *supra* note 129, at 107.

134 *See* John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1724 (2004).

135 *Sandoval*, 532 U.S. at 290 (citing Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 145 (1985)).

136 42 U.S.C. § 2000d-1.

means authorized by law."[137] Congress also provided[138] for how these avenues of enforcement may be utilized—"No enforcement action may be taken . . . 'until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.'"[139] If an agency chose the other enumerated avenue of enforcement—to terminate program funding—they would still be required to take additional steps to accomplish the termination. Specifically, they would be required to "file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action."[140] Although Justice Scalia's reasoning was clear, it was clearly not immune to error.

Section 602 arguably implies a private right of action, provided that the predicate for that right can be found in one's complaint. After providing a detailed order in which a complainant can pursue action through agencies—which is used by Justice Scalia to infer that Congress intended no other avenue of enforcement[141]—Section 602 additionally provides that "[c]ompliance with any requirement adopted pursuant to this section may be effected . . . by any means authorized by law."[142] That is, the enumerated methods of enforcement in Section 602 are not necessarily the only methods of enforcement available. For instance, it is plausible that if a constitutional right to a healthy environment were recognized within the penumbra of the Bill of Rights, as will be discussed later, then any encroachment on that right by a federal grantee may call for a private right of action.[143] But, since no such right has yet been established, a more realistic analysis of this statutory opening should focus on why Congress put it there in the first place.

The text of Title VI nearly mirrors Title IX in providing for relief by a termination of funding or by "any other means provided by law."[144] Additionally, when introduced to Congress, both bills were supported

137 *Sandoval*, 532 U.S. at 289 (cleaned up).

138 *See* 42 U.S.C. § 2000d-1.

139 *Sandoval*, 532 U.S. at 289 (citing 42 U.S.C. § 2000d-1).

140 *Id.* at 289 (citing 42 U.S.C. § 2000d-1).

141 *See Sandoval*, 532 U.S. at 284.

142 42 U.S.C. § 2000d-1.

143 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

144 *See* 20 U.S.C. §§ 1681-1688 (2018).

for nearly identical reasons by congress members. Senator John Pastore bluntly stated: "The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination."[145] Similarly, Representative Patsy Mink argued that Title IX was needed because "institutions should not be asking the taxpayers of this country to pay for this kind of discrimination."[146] In *Cannon*, a case concerning the application of Title IX, the Court articulated that the termination of funding as an avenue of enforcement serves the purpose of preventing the use of federal resources to support discrimination but that providing individual citizens effective protection against discrimination "might be remedied more efficiently by an order requiring an institution to accept an applicant who had been improperly excluded."[147] Despite the consensus that the termination of funding should not be view by the Court as a one-size-fits-all method of enforcement, Justice Scalia's discussion of Title VI in *Sandoval* suggests his disagreement.

In discussing the many different restrictions, provisions and established order of action that Section 602 provides for rectifying civil rights violations, Justice Scalia concluded that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."[148] Title IX jurisprudence and the negative-implication canon make clear that Justice Scalia's interpretation of Section 602 was incorrect to the extent that a private right of action is necessarily forbidden. Title IX jurisprudence and a basic understanding of the negative-implication canon establish that "[b]y any other means authorized by law" was included to provide flexibility in Section 602 enforcement—contradicting Justice Scalia's stringent interpretation.

B. *The Mandatory-Permissive Canon*

Another interpretational canon that brings Justice Scalia's opinion into question is the mandatory-permissive canon. The mandatory-permissive canon of interpretation establishes that, in statutory language, "may" is generally construed as permissive.[149] As opposed to a mandate, a permissive construction merely provides discretion or permission

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145 110 CONG. REC. 7062 (1964).

146 117 CONG. REC. 39252 (1971).

147 Cannon v. Univ. of Chi., 441 U.S. 677, 705 (1979).

148 Alexander v. Sandoval, 532 U.S. 275, 290 (2001).

149 *See* SCALIA & GARNER, *supra* note 129, at 112.

for those abiding by a statute to act in a certain manner.[150] It primarily serves to prevent government compulsion.[151] In the context of Title VI of the Civil Rights Act, this canon suggests that Congress intended that compliance enforcement be left to the discretion of both federal agencies and judicial oversight.

Section 602 begins by instructing federal agencies and departments to "effectuate the provisions of [Section 601] . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute."[152] Section 601, which is to be effectuated by Section 602, specifically states that no individual can be discriminated against or denied the benefits of any program receiving federal financial assistance.[153] Thus, Section 602 is primarily concerned with preventing Section 601 discrimination at an agency level. Section 602 then goes on to lay out the manner in which non-compliance may be addressed by federal agencies. Notably, these methods are introduced with the permissive "may" as opposed to a more mandatory instruction: "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 . . . or (2) by any other means authorized by law."[154] Although the previously mentioned negative-implication canon dealt with the enforcement options themselves, the mandatory-permissive doctrine primarily concerns the fact that even these enumerated options are suggestions. This interpretation is supported by the statutory language of Section 603, which follows: "Any department or agency action taken pursuant to Section 602 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds."[155] By applying its provisions to *any* action taken pursuant to Section 602, Section 603 acknowledges that there is not necessarily a specific action that must be taken or can be

150 Major Sean P. Mahard, *Where the Personal Jurisdiction Ends: A Bright-Line Rule for Determining When The Military Loses In Personam Jurisdiction*, 228 MIL. L. REV. 183, 211 (2020).

151 *See* SCALIA & GARNER, *supra* note 129, at 114.

152 42 U.S.C. § 2000d.

153 42 U.S.C. § 2000d-1.

154 *Id.* (emphasis added).

155 42 U.S.C. § 2000d-2.

expected to be taken pursuant to Section 602.[156] Therefore, it acknowledges that there is some degree of choice.

The problem that arises with this section is implicated by Justice Scalia's agreement that "[i]t is . . . beyond dispute that private individuals may sue to enforce [section] 601."[157] Section 602 specifically builds on Section 601 and even says as much by ordering those agencies and departments it addresses to effectuate Section 601's provisions.[158] The permissive manner in which the compliance enforcement methods are described then indicates that those methods are merely "precatory suggestions."[159] So, because private individuals may sue to enforce environmental discrimination based on race—covered by Section 601—it should then follow that they are allowed to sue to enforce those actions, which are covered by Section 602, since it builds on Section 601. The mandatory-permissive canon at the very least establishes that Justice Scalia's interpretation of Title VI—that there are specific, congressionally proscribed methods of enforcement—is dismissive of the actual statutory text.[160]

C. *The Constitutional Avoidance Canon*

The constitutional avoidance canon has been historically used by the Court to interpret statutes "where they are critically ambiguous, to avoid significant constitutional controversies."[161] The principle of consitutitonal avoidance finds that if a statute can be read in multiple ways, the Court should select the interpretation that does not violate constitutional principles unless that construction would contradict legislative intent.[162] When this canon is applied, the only possible constructions of a statute that should be considered are those that are "fairly possible."[163] Additionally, this canon is not to be applied when its result is at variance

156 *See id.*

157 Alexander v. Sandoval, 532 U.S. 275, 280 (2001).

158 *See* 42 U.S.C. § 2000d-2.

159 SCALIA & GARNER, *supra* note 129, at 114.

160 *See id.*; 42 U.S.C. § 2000d-1.

161 H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313, 1315 (2005) (cleaned up).

162 *See* Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 160 (2001).

163 *See* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 239 (2010).

"with the policy of the legislation as a whole."[164] An application of this canon to *Sandoval* and Title VI, in general, would have likely led to a different result.

As discussed earlier, a critical feature of Justice Scalia's analysis in *Sandoval* is his determination that Section 602 does not contain the "rights-creating" language that Section 601 contained.[165] He then analyzes the multiple restrictions and instructions that Section 602 provides for both enforcing compliance and remedying non-compliance.[166] That leads him to his conclusion that a private right of action is not allowed within the context of Section 602 because of a perceived lack of "congressional intent to create a private right of action."[167] This is Justice Scalia's way of selecting a construction without contradicting legislative intent. Title VI, however, was enacted specifically to prohibit racial discrimination by entities that receive federal financial assistance.[168]

The "rights-creating language" that Justice Scalia acknowledges in Section 601 should be understood as the basis for the entire statute. Without it, the rest of Title VI is meaningless. Title VI of the Civil Rights Act, in its entirety, affords individuals the right to not be discriminated against on the basis of their race, ethnicity, or national origin.[169] Justice Scalia's articulation that only intentional discrimination be afforded a private cause of action is contradicted by the very case he cites. The Court in *Cannon* acknowledged 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 the victims of the prohibited discrimination."[170] However, they do not specify if an implied private cause of action's existence depends on the intentional nature of discrimination. Justice Scalia's observation that the complaint at the center of *Cannon* was an instance of intentional discrimination[171] is inconsequential to any actual application of Title VI for that very reason. Additionally, in *Alexander v. Choate*—the case that Justice Scalia cites to buttress his point—the Court went as far as to acknowledge that "Title VI . . . delegate[s] to the agencies . . . the

164 16 C.J.S. *Const. Law* § 248 (rev. ed. 2023).
165 *See* Alexander v. Sandoval, 532 U.S. 275, 288 (2001).
166 *See id.* at 288-90.
167 *Id.* at 289.
168 42 U.S.C. §§ 2000d-2000d-1.
169 42 U.S.C. § 2000d.
170 Cannon v. Univ. of Chi., 441 U.S. 677, 703 (1979).
171 Alexander v. Sandoval, 532 U.S. 275, 282 (2001).

complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and [are] readily enough remediable, to warrant altering the practices of the federal grantees that produced those impacts."[172] The right of individuals to not be discriminated against by entities receiving federal funding is present in each provision of Title VI.[173]

Although it may make sense that Congress would be explicit if it intended to create a private cause of action, the negative-implication canon and mandatory-permissive canon's application to this case logically infers that Congress would be explicit if it did not intend to create a private cause of action. If Congress did not intend to eliminate a private cause of action, then Justice Scalia's opinion presents a potential constitutional problem wherein the encroachment of individual rights is not privately actionable. A penumbral analysis makes this more apparent.

III. ENVIRONMENTAL EQUALITY: A GUARANTEED RIGHT WITHIN THE PENUMBRA?

The Supreme Court has held that guaranteed constitutional rights need not be explicitly written in the Constitution to exist.[174] Rather, they may be implied by the provisions within the Bill of Rights.[175] Under a Ninth Amendment analysis, it should be understood that a right to a healthy environment is inferred by the Bill of Rights.

In *Griswold v. Connecticut*, the first notable case where a penumbral analysis was specifically utilized, Justice William O. Douglas described the concept of a "penumbra" as an "emanation from those [constitutional] guarantees that help give them life and substance."[176] In other words, Justice Douglas was arguing that the enumerated rights of the Constitution are necessarily accompanied by "zone[s]" which implicate a more nuanced understanding of what rights are protected.[177] For instance, the First Amendment protects the "right of the people peaceably to assemble."[178] In *NAACP v. State of Alabama*, the Supreme Court protected the "freedom to associate and privacy in one's associations"

172 Alexander v. Choate, 469 U.S. 287, 293-94 (1985).

173 *See* 42 U.S.C. §§ 2000d-2000d-2.

174 See Griswold v. Connecticut, 381 U.S. 479, 483 (1965).

175 *Id.*

176 *Id.* at 484.

177 *See id.* at 485.

178 U.S. CONST. amend. I.

on the basis that the freedom of association was protected by the First Amendment—an amendment which does not explicitly mention association.[179] The "freedom of association" that was recognized, according to the majority, emanated from the right of the people to peaceably assemble in the First Amendment.[180] Without being explicitly labeled as such, it was a penumbral right.

Griswold is hardly the only major Supreme Court case where a penumbral analysis has been utilized. In *Eisenstadt v. Baird*, the Supreme Court ruled that the right to privacy emanating from the Bill of Rights extends to the right of unmarried individuals to use contraception in their sexual relations.[181] The Court in *Eisenstadt* held: "If the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion . . . so fundamentally affecting a person as the decision whether to bear or beget a child."[182] In that same "penumbra" the Supreme Court has also recognized a right for same-sex couples to engage in "certain intimate conduct,"[183] a right for same-sex couples to marry,[184] and, until recently, a right to female bodily autonomy.[185] The ruling in *Griswold* has produced a line of Supreme Court cases that validate the spirit of the Ninth Amendment, which states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[186] But what real impact may this form of analysis have on a right to environmental health?

The Declaration of Independence states that all men are endowed with unalienable rights including "Life, Liberty, and the pursuit of Happiness."[187] But, despite its importance as a founding document, the Declaration of Independence carries nearly no legal weight in our judicial system. As remarked by the Eastern District of New York, "[w]hile the Declaration of Independence states that all men are endowed

179 Nat'l Ass'n for the Advancement of Colored People v. State of Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958).

180 *Id.*; U.S. CONST. amend. I.

181 Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).

182 *Id.* at 453.

183 *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003).

184 *See* Obergefell v. Hodges, 576 U.S. 644, 672(2015).

185 *See* Roe v. Wade, 410 U.S. 113, 153-54 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

186 U.S. CONST. amend. IX.

187 The DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

certain unalienable rights . . . it does not grant rights that may be pursued through the judicial system."[188] And although no amendment explicitly states that American citizens shall have a "right to life," various constitutional amendments clearly draw on that right. For instance, the Second Amendment recognizes that the right to gun ownership and, by extension, the right to self-defense is protected.[189] If there was no recognized right to life then there would be no need for such an amendment. The natural right to life is further recognized by the Fifth Amendment which recognizes that no person "[shall] be deprived of life without due process of law."[190] A natural right to life has clearly manifested through the Bill of Rights. A right to be free from an unhealthy environment is implicated by that same right.

The Supreme Court's ruling in *Sandoval* bears on whether a right to a healthy environment is recognized in American jurisprudence. If no such right is recognized then, under *Sandoval*, only intentional environmental discrimination is privately actionable.[191] The Court distinguished between the "rights-creating" language in Section 601 of Title VI and the absence of similar language in Section 602.[192] Under this framework, if an individual successfully alleged that they were intentionally discriminated against based on their race, then they would have a recognized right of action.[193] But, absent proof to that effect, these individuals may only rely on executive agencies to either "terminat[e] funding to the particular program . . . that has violated the regulation or by any other means authorized by the law."[194] The ruling in *Sandoval* has rendered any allegation of environmental racism, not proven to be unequivocally intentional, moot. However, a recognition of a right to a healthy environment within the penumbra would provide an alternative avenue to prevent environmental discrimination.

A violation of recognized constitutional rights affords individuals an implied right of action where no right has been enumerated.[195] In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, a

188 Coffey v. United States, 939 F. Supp. 85, 191 (E.D.N.Y. 1996).

189 *See* U.S. CONST. amend. II; Dist. of Columbia v. Heller, 554 U.S. 570, 592 (2008).

190 U.S. CONST. amend. V.

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

192 *Id.* at 288.

193 *Id.*

194 *Id.* at 289 (cleaned up).

195 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 405 (1971).

complaint was filed against several Federal Bureau of Narcotics agents alleging that, while acting under Federal authority, they violated the petitioner's Fourth Amendment right against unreasonable searches and seizures.[196] The lack of a congressionally-approved enforcement regime or designated relief for the violation of a constitutional right will not prevent the Court from allowing damages "according to the distinctive historical traditions of equity . . . ."[197]

That said, a right of action afforded to individuals to combat environmental discrimination would not necessarily be recognized on *Bivens* alone. The Court has also held that a cause of action will not be implied for a violation of constitutional rights where Congress has already provided a remedy.[198] The equitable sufficiency of the enumerated remedy is irrelevant to the Court's determination in such cases.[199] In this case, Section 602 of Title VI offers two avenues of enforcement. An agency may terminate their funding to programs that violate their standards which, within the scope of this paper, concerns federal grants made to facilities and companies whose operations negatively impact communities-of-color.[200] Alternatively, the other avenue provided is "by any other means authorized by law."[201] This caveat may leave recognizing a *Bivens* action on the table provided that the entities targeted by a right of action are acting with federal grant money. But, the remedial provision that agencies may withhold their funds may also prevent the Court from affording any other remedial action.

A right to a healthy environment should not be understood as a positive right. In other words, such a recognized right would not create an obligation for the federal government to ensure that every American lives in a healthy environment. Rather, the federal government would merely have an obligation to not contribute to an unhealthy environment. The Constitution is a negative-rights document.[202] It has not been historically understood as affording individuals a positive grant of

196 *Bivens*, 403 U.S. at 388-89.

197 *Id.* at 404.

198 *See* Schweiker v. Chilicky, 487 U.S. 412, 412 (1988).

199 *Id.*

200 *See* Alexander v. Sandoval, 532 U.S. 275, 289 (2001).

201 *Id.* (citing 42 U.S.C. § 2000d-1).

202 *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) (holding that the Constitution's purpose was to protect citizens from the State, not ensure that they were protected from each other).

rights, nor should it be. Rather, it recognizes the right of individuals to be free of governmental intrusion in certain aspects of day-to-day life.[203]

A recognized right to environmental health would prevent the federal government from providing grants and subsidies to corporate actors engaged in environmental racism. Recently, the Environmental and Energy Study Institute reported that the United States provides roughly $20 billion in direct subsidies to the fossil fuel industry, with 80 percent of those funds going to the oil and gas industry.[204] That makes the United States federal government complicit in any environmentally detrimental actions caused by those companies. For instance, in just the past year, the federal government has awarded north of $10 million in federal grants to Chevron.[205] In 2020, Chevron paid the Bay Area Quality Management District $147,000[206] for twenty-nine air quality violations at its facility in majority-minority Richmond, California.[207] Additionally, in 2018, Chevron agreed to pay the city of Richmond $5 million after a refinery fire forced thousands of majority-minority residents to seek medical treatment.[208] Those are just two examples of a company that receives federal funding using its resources in a way that negatively impacts minorities. A heightened standard that requires plaintiffs to prove intentional discrimination makes it likely that companies like Chevron will continue to take advantage of minority communities. Absent any recognition that a right to a healthy environment is protected by the Constitution, the defanged avenue of action provided by the Court in *Sandoval* will remain the only avenue available to address disparate environmental impact.

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[203] *See id.*

[204] Johannes Urpelainen & Elisha George, *Reforming Global Fossil Fuel Subsidies: How the United States Can Restart International Cooperation*, BROOKINGS INST. (July 14, 2021), https://www.brookings.edu/research/reforming-global-fossil-fuel-subsidies-how-the-united-states-can-restart-international-cooperation/.

[205] *Subsidy Tracker Parent Company Summary: Chevron*, GOOD JOBS FIRST, http://subsidy-tracker.goodjobsfirst.org/parent/chevron (last visited Mar. 27, 2023).

[206] *Air District Settles Case with Chevron USA Inc.*, BAY AREA AIR QUALITY MGMT. DIST. (Dec. 28, 2020), https://www.baaqmd.gov/news-and-events/page-resources/2020-news/122820-chevron-settlement.

[207] *See QuickFacts Richmond City, California*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/richmondcitycalifornia (last visited Apr. 7, 2023).

[208] Christine Schiavo, *Smoky Chevron Flare Alarms Residents, Spews Sulfur Dioxide Into Air*, RICHMOND CONFIDENTIAL (Aug. 11, 2021), https://richmondconfidential.org/2021/08/11/richmond-chevron-flare/.

IV. SOLUTION BY AMENDMENT

The holding in *Sandoval* was predicated on several different court cases.[209] A departure from precedent "demands special justification."[210] Although a penumbral analysis could be used to establish the existence of a constitutional right to environmental health, the Supreme Court likely would not find it practical to overturn several cases to enforce compliance. That leaves Congress to legislatively address Title VI's court-sanctioned deconstruction. In 2021, members of Congress introduced the Environmental Justice for All Act which, among other provisions, contains a provision that would amend the statutory text of Title VI to allow private rights of action for unintentional discrimination.[211] Specifically, the bill would "prohibit disparate impacts on the basis of race, color, or national origin as discrimination."[212] Individuals affected by disparate impacts would be proscribed a right of action.[213] The bill would also require executive agencies to prepare community impact reports that assess the environmental impacts of their actions on communities.[214] If passed, legislation of this caliber would render the Supreme Court's holding in *Sandoval* moot without disrupting prior rulings. It would also directly address the majority in *Sandoval's* view that only Congress can prescribe legal remedies.[215] Rather than overturn sixty years of Supreme Court precedent, the best path forward in rectifying the majority's mistake in *Sandoval* is to adopt an amendment in the vein of this act.

CONCLUSION

Expanding civil rights protections to unintentional acts of discrimination gives one pause for good reason. As some have pointed out, disparate impact theory may be vague as utilized.[216] Where one

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[209] *See* Alexander v. Sandoval, 532 U.S. 275, 282-86 (2001).

[210] *See* Gamble v. United States, 139 S. Ct. 1960, 1969 (2019) (quoting Arizona v. Ramsey, 467 U.S. 203, 212 (1984)).

[211] Environmental Justice for All Act, S.872, 117th Cong. (2021).

[212] *Id.*

[213] *Id.*

[214] *Id.*

[215] *See* Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

[216] *See* Michael Selmi, *Was the Disparate Impact Theory A Mistake?*, 53 UCLA L. REV. 701, 770 (2006).

sees a racial group being disproportionately discriminated against, another may find a socioeconomic explanation—a category not covered by Title VI.[217] But, the past should be consulted to inform the present. The Civil Rights Act was necessary precisely because no matter what the Federal government did to rectify racial discrimination, there was always a state entity or individual ready to take advantage of legislative loopholes. State response to judicial clarification that the Fifteenth Amendment prohibited only intentional discrimination was to discriminate in a facially neutral manner.[218] Likewise, the majority's decision in *Sandoval* gives entities that contract with the Federal government a roadmap for avoiding community-led lawsuits and does so using a faulty, error-riddled analysis that ignores precedent. While the Ninth Amendment may be used to address this issue, it was implicitly disavowed by the Supreme Court this past term.[219] Therefore, the only feasible way to rectify this mistake—and to safeguard what should be a constitutionally guaranteed right—is to amend the statutory language in Title VI of the Civil Rights Act to include a private right of action for unintentional discriminatory acts.

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217 See 42 U.S.C. § 2000d.

218 Parson & McLaughlin, *supra* note 42, at 78.

219 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245-46 (2022).