# RACIAL INJUSTICE? FERGUSON V. CITY OF CHARLESTON AND THE STATE OF TITLE VI IN THE POST-SANDOVAL ERA.

Andrew J. Kornblau[1]

May, 2005

## I. INTRODUCTION

"I am inferior of any man whose rights I trample under foot. Men are not superior by reason of the accidents of race or color. They are superior who have the best heart--the best brain."[2] There are many forms of illegal discrimination based on race, color, or national origin that can limit the opportunity of minorities to gain equal access to services and programs. Unfortunately, even through years of civil rights movements and great strides in the push for racial impartiality, society has yet to fully remove racial disparity from societal norms of every day living.

This note examines at the history of Title VI of the Civil Rights Act of 1964, from its beginning through its current status. This note also tells the story of the women of *Ferguson v. City of Charleston*.[3] It describes one hospital's attempt at reducing a growing cocaine problem in an urban community of South Carolina, including the disproportionate consequences resulting from the hospital's implementation of its policy based upon current racial guidelines. Although *Ferguson* involved many claims, this note will focus mainly on how the hospital's discriminatory practices disparately impacted the *Ferguson* plaintiffs.

Next, this note will discuss how the case of *Alexander v. Sandoval* [4],erected a major barrier for an individual to challenge a discriminatory claim. I will offer arguments as to why *Sandoval* was decided incorrectly and explain how its holding affects plaintiffs similarly situated to the women in *Ferguson*. Finally, this note will present proposed alternatives for plaintiffs to challenge unintentional discriminatory policies of federal agencies in the absence of a private cause of action under Title VI, including the likelihood of success by plaintiffs bringing such claims.

---

[1] B.S., Administration of Justice, Rutgers, The State University of New Jersey (2002); J.D., Rutgers School of Law - Camden (2005). Mr. Kornblau is a member of the Bar of the States of New Jersey and Pennsylvania. The author would like to thank his family for their unwavering love and support.

[2] Robert Green Ingersoll (1833-99), was an American political leader and orator, noted for his broad range of culture and his defense of agnosticism.

[3] Ferguson v. City of Charleston, 532 U.S. 67 (2001).

[4] *Alexander v. Sandoval*, 532 U.S. 275 (2001). *See* infra note 85 for facts.

# II. TITLE VI

## A. HISTORY OF TITLE VI THROUGH *FERGUSON*

Through the Civil Rights Act of 1964, Congress enacted § 601 of Title VI as part of an attempt to protect individuals from discrimination on the basis of their race, color, or national origin in programs that receive Federal financial assistance.[5] § 601 provides courts with broad power to interpret the ambiguous scope of the term "discrimination."[6] Congress additionally enacted § 602 to operate as the procedural arm to the substantive body of § 601, with regard to federal agencies administering federal funding or assistance.[7] These sections of Title VI prevent the allocation and distribution of federal funds in a discriminatory manner.[8] § 602 allows federal agencies to effectuate rules and regulations in order to enforce such provisions.[9] However, because neither § 601 nor § 602 defines or describes the term discrimination, individual judges and courts are left with the daunting task of interpretation.[10]

The debate over the reach of Title VI centers between § 601, dealing with intentional discrimination, and § 602, covering unintentional discrimination. Courts have considered this distinction and its effect on claims through a long

---

[5] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.

[6] § 601 of Title VI provides, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2000).

[7] § 602 of Title VI states: "Each Federal department and agency is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of [§ 601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." *Id.* § 2000d-1.

[8] Title VI, 42 U.S.C. § 2000d et seq., was enacted as part of the landmark Civil Rights Act of 1964. It prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. As President John F. Kennedy said in 1963:

> Simple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination.

Civil Rights Division of Department of Justice, *available at* http://www.usdoj.gov/crt/cor/coord/titlevi.htm (last visited Mar. 12, 2004).

[9] 42 U.S.C. § 2000d (2000).

[10] Washington v. Davis, 426 U.S. 229 (1976).

history of cases.[11] There is a crucial difference between the two sections because each standard carries a different burden of proof. [12] § 601 covers intentional discriminatory policies, which carries with it a strict scrutiny standard. Under this standard, the State must prove that the policy is necessary to advance a compelling government interest, and the burden of proof lies with the State. Conversely, § 602 deals with policies that are facially neutral, but have an unintentional discriminatory impact. These policies are viewed under a rational basis standard. The plaintiff has the burden of proof to show that the policy is not rationally related to a governmental interest.

In *Washington v. Davis*,[13] the Supreme Court held that where an agency's regulations or policies are facially neutral, showing a racially disproportionate impact by itself is not enough to establish a prima facie case of discrimination unless the discrimination can be shown to have been intentional or invidious.[14] The elements a court considers in determining whether or not a policy is intentionally discriminatory on its face were discussed in *Arlington Heights v. Metropolitan Housing Development Corp*.[15] When read together, these two cases shed light on the importance the Supreme Court places on an intentional motive and undertone of a federal agency's policy. Although the Supreme Court has held that a plaintiff must prove intentional discrimination in order to show a violation of § 601,[16] other cases have established a trend finding a constitutional violation after the mere showing of a policy's discriminatory effect, without any showing of an invidious nature or intent.[17] In *Lau v. Nichols*,[18] the Supreme Court accepted

---

[11] See, Lau v. Nichols, 414 U.S. 563 (1974); Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977); Regents of University of California v. Bakke, 438 U.S. 265 (1978); Guardians Ass'n v. Civil Service Commission, 463 U.S. 582 (1983); Alexander, Governor of Tennessee, et al. v. Choate, 469 U.S. 287 (1985).

[12] See, Washington v. Davis, 426 U.S. 229 (1976); Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977)

[13] 426 U.S. 229 (1976).

[14] The Supreme Court stated, "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." The Court further maintained "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Id.* at 241.

[15] 429 U.S. 252 (1977). In Arlington, the Court noted that a disparate impact resulting from an agency's regulations does not, in and of itself, establish intentionality. The Court insisted upon the requirement of more evidence needed in order to prove the invidious nature. Several factors considered by the Court included events leading up to the implementation of the regulation, background information regarding the decision to implement the regulation, how the regulation differs from normal administrative procedure, and any other legislative measures that influenced the regulation.

[16] Regents of University of California v. Bakke, 438 U.S. 265 (1978). In Bakke, the University's affirmative action admissions policy was claimed to have violated Title VI's ban on discrimination. The Court held that the policy was discriminatory on its face and therefore plaintiffs satisfied the burden of proof requiring intent.

Appellants' Title VI claim without indicating that the policy was intentionally motivated, by accepting a disparate impact argument as grounds for a violation.[19] A split Supreme Court in *Regents of University of California v. Bakke*,[20] however, placed the disparate impact argument in jeopardy by holding that Title VI runs within the meaning of the Fourth Amendment, and thus requires a showing of intentional discrimination.[21]

Although the *Bakke* decision seemed to eradicate any chance of winning an unintentional discrimination claim under Title VI, the Supreme Court revisited the Title VI issues of *Guardian* in yet another split opinion .[22] Although § 601 requires intentional discrimination, the same is not required for claims brought under § 602.[23] Violations of the rules and regulations issued under § 602 do not require proof of discriminatory intent.[24] In *Guardians*, the Court allowed plaintiffs to bring their challenge under the disparate impact definition of discrimination.[25] This holding was reaffirmed in *Choate*,[26] which stated that *Guardians* created a two-pronged test to analyze discrimination under Title VI.[27]

---

[17] See, Lau v. Nichols, 414 U.S. 563 (1974); Guardians Ass'n v. Civil Service Commission, 463 U.S. 582 (1983).

[18] 414 U.S. 563 (1974) (Class action by non-English speaking Chinese students who did not receive English instructional assistance and sought relief against the unequal educational opportunities). The Title VI regulations at issue in Lau, forbade funding recipients to take actions which had the effect of discriminating on the basis of race, color, or national origin. *Id.* at 568. Unlike our later cases, however, the Court in Lau interpreted § 601 itself to proscribe disparate-impact discrimination, saying that it relied solely on § 601.

[19] *Id*. at 568-69.

[20] *Bakke*, 438 U.S. 265 (1978).

[21] *Id*. at 287.

[22] Guardians Ass'n v. civil Service Commission, 563 U.S. 582 (1983). In *Guardians*, African-American and Hispanic members of a city police department brought an employment discrimination suit alleging that the department's policy was discriminatory. Although the Court ultimately held that the plaintiffs were not entitled to relief based upon their absence of showing intentional discrimination, they did acknowledge that the "Title VI implementing regulations, which explicitly forbade impact discrimination, were valid because they were not inconsistent with the purposes of Title VI." *Id*. at 591.

[23] *Id*. at 590.

[24] *Id*.

[25] *Guardians*, 463 U.S. at 601.

[26] Alexander, Governor of Tennessee, et al. v. Choate, 469 U.S. 287 (1985).

[27] *Id*. at 293. In *Choate*, the Court reached the conclusion that Title VI itself directly reached only instances of intentional discrimination. However, it did cite Guardians two-pronged test by holding that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement purposes of Title VI. In essence, the Court held Title VI delegated to the agencies in the first instance the complex determination of what

Yet, the Supreme Court in *Guardians* never addressed the evidentiary burden required of parties in a § 602 disparate impact claim. Without an explanation or clarification of such burdens, the full effect of § 602 remained ambiguous. As a result, when considering the lack of an evidentiary standard, many courts adjudicating disparate impact cases have relied upon the procedural methods of a Title VII[28] claim in analyzing a Title VI action.[29]

The disparate impact approach for bringing a § 602 claim emerged from a series of Supreme Court decisions during the 1970's, beginning with *Griggs v. Duke Power*.[30] The Supreme Court would later alter the standard set forth in *Griggs* through its decision in *Wards Cove Packaging Co. v. Atonio*.[31] The Court stated that under the "disparate impact" theory of liability, facially neutral employment practice may be deemed violative of Title VII without evidence of an employer's subjective intent to discriminate, as is required in Title VI "disparate-treatment" cases.[32] Following the decision in *Antonio*, Congress reversed the modifications to Title VII by enacting the Civil Rights Act of 1991

---

sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were sufficiently remediable to warrant altering the practices of the federal grantees that had produced those impacts.

[28] Title VII, 42 U.S.C. § 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex and national origin. It states in pertinent part:

> To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

*Id.*

[29] Because the Supreme Court in *Guardians* did not address the evidentiary burden of a Title VI disparate impact suit, courts were left with no framework under Title VI to analyze a disparate impact claim. Thus, lower courts adjudicating Title VI disparate impact claims have adopted the Title VII evidentiary framework. *See* NAACP v. Medical Ctr., Inc., 657 F.2d 1322, 1333 (3d Cir. 1981) (en banc) (accepting without comment parties' suggestion that "the decisional law allocating the burden of production and persuasion under Title VII is instructive in [a Title VI] case'). See also, Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); McNeil v. McDonough, 648 F.2d 178 (3d Cir., 1981); Smithers v. Bailar, 629 F.2d 892 (3d Cir. 1980); Kunda v. Muhlenberg College, 621 F.2d 532, 543 n.3 (3d Cir. 1980)

[30] 401 U.S. 424 (1971). The Supreme Court held that an employer was prohibited by provisions of the Civil Rights Act with regard to employment opportunities from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs, where neither standard was shown to be significantly related to successful job performance.

[31] 490 U.S. 642 (1989). The Supreme Court ruled that statistical evidence showing high percentage of nonwhite workers in employer's cannery jobs and low percentage of such workers in non-cannery positions did not establish prima facie case of disparate impact in violation of Title VII.

[32] *Id.*

(1991 CRA),[33] which amended several sections of Title VII. The Court approaches the use of Title VII evidentiary procedures as an unofficial definition of discrimination under modern civil rights acts, using it as a guideline and not a bright-line rule when faced with claims under § 602 actions under Title VI.[34]

At the time of *Ferguson*, § II of the 1991 CRA governed the disparate impact doctrine. The CRA stated that to establish a prima facie case of disparate impact based on race the plaintiff must demonstrate that defendant's practice, appearing to be facially neutral, has a harmful effect on a specific race.[35] The Eleventh Circuit substantiated this view in *Georgia State Conference of Branches of NAACP v. State of Georgia* and stated that "[i]n making a prima facie case in a disparate impact suit, the plaintiff must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue."[36] In essence, to establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question result in a significantly discriminatory pattern.

Plaintiffs cannot simply rely on the impact of a discriminatory result to show discrimination under a § 602 claim.[37] A causal link must be established between the challenged practice and the adverse effects in order to satisfy a disparate impact claim.[38] When plaintiff can demonstrate to the court that the

---

[33] Pub. L. No. 102-66, 105 Stat. 1071 (1991). The Civil Rights Act of 1991 (CRA) amends several §s of Title VII of the Civil Rights Act of 1964. It reads, in pertinent part, "The Congress finds that (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace; (2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and (3) legislation is necessary to provide additional protections against unlawful discrimination in employment."*Id.* The purpose of CRA 1991 was "(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; (2) to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination. *Id.*

[34] *See* New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995) ("Courts considering claims under analogous Title VI regulations have looked to title VII disparate impact cases for guidance."); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 n. 14 (11th Cir. 1993) ("In deciding Title VI disparate impact claims we borrow from standards formulated in Title VII disparate impact cases."); Groves v. Alabama State Bd. Of Educ., 776 F.Supp. 1518, 1523 (M.D. Ala. 1991) ("The elements of a disparate-impact claim under Title VI's regulations are substantially similar to those applicable in an employment discrimination action under Title VII.)

[35] Georgia State Conference of Branches of NAACP v. State of Georgia, 775 F.2d 1403, 1421 (11th Cir. 1985).

[36] Johnson v. Uncle Ben's, Inc., 657 F.2d 750, 753 (5th Cir. 1981), *cert denied*, 459 U.S. 967, 74 L.Ed.2d 277 (1982).

[37] *Id.*

[38] *Id.*

elements of the defendant's decision-making process are not capable of separation in determining the underlying intent, the decision-making process may be analyzed as one overall practice.[39]

Because Title VI disparate impact cases tend to challenge the manner in which public benefits such as healthcare, education, public transport are distributed, there tends to be an expectation that the public goods concerned would be dispersed on a uniform basis when provided by the government.[40]

In order to show that a federal agency policy disparately impacts a specific race under a § 602 claim, the plaintiff must prove all elements by a preponderance of the evidence.[41] If a plaintiff establishes a prima facie showing of disparate impact, "the burden shifts to the defendant to demonstrate the existence of a substantial and legitimate justification for the challenged practice."[42]

If a defendant satisfies this burden, the burden once again shifts back to the plaintiff.[43] To ultimately succeed, the plaintiff must then show that there exists an "equally effective alternative practice which results in less racial disproportionality or proof that the legitimate practices are a pretext for discrimination.."[44] If this is achieved, the court must then decide whether the proposed alternative justifies the determination that the challenged policy is discriminatory.[45]

Although § 602 claims have developed into a solid approach for a plaintiff to challenge a federal policy, the future of such suits under Title VI is unclear. In a case subsequent to *Ferguson*, the Supreme Court has virtually abolished § 602 disparate impact claims through its decision in *Alexander v. Sandoval*. *Sandoval's* outcome has thrown cases similar to *Ferguson* in flux and the Court has left no clear or decisive alternative to replace § 602 claims.

---

[39] Civil Rights Act of 1991, § 105(a), 105 Stat. at 1074.

[40] *See* NAACP v. Medical Ctr., 657 F.2d 1322 (3d Cir. 1981) (access to public hospital); Georgia State Conferences of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985) (assignment to regular elementary school classes as opposed to special classes for mentally challenged students); Committee for a Better N. Phila. v. Southeastern Pa. Transp. Auth., CIV.A.88-1275, 1990 WL 121177 (E.D. Pa. Aug. 14, 1990) (distribution of subsidies among components of public transportation system).

[41] *Georgia State Conferences*, 775 F.2d at 1417.

[42] New York Urban League, Inc. v. State of N.Y., 71 F.3d 1031, 1036 (2d Cir. 1995).

[43] *Id.*

[44] *Id.*

[45] *New York Urban League, Inc.*, 71 F.3d at 1036

## B. THE PRESENT STATUS OF TITLE VI – ALEXANDER V. SANDOVAL

A 2001 decision by the Supreme Court in *Alexander v. Sandoval*[46] has strained some aspects of the Civil Rights Acts of 1964 and the Civil Rights Movement in general. The Court in *Sandoval* finally undertook the daunting task of considering the issue of whether or not a private cause of action existed in a disparate impact claim under § 602 of Title VI.[47]

Since the early 1970's courts determined on their own how to apply the existing case law to Title VI actions brought under a disparate impact claim.[48] Finally, the Supreme Court stepped in and rendered a decision on whether such a claim existed.[49] The Supreme Court stressed several aspects of Title VI in the course of rendering its decision.[50] Using undisputed factors, Justice Scalia went on to deliver the majority opinion of the Court. In its opinion, the Court rejected the Plaintiff's argument that an implied right of action arises under § 602 based upon language from prior Court cases.[51] In dismissing Plaintiff's argument that the statutory language implies a cause of action, Justice Scalia declared that the Court is "bound by holdings, not language."[52] Based upon the fact that no prior decision of the Court specifically stated that a private cause of action exists under

---

[46] *Alexander v. Sandoval*, 532 U.S. 275 (2001) (hereinafter "Sandoval") (holding no private right of action exists for a §602 disparate impact claim under Title VI). *See* Note *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774 (2003); Joel Teitelbaum, *Civil Rights Enforcement in the Modern Healthcare System: Reinvigorating the Role of the Federal Government in the Aftermath of Alexander v. Sandoval,* 3 YALE J. HEALTH POL'Y, L. & ETHICS 215 (2003); Benjamin Labow, Note, *Alexander v. Sandoval: Civil Rights Without Remedies*, 56 OKLA. L. REV. 205 (2003); Derek Black, Comment, *Picking up the Pieces after Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C.L. REV. 356 (2002); Bradford C. Mank, Essay, *Are Title VI's Disparate Impact Regulations Valid?*, 71 U. CIN. L. REV. 517 (2002), John Arthur Laufer, Note, *Alexander v. Sandoval and its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613 (2002).

[47] *See Alexander*, 532 U.S. 275.

[48] *See* Cannon v. University of Chicago, 441 U.S. 677, 717 (1979) (holding that individuals may sue to enforce the statutory prohibition of Title IX due to its modeling after Title VI.); Guardians Ass'n v. Civil Service Commission, 463 U.S. 582 (1983) (although questioning the validity of § 602 Title VI claims, the court declined to rule that such claims were invalid); Alexander v. Choate, 469 U.S. 287 (1985) (affirming the validity of regulations under § 602 was considered in dicta).

[49] *Sandoval*, 532 U.S. 275 (2001).

[50] *Id*. at 279-80. Justice Scalia, adopting his traditional approach to Constitutional adjudication, stated that private individuals have a cause of action to bring a claim under § 601 of Title VI. The next undisputed factor is that § 601 of Title VI prohibits exclusively federally funded agency policies that evidence an intentional discrimination or invidious intent. The final conceding point Scalia made was that policies enacted pursuant to § 602 of Title VI might in fact prohibit actions that have a discriminatory effect even if such activities are permitted under § 601.

[51] *Id*. at 282.

[52] *Id*.

§ 602, the Court was under no obligation to acknowledge one.[53] One of the reasons stated was that § 602 focuses on "agencies" receiving federal assistance, and nowhere mentions persons (either regulated or protected).[54] The Supreme Court held that because § 602 can only be used in conjunction with rights established under § 601, without specific language stating otherwise, § 602 does not create or imply any specific rights not enumerated under § 601.

Because the Supreme Court failed to elaborate on the present state of § 602 in *Sandoval*, the question of whether or not a disparate impact claim is completely inadequate still exists. The disparate impact claim gave an individual a protective shield against administrative policies of agencies. Prior to *Sandoval*, even a facially neutral policy could be a violation if such a policy had a discriminatory effect. However, with the Court's analysis regarding Title VI, they have removed any possibility of private Title VI actions. The Supreme Court may not have fully realized the possible repercussions in its *Sandoval* decision. The ruling has affected not only *Sandoval*, but subsequent cases, including those similar to *Ferguson*. Plaintiffs will now need to find other means of bringing disparate impact claims without § 602. The *Sandoval* decision's effect will be illustrated by exploring the impact *Sandoval* will have on *Ferguson*-type disparate impact cases, including how the decision renders any possible claim in *Ferguson* relating to Title VI meaningless. If *Ferguson* had been tried after *Sandoval*, the § 602 disparate impact claim would have been dismissed from the suit's inception. This would leave the *Ferguson* plaintiff's with no alternative means to challenging the hospital's policy absent a showing of intentional discrimination.

## III. FERGUSON V. CITY OF CHARLESTON

### A. BACKGROUND

The Medical University of South Carolina (MUSC) instituted a drug screening policy for its patients based upon concerns regarding a perceived growth in cocaine use by patients receiving prenatal care.[55] Implemented in 1989,

---

[53] *Id.* at 286 – 287.

[54] *Id.* at 289-90.

[55] *Ferguson v. City of Charleston*, 186 F. 3d 469, 474 (4th Cir. 1999), *rev'd on other grounds*, 532 U.S. 67 (2001). For further opinions of Ferguson as well as critiques and descriptions of the Medical University of South Carolina (MUSC)'s drug-testing Policy, *See* (Author Unavailable), *Civil Rights - Title VI - Fourth Circuit Holds that Articulated Reasons Rebut Challenges Against Discriminatory Practices - Ferguson v. City of Charleston*, S.C., 186 F.3d 469 (4th Cir. 1999), 113 Harv. L. Rev. 1246, 1246-47 (2000); Schuyler Frautschi, *Understanding the Public Health Policies Behind Ferguson*, 27 N.Y.U. REV. L. & SOC. CHANGE 587, 587-92 (2001/2002); Nancy Kubasek & Melissa Hinds, *The Communitarian Case Against Prosecutions for Prenatal Drug Abuse*, 22 WOMEN'S RIGHTS L. REP. 1, 7-10 (2000); Kathleen R. Sandy, Commentary, *The Discrimination Inherent In America's Drug War: Hidden Racism Revealed By Examining the Hysteria Over Crack*, 54 ALA. L. REV. 665, 688-90 (2003); Carmen Vaughn, *Circumventing the Fourth Amendment Via the Special Needs Doctrine to Prosecute Pregnant Drug Users: Ferguson v. City of*

MUSC's policy was a response to the problem of persistent drug use by pregnant women.[56] The origin of the policy was a case manager for MUSC's obstetrics department, Nurse Shirley Brown.[57] Nurse Brown had been informed that the City Solicitor had begun prosecuting pregnant drug users based upon a theory of child abuse.[58] To further the goal of prosecuting mothers whose newborn children tested positive for drugs, the hospital created a task force to discuss the drug problem and possible solutions the hospital might employ to combat the perceived problems. [59]

The result of this coordinated effort was "Policy M-7."[60] Policy M-7 required all patients in MUSC's prenatal care unit to take urine drug screens for evidence of cocaine use when the policy's specific criteria were met.[61] The hospital reported any positive results for cocaine to the City of Charleston Police Department (CCPD) or a representative of the Solicitor's Office.[62] Authorities then arrested the patient for distributing cocaine to a minor.[63] In a very questionable practice, these women were arrested almost immediately after giving birth.[64]

---

*Charleston, S.C.*, 51 S.C. L. REV. 671, 672-74 (2000); Jacqueline R. Williams, Note, *A Well Deserved Upper-Cut to Fetal Abuse: Ferguson v. City of Charleston*, 28 S.U. L. REV. 187 (2001).

[56] *Ferguson*, 186 F.3d at 474.

[57] *Id.*

[58] *Id.*; S.C. Code Ann. § 44-53-440. (Law. Coop. Supp. 1997). According to South Carolina law, "a woman who ingested cocaine after the 24th week of pregnancy was guilty of the crime of distributing a controlled substance to a person under the age of eighteen." *Ferguson*, 186 F.3d at 474.The Supreme Court of South Carolina upheld the conviction of criminal child neglect against a South Carolina woman who had ingested cocaine during her pregnancy based upon the fact that the fetus was viable. Whitner v. State, 492 S.E.2d 777, 781 – 782 (1997).

[59] *Ferguson,* 186 F. 3d. at 474. The parties involved with the task force included: Chief of the City of Charleston Police Department (CCPD), Nurse Brown, and the City Solicitor of the Ninth Circuit, the County Substance Abuse Commission, and the Department of Social Services (DSS).

[60] *Ferguson*, 532 U.S. at 71. Policy M-7 was a 12-page document that dealt with the subject of "Management of Drug Abuse During Pregnancy."

[61] *Ferguson*, 186 F.3d at 474. The specific "indicia" of cocaine use included: (1) separation of the placenta from the uterine wall; (2) intrauterine fetal death; (3) no prenatal care; (4) late prenatal care (beginning after 24 weeks); (5) incomplete prenatal care (fewer than five visits); (6) preterm labor without an obvious cause; (7) a history of cocaine use; (8) unexplained birth defects; or (9) intrauterine growth retardation without an obvious cause.

[62] *Id.*

[63] *Id.*

[64] See Ferguson v. City of Charleston,. 186 F.3d 469 (4th Cir. 1999). Many Constitutional violations were raised in the initial suit. The suit claimed that Policy M-7 provided for "warrantless and nonconsensual drug tests" resulting in unconstitutional searches, in violation of the Fourth Amendment to the Constitution. The Fourth Amendment to the U.S. Constitution mandates that a search or seizure be reasonable and supported by a warrant issued upon a showing of probable cause. See U.S. Const. amend. IV. There are, however, numerous

Policy M-7 was amended in 1990 so that patients with positive test results were given the option of arrest or drug treatment.[65] If the patient chose to submit to drug treatment, her positive test results were not forwarded to CCPD and she would avoid arrest.[66] Even if arrested, the patient could avoid prosecution by successfully completing a treatment program, and the policy would dismiss any charges against her.[67] Only if a patient tested positive for cocaine use and refused to receive treatment, failed to complete the treatment program, or tested positive more than once, would MUSC report the test results to CCPD.[68] If reported, however, a patient could be arrested by the CCPD.[69]

Additionally, under MUSC's revised policy, the patient was charged with possession if she tested positive for cocaine use when she was twenty-seven weeks pregnant or less.[70] If she was at least twenty-eight weeks pregnant, the CCPD charged her with possession and distribution. [71] If testing positive upon delivery, CCPD charged the patient with possession, distribution, and unlawful neglect of a child.[72] In all cases, prosecutors could drop all charges if the patient agreed to treatment.[73]

The goal of Policy M-7 was to combat the perceived increase in babies born addicted to cocaine.[74] According to MUSC, the "policy was intended to encourage pregnant women whose urine tested positive for cocaine use to obtain substance abuse counseling."[75] The policy was applicable to all maternity patients in the hospital, however

---

exceptions to the warrant and probable cause requirement. See Theodore P. Metzler et al., Thirtieth Annual Review of Criminal Procedure: *Warrantless Searches and Seizures*, 89 Geo. L.J. 1084, 1084 (2001). One such exception is the special needs doctrine. The Supreme Court has held that a state's "special needs, beyond the normal need for law enforcement," may permit suspension of the warrant and probable cause requirement of the Fourth Amendment. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment).

Another Constitutional violation raised was the procedural due process right of notice with regard to the criminality of an act due to the hosptial's policy of immediate arrest after a positive test result. See also U.S. Const. amends. V, XIV (both providing that "persons shall not be deprived of life, liberty, or property without due process of law").

[65] *Ferguson,* 186 F.3d at 474.

[66] *Id.*

[67] *Id.* at 475.

[68] *Id.*

[69] *Id.*

[70] *Ferguson*, 532 U.S. at 72.

[71] *Id.*

[72] *Id.* at 73.

[73] *Ferguson,* 186 F.3d at 474 – 475.

[74] The Hospital's goal in constructing Policy M-7 is evidenced by the events leading up to its creation. The subject under which the Policy was established also provides the proper context for which the Hospital intended the policy to be used. *See* Supra note 8.

[75] *Ferguson*, 186 F.3d. at 473.

it was enforced in the obstetrics/gynecology unit, not in any of the hospital's other units or clinics.[76]

Thirty women were ultimately arrested under Policy M-7 – twenty-nine of them African American and one having an African American boyfriend.[77] Speculation arose as to the racially prejudiced views of Nurse Brown, especially in helping to implement the policy.[78]

## B. PROCEDURAL HISTORY

The path to the Supreme Court was a long and tough battle for the Plaintiffs. Beginning with the District Court and continuing through an unfavorable Appellate result, the women of *Ferguson* contested the Hospital's policy in front of the Supreme Court of the United States. Their challenges raised several constitutional and public policy issues, including Fourth Amendment search and seizure claims, as well as claims under Title VI.

### *I. FOURTH AMENDMENT CLAIMS*

Although this note focuses on the Title VI disparate impact claims, the central arguments brought forth in *Ferguson* were that the urine tests constituted "searches" within the meaning of the Fourth Amendment.[79] The tests themselves were not violative of the Fourth Amendment. However, the actual reporting of the test results to the CCPD brought about constitutional issues.[80]

The United States District Court for the District of South Carolina entered judgment for the Defendants.[81] On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's ruling.[82] On further appeal, the Supreme Court reversed and remanded the matter.[83] In reaching its decision, the Supreme Court employed a balancing test, weighing the intrusion on the patient's

---

[76] Petitioners' Brief at 12, *Ferguson* (No. 99-936).

[77] *Id.* at 13.

[78] *Id.* at n. 10.

[79] The Fourth Amendment, made applicable via the Fourteenth Amendment, grants "[the right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . ." U.S. CONST. amend. IV.

[80] *Ferguson*, 532 U.S. at 75, n.8.

[81] Defendants included MUSC, state solicitor, City of Charleston, South Carolina police and individual medical personnel.

[82] *Ferguson v. City of Charleston*, 186 F.3d 469, 476 (4th Cir. 1999).

[83] The dissenting judge of the Fourth Circuit's deicision argued that the special needs doctrine was not applicable and that "the evidence of consent was insufficient to sustain the jury's verdict." Ferguson, 532 U.S. at 75-76. The U.S. Supreme Court granted certiorari to review the Fourth Circuit's holding on the issue of special needs and, without deciding the issue, assumed that the searches were conducted without consent. *Id.* at 76.

interest in privacy versus the "special needs" underlying the Hospital's testing program.[84] The Court noted that the central feature of MUSC's policy was the use of law enforcement to coerce patients into substance abuse programs.[85] "While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment . . . the immediate objective was to generate evidence for law enforcement purposes . . . ."[86] The Court held that given the primary purpose of the policy was the threat of arrest and prosecution, the case did not fit into the "special needs" exception to searches.[87] Although the Hospital argued that their motive was benevolent, the Court held that such a motive does not justify a departure from the protections guaranteed by the Fourth Amendment.[88]

## *II. TITLE VI CLAIMS*

### *1. DISTRICT COURT' TITLE VI RULING*

Ten out of the thirty women arrested under MUSC's drug-screening policy filed suit in the U.S. District Court for the District of South Carolina against members of MUSC, the City of Charleston, CCPD, the City Solicitor, and various other parties.[89] Their initial claim argued the hospital's policy of testing urine for evidence of cocaine use constituted a warrantless search in violation of the Fourth Amendment.[90] Plaintiffs also argued the hospital's disclosure to CCPD of

---

[84] *Id.(quoting* New Jersey v. T.L.O., 469 U.S. 325 (1985) (decided in 1985, the U.S. Supreme Court considered the issue of warrantless school searches. *Id.* at 327-28. ))

In T.L.O., the State brought delinquency charges against a fourteen-year-old high school freshman (T.L.O.), after a search of her purse by the assistant vice principal revealed a small amount of marijuana and further evidence of drug-dealing. *Id.* at 328-329. T.L.O. contended that the principal's search violated the Fourth Amendment and moved to suppress the evidence found in her purse. *Id.* at 329. Justice White, writing for the majority, stated that application of the Fourth Amendment in a school setting "requires some easing of the restrictions to which searches by public authorities are ordinarily subject." *Id.* at 340. Justice White maintained that because a warrant and probable cause requirement would "unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools," school officials were excused from obtaining a warrant to search students under their authority. *Id.* The majority opinion created the basic framework for the special needs exception, it was Justice Blackmun's concurring opinion that fully elaborated on the parameters of the doctrine and ultimately coined the phrase "special needs". *Id.* at 351.

[85] *Ferguson,* 532 U.S. at 80.

[86] *Id.* at 82-83.

[87] *Id.* at 84.

[88] *Id.* at 85. "[T]he Fourth Amendment's general prohibition against nonconsensual, warrantless, and suspicionless searches necessarily applies to such a policy."

[89] *Ferguson*, 186 F.3d at 473.

[90] *Id.*

any medical information gathered violated their constitutional right to privacy.[91] Further, Plaintiffs alleged that MUSC personnel committed abuse of process, a state law tort, in administering Policy M-7.[92] While these arguments elicited the most media attention, this note concerns itself with Plaintiffs' claim that MUSC's policy had a racially disparate impact on a protected class, violating Title VI of the Civil Rights Act of 1964.[93]

The District Court ruled in favor of the Defendants for each claim.[94] On plaintiff's Title VI claim, the court ruled in favor of Defendants based on its findings of fact on the evidence presented.[95] Following the ruling by the District Court, the women appealed to the United States Court of Appeals, Fourth Circuit.

*2. FOURTH CIRCUIT'S TITLE VI RULING*

On appeal, the Plaintiff-appellants once again received an unfavorable ruling. As was the case at the District level, the Court of Appeals ruled in favor of the Defendants for all of the claims brought forth by the women.[96] Appellant's primary claim was that testing for and reporting of cocaine use by pregnant women disparately impacted African-American women to substantiate their claim.[97] Appellants needed to establish that "a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI."[98] According to the Fourth Circuit, if this prima facie case of discrimination were established, "the burden then shifts to the Defendants to demonstrate the existence of a substantial legitimate justification for the alleged discriminatory practice."[99] If Defendants satisfied this burden, Plaintiff-appellants could still succeed by

---

[91] *Id.at 473 – 474.*

[92] *Id.at 474.*

[93] *Id.at 473* See supra nn. 4 and 5 for text of the Civil Rights Act of 1964.

[94] *Ferguson*, 186 F.3d at 475.

[95] *Id.* at 475 – 476. Although the Court held that MUSC was a state institution, and therefore its staff constituted state actors, it also held that the purpose of the drug-screening policy was unrelated and independent from any law enforcement objective.

[96] *Id.* at 484.

[97] *Id.* at 479. The Court explained that "[a]lthough the statutory language of Title VI addresses only intentional discrimination, federal agencies that provide funds may prohibit disparate impact discrimination through regulations implemented under Title VI." *Id.* at 479 n.10.

[98] Elston v. Talladega County Bd. Of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993) To establish liability under Title VI, a plaintiff must first demonstrate by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI.

[99] *Ferguson*, 186 F.3d at 479 (quoting New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995)).

establishing that the same objective could be served by using less discriminatory measures.[100]

The women contended that the policy disparately affected African-American women based on three specific counts: (1) the policy was only implemented at MUSC; (2) only certain departments applied the policy; and (3) the policy was geared only toward the use of cocaine.[101] The Fourth Circuit disregarded the first count based upon lack of evidence to "support a conclusion that MUSC could have forced other hospitals to adopt the policy".[102] Without such evidence, the court concluded that there is no viable prima facie claim regarding the first count. On the other count, Appellants argued that targeting only cocaine use and not other potentially harmful substances to fetuses disproportionately affected African-American women.[103] As a result of evidence offered by Appellants, the Fourth Circuit found that such information is enough to establish a prima facie case.[104]

With Appellants satisfying a prima facie case, the burden shifted to Appellees to establish a legitimate interest in using the policy. MUSC claimed its decision to test only cocaine was due to the rise of cocaine use by pregnant women.[105] The women agreed that the Hospital's decision to fight the increased drug use was a legitimate reason for the policy's implementation.[106] Thus, in order to be successful in their claim, Plaintiff-appellants needed to establish that MUSC could succeed in its objectives by a nondiscriminatory alternative.[107]

The women offered two possible alternatives to MUSC's policy of testing only cocaine use: (1) reporting use of all illegal drugs and alcohol and (2) testing

---

[100] *Ferguson,* 186 F.3d at 480.

[101] *Id.*

[102] *Id.at 480 – 481.*

[103] *Id.at 482.*

[104] *Ferguson*, 186 F.3d at 480.

[105] *Id.* at 481. Plaintiffs supported their contention regarding the disparate effect of testing only for cocaine by offering statistics stating that only 68 percent of maternity patients testing positive for any drug were African-Americans, however 90 percent of positive results for cocaine were African-Americans. The Fourth Circuit found such evidence sufficient to at least establish that solely focusing on cocaine possibly did have the effect of a disparate impact.

The third count did not need to be considered by the Fourth Circuit Court. Appellants offered several claims supporting a Title VI violation. Thus, only one count needs to establish a prima facie case in order for the Court to consider the issue. Once the second count was determined to have established the prima facie case, the determination as to whether or not the third count could establish a prima facie case was irrelevant.

[106] *Id.* at 481. The Appellants did not challenge the legitimacy of MUSC's reasons for the policy nor do they dispute the nondiscriminatory objectives of the policy.

[107] *Id.*

all maternity patients.[108] Appellants' alternatives were immediately dismissed by the District Court based upon the undue costs and burdens imposed by changing the policy.[109] Because the women did not challenge the District Court's ruling that the alternatives suggested were "prohibitively expensive," the Fourth Circuit concluded that Appellants did not "demonstrate the existence of a means of accomplishing the goals of the policy that would have been equally effective while imposing a less disparate impact on African-Americans."[110] Based upon these conclusions, the Court ruled 2-1 in favor of Appellees regarding the Title VI claims.[111]

Judge Blake's dissenting opinion argued the plaintiff-appellants did offer viable alternatives and that the court, without any good explanation, used the prohibitively expensive excuse to reject the alternatives of the plaintiff-appellants.[112] Although Judge Blake agreed with the majority's analysis of the Title VI issue, she argued that the alternatives offered by plaintiff-appellants provided an "equally effective policy with a less discriminatory impact."[113] However, even with a strong and rational dissenting opinion by Judge Blake, the women in *Ferguson* did not appeal the Fourth Circuit's Title VI ruling to the Supreme Court.

## C. Analysis of Ferguson's Title VI Disparate Impact Claims

With such a deep-rooted civil rights argument in their suit against the hospital, it is somewhat shocking that the Fourth Circuit reached the decision that a Title VI violation did not exist. Based upon the Supreme Court's overall holding in *Guardians Ass'n*, the Ferguson Plaintiffs would have had to show that MUSC's policy had a discriminatory effect.[114] The general holding of the *Guardians* Court disagreed with the holding in *Bakke*[115] which presumed that

---

[108] *Id.*

[109] *Ferguson*, 186 F.3d at 481.

[110] *Id.* at 481 – 482.

[111] Judge Wilkins wrote the majority opinion, in which Judge Niemeyer agreed. Judge Blake dissented in part. "I disagree with the majority's conclusion that as to the Title VI claim the appellants failed to demonstrate the existence of a less discriminatory alternative policy. I would reverse the district court's decisions concerning appellants' . . Title VI claims and remand for consideration of appropriate relief." *Id.* at 484.

[112] *Id.* at 489

[113] *Id.* Under the MUSC policy, the cocaine was tested using a urinalysis that concurrently tests for other illegal drugs. Therefore, Judge Blake argues that without supporting evidence to the contrary, the inclusion of other illegal substances in the criteria for testing prenatal patients would not impose a significant financial burden on the hospital.

[114] Guardians Association v. Civil Service Com'n of City of New York, 463 U.S. 582 (1983).

[115] Regents of University of California v. Bakke, 438 U.S. 265 (1978).

Title VI's reach was confined to policies that functioned in only an intentionally discriminatory manner.[116] This holding assumes that absent the showing of deliberate discrimination, plaintiffs would be barred from bringing a suit. The *Guardians* Court, citing the principle of *Lau v. Nichols*,[117] stated that "even if Title VI itself did not proscribe unintentional racial discrimination, it nevertheless permitted federal agencies to promulgate valid regulations with such effect."[118] Therefore, the Court was reaffirming the notion that federal agencies had the discretion to enact statutes that prevent unintentional as well as intentional discrimination. Under this holding, Plaintiffs in *Ferguson* would be allowed to bring suit.

As mentioned above, in order to determine the extent of the disparate impact of MUSC's policy, a structured analysis similar to the Title VII three-pronged test in *Griggs* would likely be used.[119] The *Ferguson* Plaintiff's would have to establish that MUSC's policy had a disparate impact. [120] This prong would be satisfied based upon Plaintiffs showing that in testing only for cocaine use, the policy had a discriminatory adverse effect on African-Americans, a constitutionally protected class.[121] This would sufficiently establish the existence of a prima facie case of discrimination, required by the Supreme Court.[122]

The burden would then shift to MUSC to establish that there was a substantial and legitimate justification for the allegedly discriminatory practice.[123] MUSC's justification for its policy in solely targeting cocaine was based upon a "perceived rise in pregnant women abusing cocaine" and their resistance in obtaining treatment.[124] Although conceding that these are legitimate, nondiscriminatory motives and grounds for implementing these

---

[116] *Guardians Association*, 463 U.S. at 589.

[117] *Lau v. Nichols*, 414 U.S. 563 (1974).

[118] *Guardians Association*, 463 U.S. at 590. § 602 of Title VI, 42 U.S.C. § 2000d-1, empowers agencies providing federal financial assistance to issue "rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance...." Justice Stewart explained that the regulations therefore should be upheld as valid, because they were "'reasonably related to the purposes of the enabling legislation.' " *Lau v. Nichols*, 414 U.S. 563, 571 (1974) (opinion concurring in the result) (quoting Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973); Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280-281 (1969)).

[119] *Griggs*, 401 U.S. 424 (1971).

[120] *Id.*

[121] *See supra* n. 40.

[122] *See supra* n. 40.

[123] *New York Urban League, Inc.* 71 F.3d at 1036.

[124] *Ferguson*, 186 F.3d at 481.

policies,[125] such a policy may only stand as constitutional if plaintiffs fail to offer a showing of analogously effective policies with a less discriminatory result on the protected class, as stated in *Griggs*.[126] The *Griggs* court laid out the general path of a disparate impact claim: (1) that the agency's policy had a disparate impact on a constitutionally protected class; (2) failure by the agency to offer evidence that the discriminatory practice is justifiable and necessary; and (3) in light of a showing of justification by the defendant agency, plaintiffs can offer proof that alternative means exist to accomplish the same goal, but in which have a less discriminatory effect.[127]

As previously stated, plaintiffs proposed an alternative that would have a lessened adverse effect on African-American women.[128] MUSC's contention was that testing for all drugs would be an unacceptable alternative due to increased costs. Yet, the Court will sustain a policy only if these costs amount to an "undue burden". [129] Plaintiff's alternative would apparently support a Supreme Court ruling that MUSC could institute policies accomplishing the same goals of protecting prenatal women and their unborn children with a less adverse affect on African-American Women. Accordingly, Policy M-7 would seemingly be ruled unconstitutional.

Yet even with this proposed alternative, the Fourth Circuit was steadfast in maintaining its decision that the policy did not result in a disparate impact on a protected class. Regrettably, the above analysis would presently not be a factor, as such private causes of actions under § 602 of Title VI have been rendered obsolete by the Supreme Court's holding in *Sandoval*.

## IV. ALEXANDER V. SANDOVAL

### A. BACKGROUND

The state of Alabama declared English as its official language in 1990.[130] As a result the Department of Public Safety began administering driver's license

[125] *Id.*

[126] *Id.*

[127] *Griggs,* 401 U.S. at 434-35.

[128] *See Ferguson*, 186 F.3d at 481. The Plaintiffs proffered as alternative measures that MUSC should report the use of all illegal drugs and alcohol and to test all maternity patients.

[129] *Id.* (citing to Wards Cove Packaging Co. v. Atonio, 490 U.S. 642 (1989)). *Wards* explained that in order for an alternative policy to "serve the same purpose" as a contested policy with a less disparate impact, a court should consider whether the proposed alternative policies impose "undue costs or other burdens." *Id.* at 661. Unlike the Fourth Circuit Court which failed to test the factual findings by the District Court, the Supreme Court would likely insist that MUSC provide information evidencing an increased cost. The Court would then consider the overall cost of screening for all drugs, as opposed to the cost of just the testing itself.

[130] *Alexander v. Sandoval*, 532 U.S. 275, 278 (2001).

exams exclusively in English.[131] Because the Alabama Department of Public Safety accepted funding and assistance from the Department of Justice and the Department of Transportation, it was subjected to the regulations of § 602 of Title VI.[132] § 602 of Title VI prohibits recipients receiving federal assistance from administering this aid in a manner resulting in a discriminatory effect.[133]

Martha Sandoval, a Mexican immigrant, was not sufficiently fluent in English to pass the written driver's license exam. Sandoval challenged the Department's English-only policy, claiming it had a discriminatory effect on individuals with a different national origin who could not speak English well.[134] This, she claimed, violated Title VI and its regulations.

## B. PROCEDURAL HISTORY

Sandoval brought suit in the District Court for the Middle District of Alabama. The District Court, agreeing with Sandoval's challenge, enjoined the Alabama Department of Public Safety's policy and ordered the Department to establish a written test for non-English speaking individuals.[135]

The Department and its director appealed within the Eleventh Circuit.[136] The Eleventh Circuit affirmed the District Court's ruling that the Department's policy discriminatorily affects non-English speaking individuals.[137] As a result, the Department appealed to the Supreme Court of the United States.

The Supreme Court granted certiorari to address the specific issue of whether private individuals may sue to enforce disparate impact regulations promulgated under § 602 of Title VI. The Supreme Court affirmed that private individuals can sue to enforce § 601 of Title VI.[138] This section, however, only prohibits intentional discrimination. The Court then assumed for purposes of the case that § 602 regulations validly proscribe activities resulting in a disparate impact on racial groups.[139]

---

[131] *Id.* at 279.

[132] *Id.* at 278.

[133] *Id.*

[134] *Id.*

[135] *Id.*at 279.

[136] *Sandoval v. Hagan*, 197 F.3d 484 (1999).

[137] *Id.* at 511. The Court held that "Appellees' suit [was] not barred under the Eleventh Amendment, [and] that § 602 of Title VI create[d] an implied private cause of action to obtain injunctive and declaratory relief under federal regulations prohibiting disparate impact discrimination against statutorily protected groups."

[138] *Sandoval,* 532 U.S. at 280 – 281.

[139] *Id.* at 281.

Due to the distinction between actions that § 601 permits, but § 602 forbids, the § 602 regulations cannot simply apply the directives of § 601.[140] § 602 is "phrased as a directive to federal agencies engaged in the distribution of public funds."[141] The Court continued, stating that "this authorizing portion of § 602 reveals no congressional intent to create a private right of action."[142] The Court further stated that the methods used in enforcing § 602 do not manifest intent to create a private cause of action.[143]

In writing for the majority in *Sandoval*, Justice Scalia reasoned that because none of the prior cases relied upon by Sandoval explicitly held that § 602 contains a private right of action.[144] The Court must look at the actual statutory language. Under *Sandoval*, the Court looked to statutory intent as being the determinative factor.[145] The Court found the absence of private plaintiffs from the statutory language to be troubling.[146] Further, the implied right must come, not by looking at § 601, but from § 602 itself.[147] The Court reasoned that the statutes focus on the persons regulated rather than the individuals protected.[148] There is "no implication of intent to confer rights on any particular class of persons."[149]

The final conclusion by the Court was that there was no evidence, either in the statutory language or implied that § 602 of Title VI confers a private right of action. Because Congress had previous expressed that § 602 departments responsible for issuing regulations could cease funding to recipients who refused to comply with such rules,[150] it was unlikely they also intended to create a private remedy for those individuals affected by the discriminatory practice.[151] Congress

---

[140] *Sandoval*, 532 U.S. at 289.

[141] *Id*. quoting, Universities Research Assn., Inc. v. Coutu, 450 U.S. 754, 772.

[142] *Sandoval*, 532 U.S. at 289.

[143] *Id*.

[144] *See* Guardians Ass'n v. Civil Service Commission, 463 U.S. 582 (1983); Cannon v. University of Chicago, 441 U.S. 677, (1979).

[145] *Sandoval* 532 U.S. at 286.

[146] *Id*.

[147] *Id*.

[148] *Id*. at 289.

[149] *Id., quoting* California v. Sierra Club, 451 U.S. 287, 295 (1981).

[150] § 602 of Title VI of the Civil Rights Act of 1964 provides "Compliance with any requirement adopted pursuant to this § may be affected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement …

[151] *Id*. at 288-91

created a system for regulating noncompliance. Yet, creating a private right of action subverts congressional intent by challenging the workings of § 602.

## C. WHY *SANDOVAL* WAS DECIDED INCORRECTLY AND THE FAR-REACHING ASPECTS OF IT'S ERRONEOUS HOLDING

The Supreme Court was wrong in its *Sandoval* ruling. The Court's majority opinion, written by Justice Scalia (and joined by Chief Justice Rehnquist, and Justices O'Connor, Kennedy, and Thomas), supported the ruling by explaining that no previous cases specifically addressed this topic. The entire Court agreed on one aspect of this case; the Supreme Court never previously held that a private cause of action for a Title VI claim under § 602 actually existed.[152] This issue, however, became the only aspect of the case the Court agreed upon.[153] Without the benefit of precedent, Justice Scalia and the majority enjoyed unfettered discretion in rending the Court's decision.

By distinguishing previous cases, the Supreme Court essentially eliminated an individual's constitutional right against policies that, although facially neutral, result in a discriminatory outcome.[154] Although it is true that the Supreme Court had never made an ultimate determination as to whether or not a private right of action existed under Title VI, the majority approach limits the current existence of Title VI.[155] Although the majority utilized an acceptable

---

[152] *Sandoval*, 532 U.S. at 282-86. Although respondents in *Sandoval* proposed that the Court had previously decided that a private right of action had existed based on previous statements, the Court rejected such a contention. The Court stated that such ruling in the past were not specific case holdings, but merely dictum and inconclusive. Therefore, the fact that the Court might have allowed private causes of action in the past does not necessarily mean that such a rule was binding on the Court. The Court considered the past cases in which it was claimed by respondents' that the private action issue had been decided.

The Court considered *Cannon*, but claimed that the ruling in that case was decided upon "the assumption" that intentional discrimination existed. The Court used this same contention in considering the holding in *Guardians*. The Court also dismissed *Lau*, stating that the case rested on principles the Court no longer accepted. Without an actual binding opinion, Scalia argued that the Court was free to ignore past cases and make its ultimate determination in the *Sandoval* case, free from any prior constraints of the Court's previous rulings.

[153] The Court's dissent by Justices Stevens, Souter, Ginsburg, and Breyer argued that the majority misconstrued the actual relationship between sections 601 and 602 of Title VI and therefore misinterpreted the intent of Title VI. The dissent further argued that the majority failed to give proper weight to the Court's previous rulings, which supported a private right of action. Justice Stevens felt that the Court had faltered in its analysis of *Canon* and *Guardians* by establishing that these two cases present no supporting evidence of an established private cause o faction under Title VI.

[154] *Id*. at 295.

[155] *Id*. The Supreme Court implies from its holding that there is no private right to enforce disparate impact regulations. In his dissent, Justice Stevens states, "[i]f the regulations promulgated pursuant to 602 are either an authoritative construction of 601's meaning . . . then it makes no sense to differentiate between private actions to enforce 601 and private actions to enforce 602." *Id*. at 310. (Stevens, J., dissenting). According to Stevens, the majority's holding essentially states that a

analytical approach, its narrow and limited construction of previous case law resulted in dire consequences for a private right of action under § 602.[156]

The majority seemed very stern and set in their approach to interpreting Title VI.[157] Justice Scalia failed to read the plain language of the statute.[158] The majority ignored the actual relationship between sections 601 and 602 in its analysis. By framing the relationship in terms of distinction and removal, the Supreme Court seemed to set aside the importance of Title VI.[159] Justice Scalia treats § 602 as distinct and separate from that of § 601. However, as pointed out by Justice Stevens, § 602 was enacted to specifically effectuate the provisions of § 601 to properly achieve its goals.[160] The language of § 602 clearly provides Congressional intent that the two sections be read as a unit and not separate entities.[161] § 602 of Title VI has been used to enforce disparate impact regulations for years.[162] Suits under § 602 were extremely helpful in situations

---

regulation may be valid even if it does not authoritatively construe the statute which enables it. Such an interpretation has no basis in providing a proper context with which to analyze a statute's enforcing ability.

[156] *Id.* at 292. Scalia claimed that there was no evidence that Congress intended § 602 to be enforced through a private right of action. However, with this ruling Scalia has completely disregarded a long-standing principle of civil rights because neither he nor his colleagues who joined in the majority opinion could unmask proper Congressional intent.

[157] *Id.*

[158] This approach actually seems somewhat contradictory for Justice Scalia. He made it a point in his holding that he was not bound by the language of prior cases, but by the general principles and holdings that resulted from them. When the attention moved away from case law and shifted towards Title VI, Scalia abandoned his approach of weeding through language to find actual meaning and intent by deciding to focus solely on the text of Title VI. In doing so, Scalia wholly disregarded the legislative history and the general principles and meaning of Title VI. In Michael H v. Gerald D., 491 U.S. 110 (1989), Justice Scalia explained his methodology in framing issues and interpreting them as narrowly and constrained as possible. In footnote 6, Scalia explains the general rule is to state the issue in the most specific level at which you can define the right. And although the Court has not accepted such a method, Scalia persists to use it in rendering favorable decisions for him.

[159] *Sandoval*, 532 U.S. at 285.

[160] 42 U.S.C. § 2000d-1 (2000).

[161] What is shocking about this ruling is that the issue centers primarily on Congressional intent regarding the effectuating influence of § 602. The majority's opinion held that Congress chose to adopt regulations combating disparate impact by enacting § 602; however they had not intended there to be an implied cause of action.

[162] *Sandoval*, 532 U.S. at 295. *See also* Powell v. Ridge, 189 F.3d 387 (C.A.3 1999); Chester Residents Concerned for Quality Living v. Seif, 132 F.3d 925 (C.A.3 1997), summarily vacated and remanded, 524 U.S. 974 (1998); David K. v. Lane, 839 F.2d 1265, 1274 (C.A.7 1988);Sandoval v. Hagan, 197 F.3d 484 (C.A.11 1999); Latinos Unidos De Chelsea v. Secretary of Housing and Urban Development, 799 F.2d 774, 785, n. 20 (C.A.1 1986); New York Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (C.A.2 1995)

where a protected class was the victim of discrimination, but where no actual showing of intentional discrimination existed.[163]

## V. POTENTIAL ALTERNATIVE METHODS OF BRINGING A DISPARATE IMPACT-TYPE CLAIM IN THE ABSENCE OF A PRIVATE CAUSE OF ACTION UNDER § 602

Based upon the decision by the Supreme Court in *Sandoval*, had the *Ferguson* plaintiffs attempted to challenge MUSC's policy in court, a Title VI claim would have been unavailable. Although § 601 allows for a private right of action, it may be implemented only in a showing of intentional discrimination.[164] This would not be beneficial for cases such as *Ferguson*. Without the use of § 602 as a cause of action, victims of a policy with disparate results but no invidious motive must find an alternative route to challenge such policies.[165]

### A. TITLE VI CLAIM UNDER § 1983

Justice Stevens, in his dissent in *Sandoval*, implied that a plaintiff could bring an action under § 1983[166] to challenge policies with a disparate effect on individuals.[167] Neither Justice Stevens nor any of the other dissenters provided a framework on how an individual might purport their claim through such a mechanism.[168] Since the Court's decision in *Sandoval*, several attempts at

---

[163] *See* Charles Lane, *Justices Limit Bias Suits Under Civil Rights Act*, WASH. POST, Apr. 25, 2001, at A1.

[164] *See supra* note 21.

[165] *See supra* note 85.

[166] 42 U.S.C. § 1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." § 1983 provides the cause of action against anyone who deprives another of a constitutional right.

[167] *Sandoval*, 532 U.S. at 302 (Stevens, J., dissenting). The Court in *Sandoval* has not technically ruled out such action based in the narrowness of its holding. *Sandoval's* decision only held that a private cause of action under Title VI § 601 was not afforded to plaintiffs; however, it mentioned nothing about the prohibition of a § 1983 claim. The intention was that only the actual holding of *Sandoval* is the only binding decision. Because the Court declared that its dicta does not have a binding effect on lower courts at the time of the ruling, the plaintiffs were free to attempt to bring such an action.

[168] The Court in *Blessing v. Freestone*, 520 U.S. 329 (1997) established a three-prong test in determining whether or not a right has been created by a federal statute: (1) Congress must have intended that the plaintiff was to benefit from the federally enacted statute; (2) the federal right created by the statute is clear and unambiguous and therefore able to be judicially enforced; and (3) the statute mandates the protection of the federally granted right. *Id.* at 340-41. Once a plaintiff is

bringing disparate impact claims under a § 1983 action have produced mixed results.[169] Although such a route might provide some relief to plaintiffs depending on geographical location and the decisions of local courts, it is still unclear whether or not the Supreme Court will ultimately approve such action. Until the Supreme Court renders a definitive decision, plaintiffs such as those in *Ferguson* should not rule out the possibility of a corrective means of bringing a private cause of action to challenge discrimination.[170]

## B. A CLAIM UNDER THE EQUAL PROTECTION CLAUSE

Without the help of Title VI, plaintiffs would have to seek yet another approach to bring a claim against a policy with a disparate impact. Another potential option for plaintiffs might be to claim a violation of the Equal Protection Clause of the Fourteenth Amendment.[171] The individual plaintiffs may have a basis for an Equal Protection Clause violation if an agency policy has an adverse racial impact. Although early Equal Protection cases centered around statutes and policies that were racially discriminative on their surface, policies that are facially neutral must establish an invidious intent to prove unconstitutionality. [172] This might bring such arguments right back into the §§

---

able to satisfy all three prongs, the next step is to establish that Congress intended such a remedy under § 1983 to be available. Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989).

[169] In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771, 790-91 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 2621 (2002), a case involving New Jersey's decision to approve the operation of a cement plant in an urban neighborhood, the Third Circuit reversed the District Courts ruling that allowed the plaintiffs to enforce through § 1983 claims under Title VI regulations. The Court reasoned that the holding of the Supreme Court's majority decision in *Sandoval* precluded such claims from processing. However, in *Robinson v. Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002), the Court declared that the holding in Sandoval did not preclude such claims from being enforced by § 1983, and thereby allowed the plaintiffs to seek injunctive relief under the § 1983 premise. The Court in *Gonzaga v. Doe*, 536 U.S. 273 (2002), the Court that legislation that provides federal funding does not create an implied enforceable right under § 1983 unless Congress clearly and unambiguously establishes an intent to provide such a right through statutory language. *Gonzaga's* holding is for the most part on par with the Third Circuit's preclusion of § 1983 claims.

[170] Considering the Court's recent decisions, it seems that once the Supreme Court addresses the actual issue of whether a plaintiff may bring a Title VI claim through § 1983, the Court is likely to decide that § 602 of Title VI does not create a right under § 1983, and therefore ultimately prevent plaintiffs from bringing such an action through § 1983. Although the Court has not explicitly stated this as a binding rule based upon *Sandoval*, the principles that *Sandoval* elicited and implied are contrary to the showing of such a cause of action existing under § 1983.

[171] U.S. Const. amend. XIV, §1. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Known as the "Reconstruction Amendment," with its broadly phrased language, the Fourteenth Amendment provides a basis for civil rights claims.

[172] *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (evidence of disproportionate impact can be used to show circumstantial evidence of invidious intent). Unlike statutes that are discriminatory on the surface, which require strict scrutiny applied by the Court, statutes that are facially neutral do not

602-601 distinction. In *Ferguson*, the plaintiffs could not prove an intentional motive. Thus, the likelihood of an equal protection claim may not be a strong possibility.

## C. DELIBERATE INDIFFERENCE THEORY

Another possible alternative to bringing a private right of action under Title VI might be the enforcement of such claims under the "deliberate indifference theory."[173] This standard has already been implemented under the Title IX sexual harassment policy; [174] and might be a possible means to establish a private cause of action under Title VI.[175] The main focus of deliberate indifference ignores a plainly discriminatory policy while having knowledge of the disparate results. The agency must also attempt to correct the discriminatory practices.[176] Deliberate Indifference encompasses four basic elements: (1) a

---

automatically trigger strict scrutiny. Therefore, the *Ferguson* plaintiffs would be required to show that MUSC had some sort of invidious intent in enacting their policy for the Court to apply strict scrutiny. However, if MUSC can demonstrate that, although resulting in a disproportionate impact on a protected class, the policy serves a "compelling government interest," the policy will not be unconstitutional. *See* Brown v. Bd. Of Educ., 347 U.S. 483, 495 (1954), (applying strict scrutiny to strike down a school segregation policy even though it was governmentally sponsored).

[173] Derek Black, Comment, *Picking up the Pieces after Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C.L. Rev. 356 (2002). After the dissolution of Title VI private causes of action following Sandoval, and the unlikely success of a claim brought under § 1983, a theory of deliberate indifference, previous only applied in sexual harassment cases might provide an underlying possibility that courts may analyze a disparate impact claim analogously to these sexual harassment claims.

[174] Title IX of the Educational Amendments of 1972 states "[n]o person in the U.S. shall, on the basis of sex be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal assistance." 20 U.S.C. § 1681. Title IX governs the overall equity of treatment and opportunity in athletics while giving schools the flexibility to choose sports based on student body interest, geographic influence, a given school's budget restraints, and gender ratio. In other words, it is not a matter of women being able to participate in wrestling or that exactly the same amount of money is spent per women's and men's basketball player. Instead, the focus is on the necessity for women to have equal opportunities as men on a whole, not on an individual basis. Title IX, Prohibition of Sex Discrimination, Pub. L. No. 92-318, 901, 86 Stat. 373, 373-75 (1972) (codified as amended at 20 U.S.C. § 1681 (2000)).

[175] Although originating from 42 U.S.C. § 1983 claims, the Supreme Court in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290-91 (1998), held that the deliberate indifference theory reaches the context of Title IX.

[176] Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 644-47 (1999).

In his Comment, Black argues that the *Sandoval* Court did not hold that the practices in question were not discriminatory. *See* supra notes 123 and 171. Thus, as Black contends, an agency's deliberate indifference regarding its policies that have a discriminatory result might be equivalent to intentional conduct which has been established as the overriding issue in determining a Title VI claim. Black compares the use of Title VI in the deliberate indifference theory, such as plaintiffs in *Ferguson*, to that of a school's sexual harassment policy. Although a school might not have intended sexual discrimination (removing the intent requirement now needed under a Title VI claim), the

requirement that an official with the authority to rectify the discrimination exists; (2) this official must have notice that the recipient might be liable in the event of misconduct; (3) the official must have actual knowledge and notice of the misconduct; and (4) the official must purposely and deliberately ignore or be "indifferent" to the violation of the victim's rights or discrimination.[177] Thus, if the *Ferguson* plaintiffs could meet such requirements, it is possible that this alternative might serve as a potential method of preventing such discriminatorily policies.

## VI. CONCLUSION

While it is unclear which suggested remedies might evolve as a way to remedy the decision addressed by the Court in *Sandoval*, for now, it is clear that the *Ferguson* plaintiffs have no claim of redress against MUSC's policy. Nonetheless, the *Ferguson* plaintiffs never reached the Supreme Court on their Title VI disparate impact claims because counsel chose not to appeal the Fourth Circuit's ruling.

There is little argument that the initial motive of MUSC's policy was the protection of prenatal women and their unborn children from a growing epidemic of drug use. Nevertheless, the manner in which the policy was implemented was questionable on many grounds. Although the Supreme Court ruled the policy unconstitutional as a violation of the Fourth Amendment's right against illegal searches and seizures, the underlying claims of disparate impact under §602 of Title VI never made it past the Fourth Circuit.

It is unclear why these claims were never appealed to the Supreme Court, based upon the 2-1 decision at the appellate level, as well as the more cost-effective alternatives proffered by the plaintiffs. Yet, the entire situation has been rendered moot based upon the Court's decision in *Sandoval*. This decision poses a barrier to victims of discrimination by forcing plaintiffs to devise alternative routes in correcting injustices carried out by discriminatory policies. Without a private cause of action under Title VI, individuals, harmed by a policy or regulation not implemented in an intentionally harmful manner, must seek other remedies.

It might take legislative action to correct this issue. However, it might also take the plaintiffs' creativity in convincing a court that one of the several proposed alternatives is a viable avenue in addressing a disparate impact claim. Until such a time exists, or until the Supreme Court revisits the issue, one thing is

---

school would still violate Title IX if it ignores this violation. Similarly, if the MUSC policy acknowledges a disparate impact on minorities but deliberately ignores this result, Black believes that the plaintiffs might be able to invoke the deliberate indifference theory as a substitute for the intentional discrimination requirement. However, these standards have yet to be applied to policies other than harassment and it is unknown whether or not the distinction between harassment policies and discriminatory result policies are similar enough to invoke such a theory.

[177] *Davis,* 526 U.S. at 644 – 647.

clear – the Court has temporarily set back the effective reach of Title VI, and the Civil Rights Acts as a whole.