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Alexander v. Sandoval: A Setback for Civil Rights

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Abstract
This article confronts the serious implications of a recent U.S. Supreme Court decision, *Alexander v. Sandoval*, which eliminated an important legal avenue for civil rights plaintiffs. For over 35 years, individuals have been allowed to bring lawsuits directly challenging violations of rights set forth in the federal regulations implementing Title VI of the 1964 Civil Rights Act. Because these actions could be grounded in proof of disparate impact, rather than discriminatory intent, they allowed for some claims that could not go forward under other legal authorities, such as the Fourteenth Amendment. While the author concludes by identifying key remaining options, he highlights the real damage done by this decision.

I recently had occasion to remember a meeting three years ago with Richard Cohen, the legal director of the *Southern Poverty Law Center* in Montgomery, Alabama. At that meeting, he told me about his lawsuit on behalf of Martha Sandoval, a house cleaner

from Mobile and a Mexican immigrant. Ms. Sandoval was denied a drivers' license because she could not pass the state's written exam. The voters of Alabama had passed an English-Only law, and the state interpreted that law to require that drivers' license exams be offered only in English (the only state with such a limitation). While Ms. Sandoval's working knowledge of English was sufficient to read road signs, it was not sufficient to take the exam.

Mr. Cohen brought a class action lawsuit on behalf of Ms. Sandoval and the 24,000 other non-English speakers in Alabama, alleging that the state violated federal law by requiring applicants for drivers' licenses to take the written examination in English. The particular federal law that supported this lawsuit is known as Title VI of the 1964 Civil Rights Act (42 U.S.C. § 2000(d)). Title VI prohibits discrimination grounded in race, color or national origin.

Like the Fourteenth Amendment's Equal Protection Clause, Title VI has been judicially interpreted to require proof of discriminatory intent. Proof limited to discriminatory effect, such as is clearly evident with the Alabama law, is insufficient. Yet, while courts have interpreted the statute itself to bar only intentional discrimination, federal *regulations* implementing Title VI, pursuant to § 602 of the statute, have been consistently given a broader interpretation (see regulations at 34 C.F.R. §100.3(b)(2)). Lawsuits grounded in these implementing regulations are unique in that they allow people like Ms. Sandoval to make their arguments in federal court by showing the discriminatory effect ("disparate impact") of a law. This brief article is about such Title VI disparate impact lawsuits and April's Supreme Court decision against Martha Sandoval, in *Alexander v. Sandoval*, 121 S.Ct. 1511 (2001), eliminating the right of Ms. Sandoval and all others to pursue lawsuits directly enforcing the Title VI regulations.

Intent versus effect—what's the difference? After all, the worst discrimination is surely intentional. The SPLC, for instance, has built an impressive record of court victories on behalf of victims of such egregious racism. These cases target the KKK and neo-Nazi organizations. The defendants are abhorrent, and the issue of racist intent cannot be seriously questioned. Further, we as a society do not want to encourage frivolous lawsuits grounded only in a statistically disproportionate effect on some minority group. What is the harm of limiting lawsuits to only those where discriminatory intent is clear?

In a nutshell, policy makers today, no matter what their actual intent, are loath to expressly state an intent to discriminate. Even the English Only law that prompted Ms. Sandoval's lawsuit was likely promoted on facially neutral grounds such as unity, assimilation, and even fiscal efficiency. Within certain limits, policies that have a clear discriminatory impact should be closely scrutinized, and the government should have to offer reasonable justifications for them, even if there exists no smoking gun demonstrating an intent to discriminate. This is how courts approached Title VI disparate impact cases before April's Supreme Court decision. While the person bringing the case must prove that the practice in question has a disproportionate and negative impact on a protected group, the defendant (e.g., a state government or a school district) can then respond by demonstrating a legitimate, nondiscriminatory reason for the practice (see *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999); 34 C.F.R. §100.3(b)(2)). Frivolous lawsuits therefore fail either because of a lack of proof of disproportionate negative impact or because of an appropriate, nondiscriminatory reason for the practice.

In Ms. Sandoval's case, the SPLC lawyers easily proved that the drivers' license rule had the prohibited effect of discriminating on the basis of national origin. Given that illiterate residents who could nonetheless understand spoken English were allowed to take the Alabama drivers' license exam in spoken form (with someone reading them the

questions in English), the state could not justify denying residents like Ms. Sandoval the opportunity to take the written exam in a form that they could understand. The trial court agreed with Ms. Sandoval, as did the court of appeals. Normally, this would have been the end of the matter.

But attorneys for the State of Alabama took one last shot. They asked the U.S. Supreme Court to declare that Congress never intended private individuals to be able to bring lawsuits directly under the authority of the Title VI implementing regulations. The Court agreed to hear the case, and on April 24, 2001 they reversed the judgment. By a 5-4 majority in *Alexander v. Sandoval* (the same breakdown of individual Justices deciding in favor of George W. Bush in *Bush v. Gore*), the Court concluded that Congress only intended these regulations to be directly enforceable by the Office of Civil Rights—a political body with very limited resources—not by a private right of action.

The Court's decision even to consider this case was shocking. In the 37 years since the passage of the Civil Rights Act, the Court has several times given a tacit nod of approval to the now-forbidden private actions. Moreover, the issue of private actions brought under the Title VI regulations had been decided by 9 of the 12 U.S. Courts of Appeals, and there was no dispute: all agreed that such an action is legally appropriate. The Supreme Court will rarely hear a case addressing legal issues about which there exists no dispute among the various Courts of Appeals. Yet this Court reached out to hear the case.

The fallout from *Alexander* is potentially enormous. For instance, in New York, ACLU attorneys may not be able to continue their Title VI action claiming that educational opportunities for the state's minority students are so inferior that they amount to discrimination. Similarly, in Pennsylvania, Philadelphia may have to dismiss its Title VI claim alleging that the Pennsylvania funding formula disparately impacts districts with higher minority enrollments. Dozens of other important civil rights cases will suffer a similar fate.

For these reasons, the Court's decision in *Alexander* comes as a great disappointment. While expectations for the present Supreme Court may be low, courts as an institution play a crucial role in our constitutional system. American courts, particularly federal courts, once represented a refuge for children seeking access to educational opportunities. While the legislative and executive branches were responsive to those who sought policies expanding local control, pushing for tougher standards, or enhancing individual choice, the judicial branch served the interests of equity. Civil rights groups leveraged court mandates into broader, equity-minded educational policy reforms benefiting, among others, African Americans, Latinos, immigrants, and students with disabilities. Over the past two to three decades, litigation has undoubtedly been a less successful tool for social justice. Yet this shift, partially attributable to a corresponding shift in judges' ideologies, need not be permanent; the judiciary retains its unique institutional position as protector of the constitutional rights of political minorities.

The gloomy picture painted by the above description of *Alexander* and its probable aftermath should be tempered by the reality that, for better or worse, many judges' decisions in civil rights cases are grounded as much in their understanding of what is "fair" as in the specific elements of the legal claim for relief then at issue. From this perspective, what is important is that civil rights cases must find a legal toehold—some legislative justification to have the case considered. While the useful toehold provided by the implied right of action under the Title VI implementing regulations has now disappeared, other options remain.

The most likely alternative course for future private actions may be offered by Section 1983 (of Title 42 of the U.S. Code), the reconstruction era legislation that authorizes lawsuits against the government or government officials responsible for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The implementing regulations for Title VI may fall within the scope of Section 1983's protections. Actions brought under § 1983 bypass the increasingly difficult *implied right of action* analysis. Congress expressly intended § 1983 to give civil rights plaintiffs access to the direct judicial relief.

In fact, the Pennsylvania funding case mentioned above includes a disparate impact claim for relief, under the terms of Title VI's implementing regulations, based on § 1983 (*Powell v. Ridge*, 189 F.3d at 400-403). *See also,* Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations,* 49 U. Kans. L. Rev 321 (2001) (arguing that § 1983 should support private rights of action to enforce the disparate impact regulations issued pursuant to § 602). In the perhaps overly optimistic words of Justice Stevens (dissenting) in *Alexander*, "[T]his case is something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief." 121 S.Ct. at 1527.

Another alternative would be to turn to Congress for legislation that would return Title VI jurisprudence to its pre-*Alexander* state, as has been done with the Civil Rights Restoration Act of 1991 following the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). But such remedial legislation seems unlikely be approved by Congress or signed by the President in the near future.

During my meeting with Richard Cohen of the SPLC, we discussed the importance of responding to systemic denials of educational rights with lawsuits that employ systemic legal approaches. When he argued Ms. Sandoval's case before the Supreme Court, he tried to protect one such systemic approach. The Supreme Court's decision to undermine Title VI unquestionably represents a severe setback for children seeking schooling opportunities. Eventually, the education rights community will be able to recover from this blow, but this will take time and the opportunity costs will be high. Instead of working to advance the cause of equal rights beyond its present state, advocates will have to devote their energies to repairing the damage incurred last week. In the meantime, many aggrieved students and others will find themselves without sufficient remedies.

The Court's decision in *Alexander* was much more than a legal abstraction; it marks a poignant shift in how Americans are allowed to treat one another.

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