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Sandoval’s Retrenchment on Civil Rights Enforcement: The Ultimate Sorcerer’s Magic

By Jane Perkins and Sarah Jane Somers

Alexander v. Sandoval is one of the U.S. Supreme Court’s most important recent decisions.¹ It will influence future civil rights enforcement and may juggle the basic concepts of stare decisis. Announcing simply that it was “bound by holdings, not by language,” Justice Scalia’s majority opinion picked and chose among conclusions from previous Supreme Court decisions to reach its desired result.² Predictably attorneys on both sides of issues are already quoting this phrase to support their arguments.³ Indeed this catchall excuse for ignoring inconvenient precedent could prove ubiquitous in the future, and it threatens to change the nature of stare decisis. In part I of this article we discuss the Sandoval opinion in depth. In part II we explore the likely future effects of the decision.

I. The Sandoval Opinion

The Sandoval plaintiffs were non-English speakers who challenged the Alabama Department of Public Safety’s policy to administer driver’s license examinations only in English.

A. Background

In 1990 Alabama amended its constitution to declare English the state’s official language. Previously the Alabama Department of Public Safety had administered driver’s license examinations in numerous languages, obtaining copies at “no cost” and encountering “no significant problems in administering them.”⁴ After the constitutional amendment, the department decided to administer the examinations only in English. Even after adopting the rule, the department continued to issue

¹ Alexander v. Sandoval, 121 S. Ct. 1511 (2001) (Clearinghouse No. 51,706). The reference in the title of this article to “sorcerer’s magic” is from the opinion: “[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer’s apprentice but not the sorcerer himself.” Id. at 1522.
² Id. at 1517 (2001). Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Thomas joined Justice Scalia as members of the majority.
³ See European Cmty. v. RJR Nabisco Inc., 150 F. Supp. 2d 456, 491 (E.D.N.Y. 2001) (citing Sandoval for the proposition that the court is bound only by previous holdings and not general presumptions); A.D. Bedell Wholesale Co. v. Phillip Morris, 263 F.3d 239, 253 (3d Cir. 2001) (quoting Sandoval’s statement that court is bound by holdings, not language); Conoco v. J.M. Huber, 148 F. Supp. 2d 1157, 1172 n. 16 (D. Kan. 2001) (stating that courts are not bound by language but by holdings).
⁴ Brief in Opposition to Petition for Writ of Certiorari (on file with Jane Perkins and Sarah Jane Somers).
licenses routinely to new residents who could not speak or read English as long as they had a valid license from another state.

Martha Sandoval, a Mexican immigrant residing in Mobile, could read road signs, but her knowledge of English did not enable her to take the written examination. In a class action lawsuit filed in federal court, she alleged that the driver’s license rule had the effect of subjecting non-English speakers to discrimination based on their national origin. Ms. Sandoval sought to enforce Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination in programs receiving federal funding, and its implementing regulations. Neither the statute nor the regulations expressly authorize private enforcement; however, since the Civil Rights Act’s passage, courts, Congress, federal agencies, federal fund recipients, and private individuals had all acknowledged that individuals have an implied private right of action to enforce both Title VI and the regulations. Nevertheless, the department argued that the plaintiff class had no right to enforce the rules.

Following a two-day trial, the district court held that the department’s English-only rule violated the Title VI regulations. The court of appeals unanimously affirmed the judgment below and held that Title VI created an implied private cause of action to obtain injunctive and declaratory relief under the federal regulations. Alabama requested review by the Supreme Court and, in something of a surprise, the Court granted certiorari. As discussed below, the Court had approved of private actions under Title VI on several previous occasions. And, as pointed out by the dissent, all nine circuits that had addressed the issue had allowed these actions.7

B. Private Enforcement Restricted

The decision in Alexander v. Sandoval eliminates individuals’ ability to enforce the Title VI disparate impact regulations through an implied private right of action.8 In so doing, it offers yet another example of the Court’s philosophy of limited federalism, and it is in stark contrast to the view that prevailed in the Supreme Court when Congress passed Title VI—that courts should “provide such remedies as are necessary to make effective the congressional purpose.”9

While Sandoval presented a case of statutory construction, Justice Scalia’s result-oriented approach took greater pains to disparage Justice Stevens’s dissent than to assess the meaning of the statute and congressional intent. Readers of the opinion are exposed to an acidic dispute between the majority and the dissent as the two sides argue the meaning of the Court’s previous cases and the proper role of judicial and legislative deference.

Title VI of the Civil Rights Act, section 601, 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.”10 Section 602 authorizes federal agencies “to effectuate the provisions of section 601 by issuing rules, regulations, or orders of general applicability.”11 Immediately following passage of

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6 Id., 197 F.3d 484 (1999).
7 Alexander v. Sandoval, 121 S. Ct. at 1524 n.1.
8 Id. at 1511.
9 J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964). But see Alexander v. Sandoval, 121 S. Ct. at 1520 (finding that understanding to have been abandoned and noting that “having sworn off the habit of venturing beyond Congress’s intent, we will not accept respondent’s invitation to have one last drink”).
11 Id. § 2000d-1.
Title VI, the U.S. Departments of Justice and Transportation promulgated the “disparate impact” regulations at issue in Sandoval; the regulations prohibit federal fund recipients from “utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of race, color, or national origin.”

The Court acknowledged three aspects of Title VI that it would accept as given. First, private parties have an implied private right of action to enforce section 601. Second, section 601 prohibits only intentional discrimination. Third, for purposes of the case, the disparate impact regulations are valid. On this last point, however, the Court noted “considerable tension” between section 601, which prohibits only intentional discrimination, and the disparate impact regulations, which proscribe activities that section 601 allows. Beyond these three points, the Court conceded little. It neither deferred to its previous opinions nor admitted that congressional intent supported the private cause of action.

Stating that the Court is “bound by holdings, not language,” Justice Scalia rejected the argument that the Court already had decided that Title VI created a private right of action to challenge disparate impact discrimination. In fact, the Court had allowed enforcement of Title VI (or its gender-based twin, Title IX) on several occasions. These cases do not contain simple, straightforward holdings; rather, they are deeply fractured decisions that, as Justice Stevens pointed out, require careful analysis. However, in an upsetting move that is sure to introduce confusion to concepts of stare decisis, the Court narrowed these cases to single-sentence holdings and refused to accord them any further meaning. Thus, according to the majority, Cannon v. University of Chicago “held that Title IX created a private right of action to enforce its ban on intentional discrimination, but had no occasion to consider whether the right reached regulations barring disparate impact discrimination.”

Guardians Association v. Civil Service Commission of New York City “held that private individuals could not recover compensatory damages under Title VI except for intentional discrimination.” Because none of these decisions could be boiled down to a single-sentence holding that individuals have a private right of action to enforce the disparate impact regulations, the Court refused to be bound by these precedents.

Having freed itself from the Court’s previous decisions, the majority then applied its methodology to decide whether Congress intended that a private right of action should be available to enforce the disparate impact regulations. The Court agreed that regulations applying section 601’s ban on intentional discrimination could be privately enforced (because a “Congress that intends the statute to be enforced through a private right of action intends the authoritative interpretation of the statute to be enforced as well”). However, an implied right to enforce the disparate impact regulations could

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12 28 C.F.R. § 42.104(b)(2) (U.S. Department of Justice regulation); 49 C.F.R. § 21.5(b)(2) (similar U.S. Department of Transportation regulation).
13 According to the dissent, this “given” was “never the subject of thorough consideration by a Court focused on that question.” Alexander v. Sandoval, 121 S. Ct. at 1531.
14 Id. at 1517.
15 Id.
16 For case citations, see id. at 1517–19, 1528 n.8.
17 Id. at 1517, citing Cannon v. Univ. of Chi., 441 U.S. 677 (1979).
18 Id. at 1517–18, citing Guardians Ass’n v. Civil Serv. Comm’n of N.Y. City, 463 U.S. 582 (1983).
19 Id. at 1519.
20 Id. at 1518.
not be grounded in section 601 because the regulations forbid conduct that section 601, which proscribes only intentional discrimination, permits.

Having thus limited section 601, the majority focused on the much narrower question of whether private enforcement of the regulations is independently authorized by section 602, which authorizes federal agencies to effectuate section 601 by issuing rules. Justice Scalia identified numerous problems with this route of enforcement. First, “far from displaying congressional intent to create new rights, section 602 limits agencies to ‘effectuating’ rights already created by section 601.” Second, the focus of section 602 is not on private individuals but on administrative agencies. “Statutes that focus on the person regulated rather than the individuals protected create ‘no implication of an intent to confer rights on a particular class of persons.’” Third, the methods of enforcement contained in section 602 do not reflect an intent to create a private remedy. Section 602 empowers agencies to enforce the rules by terminating funding of a program that has violated the regulation or “by any other means authorized by law,” and it establishes certain restrictions on agency enforcement. Moreover, “[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.” In sum, the Court found no evidence “anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under section 602.” Failing to find authorization for private enforcement of the regulations in the text of either section 601 or section 602, the Court decided its search could end.

C. The Dissent

Justice Stevens, writing for the dissent, argued that the question before the Court “was only an open question in the most technical sense” and that, by deciding against enforcement, the majority issued a decision “unfounded in our precedent and hostile to decades of settled expectations.” He criticized the majority for “imposing its own preferences as to the availability of judicial remedies” and engaging in a review that “blind[ed] itself to important evidence of congressional intent.”

To the dissenting justices, the decision to allow enforcement should have been a matter of stare decisis. While agreeing that the Court had never recognized “in so many words” a private right to enforce the disparate impact regulations, the dissent noted the Court’s responsibility to canvas the prior opinions for guidance “with the care they deserve.” This process, according to the dissent, would have

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21 Id. at 1519.
22 Id. at 1521.
23 Id. (quoting Califonia v. Sierra Club, 451 U.S. 287, 294 (1981). But see id. at 1536 (“But, of course, there was no reason to put that language in § 602 because it is perfectly obvious that the regulations authorized by § 602 must be designed to protect precisely the same people protected by § 601.”) (Stevens, J., dissenting).
24 Id. at 1521 (quoting 42 U.S.C. § 2000d-1).
25 Id. at 1521–22. The dissent noted this discussion as another example of the Court ignoring stare decisis because it carefully considered and rejected this same argument in Cannon. Id. at 1536 (citing Cannon, 441 U.S. at 704–7). Moreover, the dissent described this enforcement mechanism as inadequate because federal agencies rarely, if ever, terminated funding; it also said that this reasoning was inconsistent with the majority’s “given” that private suits for intentional discrimination were allowed because intentional discrimination was also a reason for termination of federal funding.
26 Id. at 1522.
27 Id. at 1536, 1524.
28 Id. at 1534.
29 Id. at 1524–28.
30 Id. at 1524.
shown that the Court had considered the question and concluded that a private right of action did exist.31

The dissenting opinion turned to the methodology for analyzing the text and structure of Title VI. It criticized the majority for employing a straightjacketed analysis that enabled it to treat section 601 and judicial decisions interpreting that statute as authoritative but treat the regulations promulgated by the agencies under section 602 as "poor step-cousins," either parroting the text of section 601, and therefore enforceable, or advancing an agenda untethered to section 601 and therefore suspect. In stark contrast, the dissent argued that sections 601 and 602 did not stand in isolation but functioned as an integrated remedial scheme. "For three decades, we have treated section 602 as granting the responsible agencies the power to issue broad prophylactic rules aimed at realizing the vision laid out in section 601, even if the conduct captured by these rules is at times broader than that which would otherwise be prohibited," the dissent said.32

At section 601 the text of Title VI supports actions against federal fund recipients that engage in unambiguous discrimination, and at section 602 the text of Title VI supports actions against fund recipients that engage in more subtle discrimination forms that the relevant administrative agencies have identified and that regulations have addressed.33 Thus "the regulations are inspired by, at the service of, and inseparably intertwined with section 601's anti-discrimination mandate" and should be subject to private enforcement.34

Finally the dissent found the decision at odds with "lengthy, consistent, and impassioned" legislative history.35 When the disparate impact regulations were promulgated, "prevailing principles of statutory construction assumed that Congress intended a private right of action whenever such a cause of action was necessary to protect individual rights granted by valid federal law."36 Moreover, legislative history at the time of enactment, amendments to the civil rights legislation, and legislative history over the last two decades all were ample evidence of Congress' clear understanding of the existence of the private right of action.37

II. Sandoval's Aftermath

In this part we explore the effects that Alexander v. Sandoval will likely have on attempts to enforce civil rights protections. As discussed below, the decision has created confusion regarding

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31 In particular, the dissent analyzed (1) Lau v. Nichols, 414 U.S. 563 (1974), and found an "identical case" where all justices believed that private parties could enforce Title VI and its regulations (Alexander v. Sandoval, 121 S. Ct. at 1525); (2) Cannon and found the majority's analysis "wholly foreign" to the text and reasoning which held that all the discrimination prohibited by the regulatory scheme might be the subject of a private lawsuit (Alexander v. Sandoval, 121 S. Ct. at 1526 n.4); and (3) Guardians and found that, while the justices disagreed about remedies, a "clear majority" expressly stated that private parties could enforce the disparate impact regulations (Alexander v. Sandoval, 121 S. Ct. at 1526).

33 Id. at 1530.
34 Id. at 1531. Support for enforcement is also noted from Chevron U.S.A. v. Natural Res. Def. Council Inc., 467 U.S. 837 (1984), which treats validly promulgated regulations as controlling interpretations of the statute's breadth. Alexander v. Sandoval, 121 S. Ct. at 1532-34.
35 Alexander v. Sandoval, 121 S. Ct. at 1530. According to the dissent, the majority's rebuff of legislative evidence is part and parcel of its failure adequately to apply the Cort v. Ash (422 U.S. 66 (1975)) factors for finding an implied right of action. Id. at 1533-34.
36 Id. at 1524.
37 Id. at 1528 n.9, 1532 n.19, 1534-35.
the Court's earlier case holdings and the remaining avenues for private enforcement to address civil rights violations.

A. Future of Title VI Enforcement

Without a doubt, Sandoval will severely limit enforcement of Title VI. Some cases that were under way when the decision came out have already been affected.\footnote{See, e.g., Cureton v. NCAA, 252 F.3d 267 (3d Cir. 2001) (dismissing case challenging college athletic eligibility rule requiring certain Scholastic Aptitude Test scores, denying motion to amend complaint to include count of intentional discrimination); Pryor v. NCAA, 153 F. Supp. 2d 710 (E.D. Pa. 2001) (dismissing Title VI claims that academic requirements to play college sports were intentionally designed and implemented to have a disparate effect on minorities as failing to state a claim for intentional discrimination). See also James v. City of Dallas, 254 F.3d 551 (5th Cir. 2001).} Advocates will most likely seek to enforce disparate impact regulations through another avenue of private enforcement, the Civil Rights Act's Section 1983, which provides an express cause of action to individuals when the state deprives them of the protections of federal law.\footnote{42 U.S.C. § 1983.} Justice Stevens opines in his dissent that the disparate impact regulations may still be enforced under this law.\footnote{Alexander v. Sandoval, 121 S. Ct. at 1527.} Despite this opinion, however, advocates should be aware that this question is not fully settled.

One early sign is promising, for the federal district court of New Jersey has recently allowed enforcement of disparate impact regulations through Section 1983. In South Camden Citizens in Action v. New Jersey Department of Environmental Protection the plaintiffs claimed that defendants violated section 602 of Title VI and the Environmental Protection Agency's regulations implementing that section when they did not consider the adverse racially disparate impact of their decision to allow a cement plant to operate its proposed facility.\footnote{South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505, 508 (D.N.J. 2001); id., 145 F. Supp. 2d 446 (D.N.J. 2001) (Clearinghouse No. 53,759).} The court had ruled in plaintiffs' favor and granted their request for a preliminary injunction and declaratory judgment.\footnote{South Camden, 145 F. Supp. 2d at 446.} That original decision was based upon the assumption that an implied private right of action existed under section 602 and the disparate impact regulations implementing it; however, five days later, the Supreme Court issued its decision in Sandoval. The South Camden court accordingly reconsidered its decision.

While acknowledging that Sandoval essentially overruled its earlier decision, the court refused either to vacate or to stay its order for a preliminary injunction. Instead it concluded that the plaintiffs could pursue their claim for disparate impact discrimination under Section 1983 and that they were entitled to a preliminary injunction under that theory.\footnote{Id. at 509, 511.}

First, emphasizing that it would interpret Sandoval narrowly and look only to its "holding," the South Camden court found that Sandoval did not reach the issue of whether a claim could be brought pursuant to Section 1983.\footnote{Id. at 516–17. The court twice quoted the Sandoval statement that courts should consider "holdings not language." Id. at 513, 518.} Second, the court noted that the Sandoval majority assumed the validity of the disparate impact regulations. Third, the court analyzed whether the plaintiffs' claim could be pursued under Section 1983. The court, employing the traditional analysis to determine whether an enforceable federal right existed, considered whether (1) Congress intended the provision in question to benefit the plaintiffs; (2) the right was not so "vague and amorphous" that its enforce-
and (3) the statute unambiguously imposed a binding obligation upon the states. It answered each of these questions in the affirmative. Next, the court acknowledged that, even if such a right existed, the defendants could defeat the presumption of enforceability by demonstrating that Congress specifically foreclosed a remedy either expressly or impliedly by creating a comprehensive enforcement scheme that was incompatible with individual enforcement. The court found that the defendants had not done so and concluded that defendants' enforcement scheme hardly qualified as "an elaborate enforcement provision...of the kind that would foreclose a remedy." The court noted that the regulations in question merely established an administrative mechanism to review complaints and explicitly recognized that other types of judicial relief could be pursued. Moreover, the court emphasized that the Supreme Court had only twice found a remedial scheme sufficiently comprehensive to supplant Section 1983. The Third Circuit will have the opportunity to address this issue, as the South Camden defendants have appealed the decision.

Notably, other pre-Sandoval cases have looked at other aspects of Section 1983 enforcement and are decidedly less favorable to civil rights plaintiffs. Defendants are sure to cite them in future cases. The Seventh Circuit says that a Section 1983 claim is not available in a Title VI action because Title VI provides its own remedial scheme. In Alexander v. Chicago Park District the plaintiffs alleged that defendants administered the Chicago Park District in a racially discriminatory manner. Plaintiffs sought, among other claims, to address defendants' conduct by enforcing Title VI of the Civil Rights Act pursuant to Section 1983. The court ruled that Title VI provided its own administrative enforcement procedure, which a Title VI violation pled under Section 1983 would bypass; thus Section 1983 did not allow private actions. As noted above, the Sandoval majority placed great weight on the nature of the enforcement scheme prescribed under Title VI. Courts considering this issue may deem

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46 As a precursor to these findings, the court found that agency regulations could create rights enforceable through Section 1983. Id. at 524–29. This finding is the subject of disagreement among the circuits; see discussion infra. The court found that plaintiffs were the intended beneficiaries of the regulation and noted that "[i]t is axiomatic that Congress' purpose in enacting the Civil Rights Act of 1964 was to prohibit discrimination against individuals on the basis of race, color and national origin." Id. at 530. The court also found that the regulations were not vague and amorphous and that they created a binding obligation on the states. Id. at 539–42.
47 Id. at 545.
50 South Camden, Nos. 01-2224/2296 (3d Cir. filed May 14, 2001).
52 Id. at 852.
53 Id. The court also noted that the remedies under Title VI should sometimes be limited to declaratory and injunctive relief. The court found that this weighed against finding enforceability under Section 1983 because, under the broad legal and equitable remedies available under Section 1983, the limitations on relief might be lost. See also Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 2000) (holding that Title IX provides its own comprehensive enforcement scheme to the exclusion of a Section 1983 action).
54 Alexander v. Sandoval, 121 S. Ct. at 1521–22.
this enforcement scheme sufficient to defeat the presumption that Section 1983 creates a right to private action.

Moreover, despite Justice Stevens’s opinion and the ruling in South Camden, enforcement of the disparate impact regulations through Section 1983 raises other issues. The Sandoval majority appears to be poised to find enforcement of disparate impact regulations adopted under other laws, such as section 504 of the Rehabilitation Act of 1974, Title II of the Americans with Disabilities Act (ADA), and Title IX of the Civil Rights Act. A few lower courts have already addressed this issue, with interesting results.

In Access Living of Metro Chicago v. Chicago Transit Authority the plaintiffs alleged that the transit authority violated Title II of the ADA and section 504 of the Rehabilitation Act. After Sandoval was decided, the defendant moved for summary judgment, arguing that Sandoval compelled the court to find that plaintiffs could bring a claim under the ADA only if they could show intentional discrimination and that the regulations extending beyond intentional discrimination were no longer valid. The defendants also asserted that because the remedies, procedures, and rights available to private litigants under Title VI were the same as those available under the ADA and the Rehabilitation Act, the court should apply Sandoval’s holding to causes of action under these laws. The court found the defendant’s argument “wholly without merit.” The court noted that proof of intent to discriminate on the basis of disability was not a required element of a prima facie case under Title II of the ADA but was necessary only to justify an award of compensatory damages. The court went...
on to dismiss defendants’ argument as “far too broad” a reading of Sandoval. Under the ADA itself, failure to take affirmative steps, such as purchasing or leasing accessible buses, constituted discrimination. Therefore the plaintiffs had alleged discrimination within the meaning of the statutes and their claims survived the defendant’s challenge.

In Frederick L. v. Department of Public Welfare the plaintiffs—adults residing in a state psychiatric hospital—sued for declaratory and injunctive relief, alleging that their segregation in institutional settings violated Title II of the ADA, section 504, and 42 U.S.C. § 1983. The department, moving to dismiss the case, argued that plaintiffs could not bring suit under section 504 because the statute did not require states to provide care in the most integrated setting appropriate and that Sandoval compelled the court to find that no claim for unlawful segregation could be brought as a matter of law. The court, rejecting this claim, compared Title VI and section 504 and found that Congress did not intend to limit section 504 to intentional discrimination. The defendants also argued that, because the ADA’s text did not include an integration mandate, plaintiffs could not maintain an action under the ADA. The court rejected this argument as well; it reasoned that the ADA prohibited disparate impact discrimination. Therefore the regulations that require integration do not go beyond the statutory requirement and are enforceable.

C. Sandoval’s Effect on Earlier Title VI Cases

The dissent in Sandoval pointed out that the Court previously found a right to bring disparate impact discrimination claims in, among other cases, Lau v. Nichols, Cannon v. University of Chicago, and Guardians Association v. Civil Service Commission of New York City. Moreover, Justice Stevens noted, “[J]ust about every Court of Appeals has either explicitly or implicitly held that a private right of action exists to enforce all of the regulations issued pursuant to Title VI, including the disparate impact

62 Id. at *21.
64 Id., 2001 U.S. Dist. LEXIS 10225 at *70.
65 Interestingly, although the Access Living court acknowledged Sandoval, it considered “contemporary legal context” by finding that failure to amend a law to overturn the result of an interpretive court decision amounted to approval of that decision. Sandoval clearly disfavored this consideration. However, the Access Living court noted that Title VI and section 504 were similar and that section 504, enacted nine years after Title VI, was likely based upon that law. The court further observed that, at section 504’s enactment, model Title VI regulations incorporating a disparate impact standard had been drafted and that the House of Representatives had rejected an amendment to Title VI that would have limited its intentional discrimination. The court therefore reasoned that Congress was fully aware of the intentional discrimination/disparate impact issue when it enacted section 504, and its use of language identical to that in Title VI meant that it “could be thought to have approved a disparate impact standard for section 504.” Frederick L., 2001 U.S. Dist. LEXIS 10225 at *83.
66 Id. at *84. See also DuVall v. County of Kitsap, 260 F.3d 1124 (9th Cir. 2001) (reversing grant of summary judgment on plaintiffs’ claims that state and county defendants failed to accommodate hearing impairment and holding that trier of fact could have found intentional discrimination). See also Walker v. City of Lakewood, distinguishing Sandoval and holding that Fair Housing Act provides for private right of action. Plaintiff, an independent fair housing services provider, claimed in suit against defendant city that city failed to renew a contract with plaintiff in retaliation for participating in fair housing discrimination litigation. The court found that the Fair Housing Act explicitly stated a private right of action and provided a remedy for retaliation and that plaintiff successfully stated a claim for such a remedy. 263 F.3d 1005 (9th Cir. 2001).
67 Alexander v. Sandoval, 121 S. Ct. at 1524.
regulations." Nevertheless, the Sandoval majority identified a lack of clarity in the Court's previous decisions addressing enforcement of Title VI. It read these previous opinions much more narrowly than the lower courts. An examination of how the majority construed two of the cases—Lau v. Nichols and Guardians Association v. Civil Service Commission of New York City—illustrates this and suggests that the future role of these cases is unclear.

First, in Lau v. Nichols, the Court held that the San Francisco school district violated Title VI when it failed to provide adequate instruction for children who were of Chinese ancestry and did not speak English. A five-member majority, with whom four justices concurred, found that disparate impact discrimination violated Title VI. With little discussion of the issue, the Court held that section 602 authorized adoption of regulations implementing section 601, that valid regulations prohibiting disparate impact discrimination had been adopted, and that the plaintiffs had suffered such discrimination. The Court explicitly stated that it relied only upon section 601 in reaching its conclusion.

The Sandoval majority acknowledged Lau and that case's interpretation of section 601 to prohibit disparate impact discrimination. The Court gave Lau no weight, however; it found that its interpretation of section 601 had been "rejected" in later cases.

One of the later cases that supposedly rejected Lau's interpretation of section 601 is Guardians Association v. Civil Service Commission of New York City. In Guardians the Court affirmed a court of appeals decision dismissing plaintiffs' claims for compensatory damages under Title VI and considered a number of questions without reaching consensus on most of them. The questions included (1) whether the disparate impact regulations were valid; (2) whether Title VI created a private right of action; and (3) whether a showing of intentional discrimination was necessary to a successful Title VI claim. Justice White announced the Court's judgment and characterized its opinion as consisting of two separate holdings: (1) one majority of five held that proof of discriminatory intent was not required to make out a prima facie case under Title VI and (2) a different majority of five held that compensatory relief could not be awarded to private Title VI plaintiffs without showing discriminatory intent.

In Sandoval Justice Stevens pointed out that, in order to make such a finding in Guardians, the Court would have had to find that the regulations were valid and could be enforced to provide declaratory and injunctive relief. Indeed, for the first proposition, Justice White noted that both he and Justice Marshall were of the opinion that actions under Title VI did not require proof of intentional discrimination. Justices Stevens, Blackmun, and Brennan disagreed, however; they believed that the disparate impact regu-

68 Id. at 1524 n.1 (citations omitted).
69 According to the majority, "[a]lthough Title VI has often come to this court, it is fair to say (indeed, perhaps an understatement) that our opinions have not eliminated all uncertainty regarding its commands." Id. at 1515.
71 Id. at 788-89.
72 Id. at 788.
73 Alexander v. Sandoval, 121 S. Ct. at 1519. According to the majority (id. at 1517), these cases are Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Guardians, 463 U.S. at 582; and Alexander v. Choate, 469 U.S. 287 (1985).
74 Guardians, 463 U.S. at 582.
75 Id. at 584 n.2.
76 See Alexander v. Sandoval, 121 S. Ct. at 1524 (Stevens, J., dissenting).
lations were valid and that successful actions for disparate impact discrimination could be maintained.\footnote{Guardians, 463 U.S. at 643 (Stevens, J., dissenting); id. at 592 (White, J.); id. at 642 n.15 (Marshall, J., dissenting). See also id. at 607 n.27. The regulations at issue in Guardians were promulgated by the Department of Justice, as was the case with Sandoval, as well as by the U.S. Departments of Labor and Housing and Urban Development, but they contain the identical prohibitions against disparate impact discrimination. Id. at 642 n.14 (Marshall, J., dissenting).}

Nevertheless, the Sandoval majority displayed little difficulty in applying Guardians to support its conclusions. It found that Guardians "held" only that private individuals could not recover compensatory damages under Title VI in the absence of intentional discrimination.\footnote{Alexander v. Sandoval, 121 S. Ct. at 1516.} It then picked and chose among the various conclusions in Guardians; it discarded those that did not support its desired result and presented propositions that supported the Sandoval opinion as settled law. For example, according to the majority, no opinion of the Court in Guardians held that the disparate impact regulations were valid; however, five of the Guardians justices, in various opinions, stated that they were so holding.\footnote{See note 77, supra.}

The majority also stated, without qualification, that Guardians "made it clear" that under Bakke only intentional discrimination was forbidden by section 601; however, only three justices, in a concurrence, reached that conclusion.\footnote{Alexander v. Sandoval, 121 S. Ct. at 1517–18.}

Clearly Sandoval calls into question the import and content of Lau and Guardians. Regardless of how lower courts and advocates may have read these decisions over the years, Sandoval makes it clear that a majority of the Court will rely upon these cases only for the narrowest of holdings.

D. Determining Implied Rights of Action After Sandoval

Federal courts have traditionally used the factors set forth in Cort v. Ash to determine whether an implied right of action exists.\footnote{Cort, 422 U.S. at 66.} While the majority in Sandoval does acknowledge the case, it does not apply the Cort v. Ash factors and appears to signal that they will have less importance in future cases.\footnote{Alexander v. Sandoval, 121 S. Ct. at 1520.}

In Cort the Court considered whether an implied private right of action existed under a regulatory statute that prohibited corporations from making expenditures in connection with specified federal elections. The plaintiff stockholders claimed that the defendant made political contributions that violated the statute; plaintiffs demanded damages and injunctive relief. The Court held that the plaintiffs had no implied right of action to enforce the statute; the Court set out four factors for analysis: (1) whether the plaintiff was one of the class for whose benefit the statute was enacted; (2) whether the statute contained any explicit or implicit legislative intent to create or deny such a remedy; (3) whether it was consistent with the underlying purposes of the legislative scheme to imply such a remedy; and (4) whether the cause of action was in an area that was primarily the concern of the states and generally relegated to state law.\footnote{Cort, 422 U.S. at 78.} Lower courts typically consider all four factors when determining whether an implied right of action exists.

Sandoval cited Cort not to apply its factors but to support a brand of strict constructionism whereby the Court refused to consider any evidence of congressional intent other than the text of Title VI. According to the majority, Cort constituted a rejection of the principle that "courts should be alert to
such remedies as are necessary to make effective the Congressional purpose." The majority regarded this as a triumph over intemperate judicial overreaching: "Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink. We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."85

In so ruling, the Court left a number of questions unanswered. First, should lower courts continue to consider each of the Cort factors? Regardless of Sandoval, most courts continue to apply the Cort factors. Since the Sandoval decision, at least eighteen federal court cases have cited Cort, and several of these have applied its four-factor analysis without referring to Sandoval.86 The Eleventh Circuit, for example, stated that "[o]ur touchstone for determining whether a federal statute implies a private cause of action remains the four-part test handed down by the Supreme Court in Cort v. Ash."87 By contrast, in Litman v. George Mason University, a district court relied on Sandoval's interpretation of Cort to hold that a plaintiff had no implied private right of action to enforce the Title IX regulations' prohibition of retaliatory actions.88

Second, if the Cort factors continue to be relevant in light of Sandoval, how should courts apply the factors in assessing whether an implied right of action exists? Sandoval provides no definitive answer to this question. However, the majority opinion suggests that the following criteria will become the primary focus:

- Does the statute itself show an intent to create a remedy as well as a right? The Court emphasized that "the judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."89 Thus the majority did not infer remedies that would be necessary to effectuate the congressional purpose but looked only to the statute's text.90

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84 Alexander v. Sandoval, 121 S. Ct. at 1520.
85 Id.
87 Bellsouth Telecomm. Inc. v. Town of Palm Beach, 253 F.3d 1169, 1189 (11th Cir. 2001) (analyzing whether section 253 of the Federal Telecommunication Act created private right of action, applying Cort's four-factor test).
89 Alexander v. Sandoval, 121 S. Ct. at 1519 (emphasis added).
90 Id. at 1520.
The import of this reasoning to civil rights enforcement cannot be understated. Civil rights laws are enacted to give basic rights to a specific class of people who have traditionally been denied those rights. For precisely this reason, courts have long held that civil rights statutes should be broadly construed to effectuate their purpose. However, the Sandoval majority cited neither this principle nor cases adopting it. Rather, in its analysis, the Court applied a rigid assessment only of the statute itself and, in so doing, relied on cases interpreting regulatory statutes that affected the public more generally.

Does the statute address methods of enforcement? The Court looked closely at the enforcement methods in section 602 of Title VI. That the prescribed methods were "elaborate, specific and circumscribed ... tend[ed] to contradict a congressional intent to create privately enforceable rights." According to the majority, such a detailed enforcement scheme can be more important to the inquiry than language making would-be plaintiffs beneficiaries of the statute.

Thus an analysis of the nature and extent of a statute's enforcement scheme will be crucial in future cases. This could raise a conundrum for plaintiffs—if the statute does not reflect an intent to create a remedy, then none will be inferred (see previous question); however, if the statute does reflect an intent to create a remedy by describing a method of enforcement, then that method—if it is sufficiently detailed—may limit other, implied rights of action.

-- Does the statute contain "rights-creating" language? The Sandoval majority notes with approval Cannon v. University of Chicago, which stated that "right or duty-creating language ... has generally been the most accurate indicator of the propriety of implicating a cause of action." Such language, of course, reduces the role and importance of probing the underlying congressional scheme in enacting the legislation and congressional history. Rather, the focus is on the statute itself.

-- Does the statute focus on the entity regulated, rather than the individuals protected? In Sandoval the Court stated, "Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" The Court accorded great importance to section 602 being phrased as a directive to federal agencies about how to implement the statute rather than as a direct protection for individuals who are members of racial or ethnic minorities. According to the Court, such a focus gives

93 Alexander v. Sandoval, 121 S. Ct. at 1521–22.
94 Id. at 1522.
95 Cannon, 441 U.S. at 690 n.13. The Sandoval dissenters argued that, in Cannon, the Court applied all the Cort factors to examine the nature of the rights at issue, the text and structure of the statute, and the relevant legislative history and concluded that Congress unmistakably intended a private right of action to enforce Title VI intentional discrimination and disparate impact claims. Alexander v. Sandoval, 121 S. Ct. at 1533–34.
“far less reason” to infer a private right of action.97

The Court’s reasoning appears flawed. As Justice Stevens pointed out, Congress had no reason to include language regarding protected individuals in section 602 because it created the provision expressly to effectuate section 601, which is directed to the protection of individuals.98 Nevertheless, if applied literally, this language could have extensive consequences. For example, many public benefits and housing statutes specify steps that the state or federally funded entity must take when providing the benefit.

Does legal context play any role? The Court refused to consider “contemporary legal context” as part of its analysis. In three cases decided between 1979 and 1989, the Court gave weight not only to the statute’s language and structure but also to the circumstances of its enactment, which the Court described as “Congress’ perception of the law that it was shaping or reshaping.”99 By this the Court meant that courts should presume congressional familiarity with current legal precedents.100 According to the majority, however, “legal context matters only to the extent that it clarifies text.”101 Taken literally, this language means that legal context can reinforce, but cannot enhance, what the statute actually says.

Given all the uncertainty, advocates should continue to cite and apply the Court v. Ash factors when seeking to enforce an implied private right of action. However, advocates must also acknowledge and address the questions raised above.

ALEXANDER V. SANDOVAL HAS DASHED ANY hopes that this Court would apply the long-held principle that, as remedial statutes, the civil rights laws must be broadly construed. Absent a congressional enactment to return the law to its pre-Sandoval state, future litigants will be left with much to untangle. In the words of one federal judge attempting to apply the decision:

The fact that federal judges have a great many constitutional powers and duties which enable them to resolve difficult issues with authority is put to the test in a situation like this where the law is developing and many of the principles are amorphous. Even had I the benefit of the Oracle at Delphi some of these issues will finally be resolved in another forum.102

97 Id. at 1521 (citations omitted).
98 Id. at 1536.
100 Cannon, 441 U.S. at 699-700.
101 Alexander v. Sandoval, 121 S. Ct. at 1520 (emphasis added). In support of its pronouncement, the Court instructed: “In determining whether statutes create private rights of action, as in interpreting statutes generally, see Blatchford v. Native Village of Noatak, 501 U.S. 775, 784 (1991).” In Blatchford the Court considered whether the Eleventh Amendment protected states from suits against Indian tribes and placed little emphasis on the legal context of the underlying statute. It relied much more on the language of the statute itself in drawing its conclusions.
102 Frederick L., 2001 U.S. Dist. LEXIS 10225, at *93.