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Applying the Disparate Impact Rule of Law to Environmental Permitting Under Title VI of the Civil Rights Act of 1964

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APPLYING THE DISPARATE IMPACT RULE OF LAW TO ENVIRONMENTAL PERMITTING UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

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In February 1994, President Clinton issued Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*,[1] which applied the environmental justice concept to federal agencies. A Presidential Memorandum issued with E.O. 12898 specifically identified Title VI of the Civil Rights Act of 1964 as a means of ensuring that federally assisted programs do not discriminate against minority communities in particular by subjecting them to "disproportionately high and adverse environmental effects."[2] In response to the President's directive, the United States Environmental Protection Agency ("EPA") issued its *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits*[3] in February

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The views expressed herein are the author's own, and do not necessarily reflect those of the Environmental Protection Agency.

[1] Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (1994 & Supp. IV 1998).

[2] President's Memorandum for the Heads of All Departments and Agencies, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994) [hereinafter President's Memo].

[3] OFFICE OF ENVIRONMENTAL JUSTICE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998), *available at* http://www.epa.gov/oeca/oej/titlevi/html [hereinafter INTERIM GUIDANCE]. The *Interim Guidance* is based on a legal argument presented in an amicus brief filed for EPA by the U.S. Department of Justice ("DOJ") in August 1996 in a model environmental justice lawsuit based on Title VI and the disparate impact rule. *See generally* Brief of the United States as Amicus Curiae in Opposition to Defendants' Motion to Dismiss, Chester Residents Concerned for Quality Living v. Seif, 944 F. Supp. 413 (E.D. Pa., May 28, 1996) (No. 96-CV-3960).

EPA's *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* was described more fully in a prior article by this author. *See generally* Michael D. Mattheisen, *The U.S. Environmental Protection Agency's New Environmental Civil Rights Policy*, 18 VA. ENVTL. L.J. (1999).

1998. Based on Title VI of the Civil Rights Act of 1964[4] and the "disparate impact rule,"[5] EPA's *Interim Title VI Guidance* promulgated a new environmental civil rights policy pertaining to state environmental permitting.

Drafted by EPA's Office of General Counsel ("OGC") and issued by EPA's Office of Civil Rights ("OCR") as an internal policy directive, EPA's *Interim Title VI Guidance* was "intended to provide a framework for the processing . . . of complaints . . . alleging discriminatory effects resulting from the issuance of pollution control permits by state and local governmental agencies that receive EPA funding."[6] While internal only, the policy acknowledged that it had broad implications for a variety of interests, including the states, industry, and communities.[7]

EPA's *Interim Title VI Guidance* is EPA's first formal attempt to use Title VI and the disparate impact rule to apply race-based civil rights to environmental policy and programs. This article examines the application of the disparate impact rule to state environmental permitting under Title VI. Part I of the article presents the environmental justice problem and President Clinton's response, and provides a general introduction to Title VI and the disparate impact rule. Part II of the article examines the disparate impact rule's requirements in more detail—especially the causation requirement. Part III discusses the analogous causation requirement in licensing cases under the "state action rule." The article concludes in Part IV with the proposition that neither Title VI nor the disparate impact rule can achieve environmental justice's objectives.

I. BACKGROUND

A. *Environmental Justice*

The EPA's new environmental civil rights policy is designed to effectuate environmental justice, which calls for uniform environmental and health conditions across races and income levels.[8] It relies on the

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[4] 42 U.S.C. § 2000d (1994).

[5] The disparate impact rule, first annunciated in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), is discussed in detail *infra* Part I(D).

[6] INTERIM GUIDANCE, *supra* note 3, at 1.

[7] *See id.* at 1.

[8] Environmental justice addresses the logistic distribution of benefits and burdens in modern industrial society. Throughout the history of the United States, there has existed an "inextricable link between exploitation of the land and the exploitation of people." Numerous communities scattered across the nation are suffering from the negative

premise that minority and low-income populations or communities are disproportionately exposed to pollution and environmental risk. The term "environmental justice" refers to the solution; the problem is referred to as environmental racism.[9] EPA defines environmental justice as:

> The fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic, or socioeconomic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.[10]

> consequences of industrial production and modern society. Indeed, some communities are more equal than others. But where racial discrimination exists in education, employment, housing, health care delivery, and voting rights, it should be no surprise that it affects environmental issues as well.

Charles Lee, *Developing the Vision of Environmental Justice: A Paradigm for Achieving Healthy and Sustainable Communities*, 14 VA. ENVTL. L.J. 571, 571 (1995) (footnote omitted) (quoting Robert D. Bullard, *Overcoming Racism in Environmental Decisionmaking*, ENVIRONMENT, May 1994, at 11). Charles Lee was Research Director for the United Church of Christ Commission for Racial Justice, where he oversaw the 1987 Commission study *Toxic Waste and Race in the United States*, one of the principal studies upon which environmental justice is founded. He was also appointed by EPA Administrator Carol Browner to EPA's National Environmental Justice Advisory Committee ("NEJAC"), and is currently Deputy Director of EPA's Office of Environmental Justice ("OEJ").

[9] *See* Luke W. Cole, *Environmental Justice and the Three Great Myths of White Americana*, 3 HASTINGS W.-N.W.J. ENVTL. L. & POL'Y 449, 449 (1996). Luke Cole is general counsel to the California Rural Legal Assistance Foundation in San Francisco, California, and a prominent environmental justice author, attorney, and advocate. He has filed several Title VI environmental justice administrative complaints with EPA against state environmental departments, and was appointed by Carol Browner to NEJAC.

[10] Office of Federal Activities, United States Environmental Protection Agency, Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses (visited Apr. 8, 2000) <http://www.epa.gov/oeca/ofa/ejepa.html>. EPA's Office of Environmental Justice has recommended the EPA broaden its definition of environmental justice to include fair treatment by culture and educational level as well as by race and income. *See* Memorandum from Barry E. Hill, Director, U.S. EPA Office of Environmental Justice, to Deputy Regional Administrators, Environmental Justice Regional Coordinators, and Designated Federal Officials 1 (Dec. 16, 1998) (on file with the *William and Mary Environmental Law and Policy Review*).

EPA's comprehensive definition encompasses two important environmental justice goals: an inclusive process and a proportional environmental result or condition. It reflects the environmental justice premise that minority and low-income populations have not been included in environmental processes and are disproportionately subject to "negative environmental consequences"[11] from private and government actions. An inclusive process means the "meaningful involvement of all people"[12] in the development and implementation of environmental law and policy. Fair treatment does not mean the process itself, but the end result: a condition in which no racially or economically defined group disproportionately experiences adverse environmental impacts. Environmental justice, however, is not as neat a concept as the EPA's brief definition might suggest. It is, in fact, highly elastic and not necessarily concerned with environmental issues in a conventional sense.[13] In the words of Robert Bullard, one of environmental justice's chief spokesmen and theorists:

> The environmental justice movement has basically redefined what environmentalism is all about. It basically says that the environment is everything: where we live, work, play, go to school, as well as the physical and natural world. And so we can't separate the physical environment from the cultural environment. We have to talk about making sure that justice is integrated throughout all of the stuff that we do. What the environmental justice movement is about is trying to address all of the inequities that result from human settlement, industrial facility siting and industrial development. What we've tried to do over the last twenty years is educate and assist groups in organizing and mobilizing, empowering themselves to take charge of their lives, their community and their surroundings. It's more of a concept of trying to address power imbalances, lack of political enfranchisement, and to redirect resources

[11] United States Environmental Protection Agency, *supra* note 10.
[12] *Id.*
[13] For discussions of the scope and nature of the environmental justice concept, see Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U.L. REV. 1, 10-76 (1998) and Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U.L. REV. 221, 225-56 (1997).

> so that we can create some healthy, livable and sustainable types of models.[14]

Bullard defines environmental racism more simply as: "any policy, practice or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color."[15]

Environmental justice is one of six "key cross-Agency programs" in EPA's Strategic Plan that are designed to address conditions that are disproportionately distributed either demographically or geographically and are not addressable through conventional regulatory approaches.[16]

> Although EPA and its partners have made substantial progress towards clean air, water, land and food, there are many human health and environmental challenges that

[14] Errol Schweizer, *Interview with Robert Bullard*, EARTH FIRST! J. (July 6, 1999) <http://www.enviroweb.org/ef> (quoting Robert Bullard, Ware Professor of Sociology, Clark Atlanta University). Professor Bullard is a major figure in environmental justice; the author of many books and articles, a frequent speaker, an advocate and activist, and occasional expert witness on a variety of subjects.

Some environmental justice constructions are less elaborate than Professor Bullard's interpretation of the problem. *See, e.g.*, *EPA Lawyers Urged to Use Enforcement Settlements to Spur Environmental Justice*, PESTICIDE & TOXIC CHEMICAL NEWS, May 8, 1996 ("These are not legal struggles, they're struggles over power and political leverage."); Cole, *supra* note 9, at 451 ("[E]nvironmental justice struggles are not about right and wrong. They are not struggles about what is the best thing to do in a particular situation. They are struggles about power. They are struggles about political and economic power, and the exercise of this power."). While the environmental justice concept may be broad and somewhat ambiguous, environmental justice advocates' depth of feeling cannot be gainsaid. Robert Bullard, for example, has equated it to South African apartheid, in everything but "overt legal sanction." Robert Bullard, *Environmental Justice For All: It's the Right Thing to Do*, 9 J. ENVTL. L. & LITIG. 281, 282 (1994). The Director of EPA's Office of Environmental Justice has equated the use of "race-neutral criteria" by "state environmental regulatory agenc[ies]" with "'State enactments, regulating the enjoyment of civil rights upon the basis of race . . . under the pretense of recognizing equality of rights.'" Barry E. Hill, *Chester, Pennsylvania—Was it a Classic Example of Environmental Injustice?*, 23 VT. L. REV. 479, 524-25 (1999) (quoting Plessy v. Ferguson, 163 U.S. 537, 560-61 (1896).

[15] Robert Bullard, *Environmental Racism and Invisible Communities*, 96 W. VA. L. REV. 1037, 1037 (1994).

[16] *See* OFFICE OF THE CHIEF FINANCIAL OFFICER, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, EPA STRATEGIC PLAN 80 (April 3, 1995), *available at* <http://www.epa. gov/docs/oejpubs/strategy/strategy.txt.html>. The other "key cross-agency programs" are: (1) Health Risks to Children, (2) the National Environmental Performance Partnership System, (3) Community-based Environmental Protection, (4) Indian Programs, and (5) Customer Service. *See id.*

> cannot be met with traditional media-specific "command and control" approaches. . . . Likewise, not all areas of the country have the same environmental problems or need the same kind of solutions. To address these specific needs as we move forward over the next five years, the Agency has created a number of innovative multimedia programs that rely on the active participation of the affected communities to reduce specific human health and environmental risks in the most effective manner.[17]

The importance of environmental justice to EPA's programs was recognized in EPA's 1995 *Environmental Justice Strategy*: "[t]he Environmental Justice Strategy is well-integrated into the fabric of many of the Agency's principles and initiatives which the Agency considers fundamental to its operation and mission. In fact, environmental justice is one of the seven guiding principles established in the Agency's strategic plan . . . ."[18]

B. *Executive Order 12898*

The environmental justice concept was adopted by, and applied to, the federal government in February 1994 by Presidential Executive Order No. 12898 (E.O. 12898), *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, which directed: "[t]o the greatest extent practicable and permitted by law, . . . each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[19]

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[17] *Id.*

[18] OFFICE OF ENVIRONMENTAL JUSTICE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL JUSTICE STRATEGY: EXECUTIVE ORDER 12898 (Feb. 11, 1994) (last modified March 1, 1997) <http://www.epa.gov/docs/exeorder.txt.html>.

[19] Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (1994 & Supp. IV 1998). An environmental justice executive order had been recommended by The Environmental Justice Transition Group in December 1992: "[t]o reinforce that the principles of equal protection pertain to the entire scope [of] environmental issues, the President should issue an Executive Order providing for the equitable implementation of environmental programs." THE ENVIRONMENTAL TRANSITION GROUP, RECOMMENDATIONS TO THE PRESIDENTIAL TRANSITION TEAM FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY ON ENVIRONMENTAL JUSTICE ISSUES 24 (1992). The Group consisted of nine environmental and civil rights associations,

A Presidential Memorandum accompanying the executive order directed federal agencies to use Title VI to achieve environmental justice in minority and in low income communities.

> In accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.[20]

Nonetheless, neither E.O. 12898 nor the accompanying Presidential Memorandum created any new law or changed existing law, and neither document is enforceable at law.[21] Which is not to say that they have no practical effect. Each federal agency to which E.O. 12898 applies, and some to which it does not apply, have developed environmental justice strategic plans to implement the policy.[22]

C. *Title VI*

Title VI of the Civil Rights Act of 1964 provides that "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

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including the United Church of Christ, which had made an earlier call for such an executive order with its seminal environmental justice report in 1987:

> 1. The President of the United States is called upon to issue an executive order mandating that all executive branch agencies with responsibility for regulating hazardous wastes assess and consider the impact of their current policies and regulations on racial and ethnic communities, and take such considerations into account when establishing new policies and promulgating new regulations.

COMMISSION FOR RACIAL JUSTICE & UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES 24 (1987).

[20] President's Memo, *supra* note 2, at 280.

[21] *See id.* ("This memorandum is intended only to improve the internal management of the Executive Branch and is not intended to, nor does it create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person.")

[22] *See* 60 Fed. Reg. 308971 (1995).

assistance" and directs federal agencies to implement this prohibition by regulations that do not conflict with the statute authorizing the financial assistance.[23]

Title VI is a remedial civil rights statute enacted pursuant to the Fourteenth Amendment and the Spending Clause that codifies into statutory formula the equal protection and nondiscrimination guarantees of the Constitution.[24] The Spending Clause gives Congress the power to attach reasonable conditions to its grants of financial assistance.[25] State environmental departments are the principal recipients of financial assistance from EPA, and all of their operations are covered by Title VI when they accept federal assistance.[26] Federal agencies, including EPA, are not subject to Title VI because they do not receive "federal financial

[23] Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1994). The federal government recognizes five "racial classifications": White, Black, Amerind, Asian, and Hispanic. *See* 40 C.F.R. § 7.25 (1999). It may not be appropriate to aggregate minority races for Title VI purposes. *See* City of Richmond v. Croson, 488 U.S. 469, 506 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284, n. 13 (1986).

[24] *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 853 (5th Cir. 1966) ("Congress therefore fashioned a new method of enforcement to be administered not on a case by case basis as in the courts but generally, by federal agencies operating on a national scale and having a special competence in their respective fields."); Associated Gen. Contractors v. U.S. Dep't of Commerce, 441 F. Supp. 955, 968 (C.D. Cal. 1977) (finding that Title VI was enacted to "codify into statutory formula the equal protection and nondiscrimination guarantees of the Federal Constitution"), *vac. on other grounds*, 438 U.S. 909 (1977); Goodwin v. Wyman, 330 F. Supp. 1038, 1040 n.3 (S.D.N.Y. 1971) ("Essentially, the same showing is required to establish a violation of [Title VI] as is required to make out a racial discrimination violation under the Fourteenth Amendment's Equal Protection Clause."), *aff'd* 406 U.S. 964 (1972).

[25] *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987). This spending power is not unlimited though. It must be used in pursuit of the general welfare, it must be related to the federal interest in particular national projects or programs, and it must be unambiguous so the states may knowingly choose and be cognizant of the consequences of their choice. *See id.* at 207.

[26] *See* INTERIM GUIDANCE, *supra* note 3, at 2.

> For the purposes of this subchapter, the term "program or activity" and the term "program" mean all of the operations of—(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local governmental entity) to which the assistance is extended, in the case of assistance to a State or local government.

42 U.S.C. § 2000d-4a (1994). *But see* Cureton v. National Collegiate Athletic Ass'n, 198 F.3d 107 (3d Cir. 1999) (stating that Title VI statute and regulations are "program specific" and "[do] not preclude recipients of Federal financial assistance from discriminating with respect to a program not receiving such assistance").

assistance."[27] EPA's Office of Civil Rights has, on this basis, rejected Title VI administrative complaints because they involved EPA rather than state environmental permits.

> Based on OCR's review, this complaint cannot be accepted for investigation. The two permits in question were issued by the USEPA . . . . EPA's Title VI regulations define a recipient as "any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient. . . ." . . . The USEPA is a Federal agency and not a recipient, as per this definition, of Federal financial assistance.[28]

The ultimate sanction for violating Title VI is the withholding of federal financial assistance.[29]

D. *The Disparate Impact Rule*

1. Development of the Disparate Impact Rule and EPA's Authority to Regulate Disparate Impacts

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[27] *See* Jersey Heights Neighborhood Ass'n. v. Glendening, 174 F.3d 180, 191 (4th Cir. 1999); Soberal-Perez v. Heckler, 717 F.2d 36, 38 (2d Cir. 1983); Williams v. Glickman, 936 F. Supp. 1, 5 (D.D.C. 1996); Archer v. Reno, 877 F. Supp. 372, 379 (E.D. Ky. 1995).

[28] Letter from Ann E. Goode, Director, Office of Civil Rights, United States Environmental Protection Agency, to Sandra K. Yerman 1 (Feb. 18, 1999) (citation omitted) (quoting 40 C.F.R. § 7.25 (1996)).

[29] INTERIM GUIDANCE, *supra* note 3, at 3.

> In the event that EPA finds discrimination in a recipient's permitting program, and the recipient is not able to come into compliance voluntarily, EPA is required by its Title VI regulations to initiate procedures to deny, annul, suspend, or terminate EPA funding. EPA also may use any other means authorized by law to attain compliance, including referring the matter to the Department of Justice (DOJ) for litigation. In appropriate cases, DOJ may file suit seeking injunctive relief. Moreover, individuals may file a private right of action in court to enforce the nondiscrimination requirement in Title VI or EPA's implementing regulations without exhausting administrative remedies.

Id. (footnotes omitted). For a description of enforcement options under Title VI, see generally Civil Rights Division, United States Department of Justice, *Title VI Manual* (visited Feb. 11, 2000) <http://www.usdoj.gov/crt/grants_statutes/legalman. html>.

The U.S. Supreme Court applied the disparate impact test for the first time in *Griggs v. Duke Power Co.*,[30] under Title VII of the Civil Rights Act of 1964.[31] According to the Court in *Griggs*,

> [t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, *practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.*[32]

Three years later the Supreme Court applied the disparate impact standard under Title VI for the first time in *Lau v. Nichols*.[33] In *Lau*, the Court held that because an English language requirement for instruction and graduation had a disparate impact on non-English-speaking Chinese students, Title VI was violated as the school system was under affirmative duty to compensate for language deficiencies.[34] The Court, however, did not discuss the applicability of the disparate impact standard under Title VI. A divided Supreme Court did address the applicability of the disparate impact standard to Title VI for the first time in the plurality decision *Guardians Ass'n v. Civil Service Commission of New York City*.[35] There, the Court considered a written examination used by the city to make entry-level appointments to police department that had a disparate impact on the pass rates of blacks and Hispanics, compared to whites, and was not job related.[36] The Court determined that even without any discriminatory intent, proof of discriminatory effect was enough to establish a Title VI violation.[37]

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[30] 401 U.S. 424 (1971).
[31] 42 U.S.C. §§ 2000e to 2000e-17.
[32] *Id.* at 430 (emphasis added).
[33] 414 U.S. 563 (1974).
[34] *See id.* at 566-69.
[35] 463 U.S. 582 (1983).
[36] *See id.* at 585.
[37] *See id.* at 593.

The Supreme Court affirmed its holding in *Guardians*, and provided a clear, unanimous statement concerning the applicability of the disparate impact rule under Title VI in *Alexander v. Choate*.[38]

As the Court in *Choate* explained it, *Guardians* offered

> a two-pronged holding on the nature of the discrimination proscribed by Title VI . . . . First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily remediable, to warrant altering the practices of the federal grantees that had produced those impacts.[39]

Thus, while Title VI itself prohibits only intentional discrimination, federal agencies may, pursuant to the broad language in *Choate*, prohibit unintentional discriminatory effects by adopting a disparate impact standard in the regulations they issue to implement Title VI.[40] EPA has inferred from this broad language correspondingly broad

[38] 469 U.S. 287 (1985). In *Choate*, the undisputed statistical evidence indicated that 27.4% of handicapped users of hospital services who received Medicaid required more than 14 days of inpatient care, compared to only 7.8% of non-handicapped users. *See id.* at 289-90. Thus, when the state Medicaid program reduced the number of days of inpatient care it would cover, handicapped patients were disproportionately impacted. The Supreme Court concluded, however, that since the reduction in coverage by the state Medicaid program was made for budgetary reasons, it did not violate section 504 of the Rehabilitation Act of 1973. *See id.* at 309. The Court said that since the Medicaid program "is neutral on its face, is not alleged to rest on a discriminatory motive," and is based on a legitimate purpose, and because "[t]he State has made the same benefit—14 days of coverage—equally accessible to both handicapped and nonhandicapped persons," the state cannot be required under Title VI to correct an incidental inequity. *Id.*

[39] *Id.* at 292-94 (footnotes omitted).

[40] *See* INTERIM GUIDANCE, *supra* note 3, at 2. Disparate impact analysis may also be used, in combination with other factors, to prove intent in constitutional causes of action which require a showing of intent. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious discrimination."), *cited with approval in* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-68 (1977); Bryan v. Koch, 492 F. Supp. 212, 217-18 (S.D.N.Y. 1980) ("[a]lthough the foreseeability of a racially adverse

powers to regulate disparate environmental impacts through the states under civil rights laws.

2. Elements of the Disparate Impact Rule

The disparate impact rule has been applied to a variety of state programs under the Civil Rights Act of 1964 and other civil rights acts (notably education, housing, employment and voting),[41] and the basic elements of the disparate impact rule are now well established in case law. They have been articulated clearly in *Elston v. Talledaga County Board of Education*.[42]

> To establish liability under the Title VI regulations disparate impact scheme, 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. If the plaintiff makes such a prima facie showing, the defendant then must prove that there exists a substantial legitimate justification for the challenged practice, in order to avoid liability. If the defendant carries this rebuttal burden, the plaintiff will still prevail if able to show that there exists a comparably effective alternative practice which would result in less disproportionality, or that the defendant's proffered justification is a pretext for discrimination.[43]

In *Elston*, the Court of Appeals for the Eleventh Circuit held, first, that a school board did not violate Title VI regulations when it failed to make a consolidated elementary school attendance zone coextensive with an existing black-majority high school because the plaintiff had not demonstrated a "causal link" between the disparate impact and the school board's attendance zone decision.[44] Second, assuming there was a disparate impact on black students, the school board's siting of a

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impact is still a proper consideration in determining discriminatory purpose, a foreseeable adverse impact in itself is insufficient prove discriminatory purpose." (footnote omitted)).

[41] "Although the disparate impact theory was originally developed in cases involving employment discrimination, courts have subsequently applied the theory to claims brought pursuant to the regulations implementing Title VI." Cureton v. National Collegiate Athletic Ass'n, 37 F. Supp. 2d 687 (E.D. Pa. 1999).

[42] 997 F.2d 1394 (11th Cir. 1993).

[43] *Id.* at 1407 (citations and footnotes omitted).

[44] *See id.*

consolidated elementary school did not violate Title VI regulations because the board demonstrated a "substantial legitimate justification" for the siting decision, it was "demonstrably necessary to meeting [an] important educational goal,"[45] and the plaintiff proffered no "comparably effective alternative" site or evidence that justification was pretextual.[46] And, third, despite a disparate impact from "zone-jumping" by white students, the school board's failure to stop zone-jumping did not violate Title VI because the board's policy regarding zone-jumping was not "causally linked" to the identified disparate impact of increased racial identifiability of a training school.[47]

One of the few Title VI cases involving a facility (a highway) and its effects on a minority neighborhoods to apply these disparate impact elements was *Coalition of Concerned Citizens Against I-670 v. Damian*,[48] which is frequently noted and discussed in environmental justice articles.[49] In *Damian*, the court held that construction of a new highway that had a disparate impact on predominantly minority neighborhoods did not violate Title VI because its location was justified, impacts were minimized, and there were no feasible, less discriminatory alternatives.[50]

Damian is inapposite to environmental permitting cases because it involves a government facility rather than permitting or any other form of government regulation. It was, nonetheless, relied on by thirty seven members of Congress who wrote to EPA Administrator Carol Browner in July 1998 urging EPA to investigate, and prevent approval of, an air permit by the Louisiana Department of Environmental Quality ("LDEQ") for a plastics facility proposed by Shintech, Inc., to be located in Convent, Louisiana.[51] They also asked EPA to revise its *Interim Title VI Guidance*

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[45] *Id.* at 1412.

[46] *See id.* at 1412-13.

[47] *See id.* at 1415.

[48] 608 F. Supp. 110 (S.D. Ohio 1984).

[49] *See, e.g.*, James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125, 160-65 (1994); Alan Jenkins, *Title VI of the Civil Rights Act of 1964: Racial Discrimination in Federally Funded Programs*, in CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 173 (Steven Saltzman & Barbara M. Wolvovitz eds., 1995); Donna Gareis-Smith, *Environmental Racism: The Failure of Equal Protection to Provide a Judicial Remedy and the Potential of Title VI of the 1964 Civil Rights Act*, 13 TEMP. ENVTL. L. & TECH. J. 57, 73 (1994); Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 325-28 (1995).

[50] *See Damian*, 608 F. Supp. at 127-29.

[51] *See* Letter from Thirty-seven Members of the House of Representatives, Congress of the United States, to Carol Browner, Administrator, United States Environmental Protection Agency 5-10 (July 16, 1998) (footnotes omitted) (on file with the *William and*

to make it consistent with established Title VI law.[52] Relying on *Damian*, the letter stated: "[i]n the context of environmental protection, Title VI prohibits discrimination that results in burdening minority populations with disproportionate exposure to hazardous industrial operations which are potentially inimical to their health."[53] Applying *Damian* to Shintech, the letter stated:

> The LDEQ's decision to permit the Shintech facility appears to clearly have the impermissible discriminatory effect which is forbidden by both Title VI and the EPA's implementing regulations in light of the grossly disproportionate toxic exposure of African American communities, discussed *supra*, which will clearly be aggravated by location of the Shintech facility.
>
> Indeed, there is precedent for federal agencies implementing the strictures of Title VI when the statistical data was even less compelling than in the Shintech case. In the environmental discrimination case of [*Damian*], an African American community group sued the Department of Transportation under its Title VI implementing regulations to enjoin highway construction that threatened their neighborhood. While the district court accepted the defendants' claim that there were no less discriminatory alternatives, and therefore, ultimately held that there was not a violation of Title VI, the case is instructive because the court initially concluded that the plaintiffs had made a prima facie showing under Title VI that the construction and operation of a new interstate would have a disparate effect on racial minorities. The court based its reasoning on the evidence in the record that: (1) parts of the interstate would travel through neighborhoods that ranged from 50% to over 90% racial minorities; (2) 260 or nearly 75% of the 355 persons displaced by the construction of the interstate were members of racial minorities; and (3) the disruptions and negative impacts of highway construction and

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the United States, to Carol Browner, Administrator, United States Environmental Protection Agency 5-10 (July 16, 1998) (footnotes omitted) (on file with the *William and Mary Environmental Law and Policy Review*).

[52] *See id.* at 10-12.

[53] *Id.* at 1.

> Under the district court's reasoning in [*Damian*], we believe that the EPA should find, at a minimum, that a prima facie case exists that LDEQ's issuance of air permits to Shintech has a disparate effect on racial minorities. First, the Shintech facility would be located in a community that is over 80% African American. More importantly, 95% of the residents within a one-mile radius of the proposed Shintech complex are African American. And the pollution burdens and threats of toxic exposure will fall primarily on the African American community of Convent.[54]

II. DISCUSSION

A. *First Requirement: Causation*

As discussed above, the first step in a disparate impact case under Title VI, is for the plaintiff to show that a particular, apparently neutral practice or standard actually causes a disproportionate adverse effect by race, color, or national origin. As the Eleventh Circuit stated in *Elston*, "[t]he plaintiff's duty to show that a practice has a disproportionate effect by definition requires the plaintiff to demonstrate a *causal link* between the defendant's challenged practice and the disparate impact identified."[55] Thus, because it prohibits *causing* discriminatory effects or disparate impacts, and does not simply prohibit disparate conditions as such, causation is a basic tenet of the disparate impact rule.

Elston cited *United States v. Lowndes County Board of Education*[56] and *Freeman v. Pitts*.[57] In *Lowndes County Board of Education*, the court held that "[r]acial imbalance in the public schools amounts to a constitutional violation only if it results from some form of state action and not from factors, such as residential housing patterns, which are beyond the control of state officials."[58]

In *Freeman v. Pitts* the Supreme Court distinguished between a statistical racial imbalance that resulted from, or was caused by, state action and thereby gave rise to an affirmative duty to remediate, and one

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[54] *Id.* at 8-9.

[55] Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993) (emphasis added).

[56] 878 F.2d 1301, 1305 (11th Cir. 1989).

[57] 503 U.S. 467 (1992).

[58] *Lowndes County Bd. of Educ.*, 878 F.2d at 1305.

In *Freeman v. Pitts* the Supreme Court distinguished between a statistical racial imbalance that resulted from, or was caused by, state action and thereby gave rise to an affirmative duty to remediate, and one that did not. There, the Court indicated that it would not require extraordinary desegregation "measures to achieve racial balance in student assignments in the late phases of carrying out a decree, when the imbalance is attributable neither to the prior de jure system nor to a late violation by the school district but rather to independent demographic forces."[59]

In another Title VI case, *Coates v. Illinois Board of Education*,[60] the court held that a complaint alleging segregation in three school districts did not state a cause of action under Title VI because it failed to recite how specific prior actions caused a discriminatory effect.[61] The plaintiffs asserted that they had been denied equal educational opportunities because the defendants failed to correct school segregation.[62] The complaint asserted that the defendants were required to prevent segregation of school facilities under state law and were affirmatively required to change attendance units to eliminate pre-existing segregation, and to prevent future segregation.[63] For support, the plaintiff cited a finding by the State Superintendent of Public Education that the school districts were in violation of a state segregation and discrimination law.[64] The district court disagreed with the complainants, however, and dismissed the action because the complainants failed to link specific prior actions to discrimination and segregation.[65] The Seventh Circuit affirmed.[66]

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[59] *Freeman*, 503 U.S. at 493-94. *See also* Cureton v. National Collegiate Athletic Ass'n, 37 F. Supp. 2d 687, 697-98 (E.D. Pa. 1999) ("The Supreme Court's 'formulations' have only 'stressed that statistical disparities must be sufficiently substantial that they raise . . . an inference of causation.'" (quoting Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 987 (1988))), *rev'd*, 198 F.3d 107 (3d Cir. 1999).

[60] 559 F.2d 445 (7th Cir. 1977).

[61] *See id.* at 449. *See also* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988) ("Under a disparate impact analysis, as other circuits have recognized, a prima facie case is established by showing that the challenged practice of the defendant 'actually or predictably results in racial discrimination; in other words that it has a discriminatory effect.'" (quoting United States v. City of Black Jack, Missouri, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. den.*, 422 U.S. 1042 (1975)).

[62] *See Coates*, 559 F.2d at 446-48.

[63] *See id.* at 447-48.

[64] *See id.*

[65] *See id.* at 447.

[66] *See* Coates v. Illinois Bd. of Educ., 559 F.2d 445, 451 (7th Cir. 1977).

Under the disparate impact rule, causation must be identified with some particularity; generalized allegations of causation will not support a disparate impact claim. In *Latinos Unidos de Chelsea en Accion (LUCHA) v. HUD*,[67] for example, the First Circuit found "the disparate impact model . . . inappropriate because plaintiffs point[ed] to no specific practice—objective or subjective—that allegedly caused a discriminatory impact on minorities."[68] Plaintiffs had only claimed that the defendant, the City of Chelsea, employed a "disproportionately low number of minorities."[69] But the court found this claim insufficient to establish a prima facie case of discrimination. The court said that the disparate impact rule required "the threshold of a specific, facially-neutral procedure (or possibly, a combination of procedures) . . . ."[70] It also indicated that "the disparate impact model was created 'to challenge those specific, facially-neutral practices that result in a discriminatory impact and that by their nature make intentional discrimination difficult to prove.'"[71] The court concluded: "[i]f plaintiffs' claims do not focus on a specific practice, it is impossible to apply the *Griggs* analysis, which envisions the employer rebutting a prima facie case of discrimination by showing that the practice leading to a disparate impact was justified as necessary to the employer's business."[72]

2. The Causation Requirement Was Codified in Title VII

The causation requirement of the disparate impact model was explicitly codified in Title VII when that title was amended by the Civil Rights Act of 1991.[73] The purpose of the Civil Rights Act of 1991 was "to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, . . . and in the other Supreme Court disparate impact decisions prior to *Wards Cove Packing Co. v. Atonio*,"[74] and "to confirm statutory authority and provide statutory

[67] 799 F.2d 774 (1st Cir. 1986).
[68] *Id.* at 786.
[69] *Id.*
[70] *Id.* (citation omitted).
[71] *Id.* at 787 (citation omitted) (quoting Atonio v. Wade Cove Packing Co., 768 F.2d 1120, 1133 (9th Cir. 1985)).
[72] *Id.* (citations omitted).
[73] Pub L. No. 102-166 § 105(a), 105 Stat. 1071, 1074-75 (codified at 42 U.S.C. § 2000e-2(k) (1994). *See* James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125, 163-64 (1994).
[74] Civil Rights Act of 1991 § 3. In *Wards Cove*, the Supreme Court required that complainants show that a particular practice caused a statistical racial imbalance in the

guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964."[75] Consistent with the disparate impact rule, the amended Title VII requires causation proceeding from a particular practice:

> (1)(A) An unlawful employment practice based on disparate impact is established under this title only if—(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity;[76]

Title VII has been, and remains, a basic reference for Title VI law.[77]

3. EPA Title VI Regulations Regarding Causation

EPA's Title VI regulations, also expressly incorporate the disparate impact rule's causation requirement and specifically prohibits "criteria or methods" (standards or practices) that cause discriminatory effects "with respect to individuals of a particular race, color, [or] national origin."[78] Likewise, these regulations prohibit facility sitings that cause discriminatory effects.[79]

The relationship between the causation (with particularity) requirement under the disparate impact rule and the "criteria and methods" requirement under Title VI implementing regulations was described in *Latinos Unidos de Chelsea en Accion (LUCHA)*:

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workforce, but did not require the employer prove that the challenged practice was justified by "business necessity," only a "business justification." *See Wards Cove Packing v. Atonio*, 490 U.S. 642, 658-61 (1989).

[75] Civil Rights Act of 1991 § 3.

[76] 42 U.S.C. § 2000e-2(k)(1)(A).

[77] *See* Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 n.14 (11th Cir. 1993); Larry P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1984); Powell v. Ridge, 189 F.3d 387, 393 (3d Cir. 1999).

[78] 40 C.F.R. § 7.35(b).

[79] *See* 40 C.F.R. § 7.35(c).

> Our analysis [concerning particularity in the disparate impact rule] is also consistent with the language of 24 C.F.R. § 1.4 [HUD Title VI regulations], which contemplates a challenge to particular "criteria or methods of administration" that result in a discriminatory impact. As noted above, plaintiffs have not pointed to any such specific criterion or method. Moreover, following plaintiffs' argument to its logical conclusion leads to an untenable result. If [the City of] Chelsea is guilty of discriminating simply because it has few minority employees, a city with no minority residents in 1970 and 22 percent minority residents in 1980, and no city hiring during that decade, would be in violation of the law. In effect, discrimination law would embody a mandatory affirmative action component, including a requirement that white employees be fired to enable the hiring of minorities. We are certain that *Griggs* does not countenance such a scenario.[80]

This case is useful because it involved Title VI regulations issued by the U.S. Department of Housing and Urban Development ("HUD") that were virtually identical to EPA's in their operative language.[81]

4. Summary of the Causation Requirement

In disparate impact cases, the causation requirement itself is usually not an issue. The causation question is usually not a legal one—whether causation is required, but a factual one—whether a particular

[80] Latinos Unidos de Chelsea en Accion (LUCHA) v. HUD, 799 F.2d 774, 787 (1st Cir. 1986). Courts may not create substantive constitutional rights to guarantee equal protection of the laws, such as to housing, education, or employment. *See* San Antonio Independent Sch. Dist. V. Rodriquez, 411 U.S. 1, 33 (1973); Craig v. Boren, 429 U.S. 190, 216 (1976); Milliken v. Bradley, 433 U.S. 267, 281 n.14 (1977). The Court has thus far declined to recognize a constitutional right to a clean environment. *See* Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1430 n.21 (9th Cir. 1989).

[81] *Compare* 24 C.F.R. § 1.4(b)(2)(i) (2000) ("A recipient [of federal funds], in determining the types of housing accommodations, facilities, services, financial aid, or other benefits which will be provided . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin . . . .") *with* 40 C.F.R. § 7.35(b) (1999) ("A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex . . . .").

whether causation is required, but a factual one—whether a particular standard or practice actually caused a particular disparate impact.[82] In every case where a violation is found, the standard or practice in question, despite being "facially neutral," is found to be not "neutral in fact,"[83] meaning that despite being neutral on its face, or in its terms, the standard or practice actually causes a disparate impact or disproportionate effect.

It is important to note, however, that just because a particular standard or practice has an adverse disparate impact, that standard or practice does not necessarily violate Title VI or the disparate impact rule. Despite the adverse disparate impact, the particular standard or practice may be programmatically justified.

5. First Corollary to the Causation Requirement: Statistical Racial Balance Not Required

A corollary of the causation requirement is that a statistical racial demographic imbalance in and of itself does not violate the disparate impact rule, or mean that a Title VI violation has necessarily occurred.[84] As the disparate impact rule only prohibits *causing* disparate impacts, not the mere existence of disparate impacts or conditions, neither Title VI nor the disparate impact rule necessarily requires a racially balanced result or condition.[85] This corollary was addressed in *Freeman*:

> That there was racial imbalance in student attendance zones was not tantamount to a showing that the school district was in noncompliance with the decree or with its duties under the law. Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation. Once the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors. If the unlawful de jure policy of a school system has been the cause of the racial imbalance in student attendance, that condition must

[82] *See* Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993).
[83] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
[84] *See* Freeman v. Pitts, 503 U.S. 467, 495 (1992); Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 424 (1986); Pasadana City Bd. of Educ. v. Spangler, 427 U.S. 424, 433 (1976); Swann v. Charlotte—Mecklenburg Bd. of Educ., 402 U.S. 1, 24 (1971); Wright v. Council of the City of Emporia, 407 U.S. 451, 465, 472 (1972).
[85] *See* United States v. Lowndes County Bd. of Educ., 878 F.2d 1301, 1305 (11th Cir. 1989).

showing that any current imbalance is not traceable, in a proximate way, to the prior violation.[86]

This corollary was also addressed in *Lowndes County Board of Education*, where the Eleventh Circuit held that it was "inappropriate" to require that the enrollment ratios in each of a school district's schools mirror the racial composition of the community as a whole.[87] The court cited demographic factors as the reason for the imbalance, and said "[r]acial imbalance in the public schools amounts to a constitutional violation only if it results from some form of state action and not from factors, such as residential housing patterns, which are beyond the control of state officials."[88]

In *Coates*, the Seventh Circuit squarely addressed the question of whether a plaintiff can hold a state liable for the mere existence of segregation (and rejected it): "Plaintiffs seek to have the defendant held liable for a state-found condition of segregation by reason of the existence of the condition itself and not because of any responsibility for its creation. Such a finding without more is not a talisman which can invoke Title VI affirmative remedial action."[89]

This corollary was also applied in *Edwards v. Johnson County Health Dept*,[90] the only court decision involving the disparate impact rule and permitting. The question in *Edwards* was whether granting permits for substandard housing for (mostly) non-white migrant farmworkers violated the Fair Housing Act of 1968 (Title VIII)[91] and the Fourteenth Amendment's due process guarantee.[92] The court pointed out that, "any policy or action taken with respect to these workers will necessarily affect

[86] Freeman v. Pitts, 503 U.S. 467, 494-95 (1992). As the Supreme Court said in *Swann*, "[n]either school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *Swann*, 402 U.S. at 31-32. *See also* Eisenberg v. Montgomery County Schools, 197 F.3d 123, 131-33 (4th Cir. 1999) (finding nonremedial racial balancing unconstitutional).

[87] *See Lowndes County Bd. of Educ.*, 878 F.2d at 1305.

[88] *Id.* Indeed, the Supreme Court has gone so far as to expressly forbid annual readjustments in racial balances, reasoning that once the segregation due to state action has been eliminated, tinkering with racial ratios would exceed the scope of Title VI. *See Pasadena City Bd. of Educ.*, 427 U.S. at 434-35.

[89] Coates v. Illinois Bd. of Educ., 559 F.2d 445, 449 n.9 (7th Cir. 1979).

[90] 885 F.2d 1215 (4th Cir. 1989).

[91] 42 U.S.C. §§ 3601-3631 (1994 & Supp. IV 1998).

[92] *See Edwards*, 885 F.2d at 1217.

more non-white than white migrant farmworkers,"[93] but found that no violations of either Title VIII or the Due Process Clause were present because "appellants have failed to allege more than statistical disparity."[94]

6. Second Corollary to the Causation Requirement: No Affirmative Duty to Prevent Discrimination

Another corollary of the causation requirement, closely related to the first, is that Title VI does not impose an affirmative duty to prevent or counteract discrimination generally, or discrimination caused by others.[95] Under Title VI, a recipient must refrain from causing disparate impacts, but is not required or authorized to prevent or counteract disparate impacts it did not cause.[96]

In *M.C. West, Inc. v. Lewis*,[97] a federal district court explained, "[t]he language of Title VI does not specifically call for affirmative action. . . . The tendency to turn the language of laws that require racial neutrality thou-shalt-not-discriminate laws into authority for granting racial preference is twisting the plain meaning of statutes too far."[98] In *Latinos Unidos de Chelsea en Accion (LUCHA)* the First Circuit discussed Title VI implementing regulations, and rejected a reading of the statute that would include an affirmative action requirement.[99] Although the court found that there was a disproportionately low number of minorities employed by the City of Chelsea, which may have been the result of "an inhospitable working environment for them,"[100] the court nonetheless

[93] *Id.* at 1223.

[94] *Id.* at 1224. *Cf.* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989) ("In a Title VII case, racial imbalance in one segment of an employer's work force, does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions . . . ."). *See also* Jefferson v. Hackney, 406 U.S. 535, 549 n.19 (1972) ("Since the Texas procedure challenged here [providing lower benefits recipients of Aid to Families with Dependent Children] is related to the purposes of the welfare programs, it is not proscribed by Title VI simply because of variances in the racial composition of the different categorical programs."); United States v. Louisiana, 718 F. Supp. 525, 530 (E.D. La. 1989) ("The Court has not attempted to require that the schools have a particular racial balance; such would ignore the wealth of non-race related factors that may legitimately affect racial make-up at different schools and organizations.").

[95] *See* 42 U.S.C. § 2000e-2(j).

[96] *See* Latinos Unidos de Chelsea en Accion (LUCHA) v. HUD, 799 F.2d 774, 784 (1st Cir. 1986).

[97] 522 F. Supp. 338 (M.D. Tenn. 1981).

[98] *Id.* at 345.

[99] *See LUCHA*, 799 F.2d at 784.

[100] *Id.*

held, "Chelsea is not required to adopt an affirmative action policy in order to avoid a finding of intentional discrimination under Title VI. In fact, it may be prohibited from employing affirmative action practices in the absence of a prior finding of discrimination."[101]

EPA's Title VI regulations, however, do incorporate a remedial affirmative duty in cases where a recipient of federal funding has discriminated on the basis of race, color, or national origin.[102]

B. *Second Requirement: Justification*

The second step in a disparate impact case is for the defendant to justify (i.e., excuse) the particular standard or practice that causes the adverse disparate impact.[103] As the court said in *Damian*, "[d]efendants are not per se prohibited from . . . [taking actions that] will have differential impacts upon minorities. Rather, Title VI prohibits taking actions with differential impacts without adequate justification."[104]

To justify a practice or standard, one must show that there is a programmatic reason for the practice or standard.[105] While this requirement is known as the "business necessity" test,[106] it has also been applied in education and employment.[107] "Necessity" in any of these cases, however, does not mean the practice or standard is required to be essential, but only "related to" the defendant's program.[108]

Consistent with the causation requirement, it is the practice or standard causing the disparate impact that must be justified, not the disparate impact itself.[109] In *Connecticut v. Teal*, the Supreme Court explained that Title VII "speaks, not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*."[110]

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[101] *Id.*

[102] *See* 40 C.F.R. § 7.35(a)(7) (1999).

[103] *See* Elston v. Talledaga County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993).

[104] Coalition of Concerned Citizens v. Damian, 608 F. Supp. 110, 127 (D. Ohio 1984).

[105] Title VI regulations must not be inconsistent with the achievement of the objectives of the programmatic statute pursuant to which the financial assistance is provided. *See* 42 U.S.C. § 2000d-1 (1994).

[106] *See* NAACP v. Medical Ctr., Inc., 657 F.2d 1322, 1334 (3d Cir. 1981).

[107] *See, e.g.*, Larry P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1984) (discussing "educational necessity").

[108] *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *NAACP v. Medical Ctr.*, 657 F. Supp. at 127.

[109] *See* Connecticut v. Teal, 457 U.S. 440, 454-55 (1982).

[110] *Id.* at 448 (emphasis in original). It is axiomatic that civil rights attach to individuals, not groups or races. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289

Inasmuch as it is the standard or practice that causes the disproportionality that must be justified, the appropriate or relevant facilities to be looked at in any disparate impact case involving the permitting of facilities consists of those facilities to which the standard or practice applies, and the relevant population is the population that is affected by those facilities.[111] Using this standard, the Fourth Circuit explained why the plaintiffs in *Edwards*, non-white migrant farmworkers, were deficient in their lawsuit:

> Appellants allege only . . . that appellees' actions have a greater adverse impact on non-white migrant farmworkers than on their white colleagues. The standard by which this greater adverse impact allegation must be tested is "whether the policy in question had a disproportionate impact on minorities in the total group to which the policy was applied.". . . In the case at bar, the state permit requirement applied only to migrant housing facilities in North Carolina, and the sharp focus of appellants' claims is the migrant housing facilities in Johnston County. To allege a valid disparate impact claim, appellants must therefore contend that appellees' actions had a greater adverse impact on minority migrant farmworkers in Johnston County than on that county's white migrant farmworkers. Yet, nowhere in the Complaint do appellants contend that the appellees' actions affected non-white

(1978) ("It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.'" (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)). Civil rights acts, for example, prohibit discrimination against "persons" or "individuals." *See, e.g.*, 20 U.S.C. § 1681 (prohibiting sex discrimination in federally-assisted education programs); 29 U.S.C. § 794 (prohibiting discrimination against the disabled in federally-assisted programs); 76 U.S.C. § 6102 (prohibiting age discrimination); 42 U.S.C. § 2000d (prohibiting discrimination based on race, color, or national origin in federally-assisted programs); 42 U.S.C. § 2000e-2 (prohibiting discrimination on the basis of race, color, religion, sex, or national origin in employment); 42 U.S.C. § 2000a (prohibiting discrimination on the basis of race, color, religion, or national origin in public accommodations); 42 U.S.C. § 3604 (prohibiting discrimination on the basis of race, color, religion, sex, familial status, or national origin in housing). EPA's nondiscrimination regulations also prohibit discrimination against a "person." 40 C.F.R. §§ 7.30, 7.35, 7.45, 7.50. E.O. 12898, and EPA's environmental justice definition and Interim Title VI guidance, however, address discrimination against "populations," "communities," or "groups of people."

[111] *See* Edwards v. Johnston County Health Dept., 885 F.2d 1215, 1223-24 (4th Cir. 1989).

> migrant farmworkers to a greater *degree* than white farmworkers. Nor could such a contention reasonably be made; manifestly, white and nonwhite migrant workers suffered the same *degree* of harm because they shared the same substandard housing.[112]

C. *Third Requirement: Alternatives and Pretext*

The third, and final, step in a disparate impact case comes about only if the plaintiff has made out a prima facie case of disparate results from the defendant's standards or practices, and the defendant has responded by demonstrating that they were programmatically justified. Here, the plaintiff still has an opportunity to win his case if he shows that there exists a feasible, comparably effective alternative standard or practice that would result in less disproportionality, or that the defendant's proffered justification is a pretext for discrimination.[113]

In *Damian* for example, even after finding that the plaintiffs had made "a *prima facie* showing of disparate impact upon racial minorities"[114] from the chosen location of a new highway,[115] the court found that there was no Title VI violation under a disparate impact theory because the defendants had justified the highway's location "by articulating legitimate nondiscriminatory reasons for the location" and minimizing its impacts,[116] and because the plaintiffs had failed to show that there were "any *appropriate* alternatives to be considered."[117]

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[112] *Id.* at 1223 (emphasis added) (citations omitted) (quoting Betsey v. Turtle Creek Ass'n, 736 F.2d 983, 987 (4th Cir. 1984)).

[113] *See* Elston v. Talledaga County Bd. of Educ, 997 F.2d 1394, 1407 (11th Cir. 1993).

[114] Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110, 127 (D. Ohio 1984).

[115] The court recognized that the proposed highway "would travel through neighborhoods that range from 50% to over 90% racial minorities," that "of the 355 persons displaced by the construction of I-670, 260 or nearly 75% are members of racial minorities," and that "the disruptions and negative impacts of highway construction and after the highway is operating will fall primarily upon neighborhoods that are mostly comprised of minorities." *Damian*, 608 F. Supp. at 127.

[116] *Id.*

[117] *Id.* at 128 (emphasis in original). At trial the plaintiffs argued that the proposed highway was a "very indirect route." This argument was rejected by the district court as speculative. *See id.* The plaintiffs further argued that the Environmental Impact Statement undertaken by the defendant was inadequate. The court rejected this argument as well, indicating that plaintiffs need to do more than point out deficiencies—they need to offer reasonable, feasible alternatives. *See id.* at 127. Finally,

> plaintiffs put forth an alternative solution [to the proposed freeway]. . . . This alternative involved a combination of light rail transport and

Similarly, in *Elston* the court found the plaintiffs' case lacking because they failed to show pretext or to present any viable, alternate site: "Since plaintiffs have proffered no other alternative sites, they have not met their ultimate burden of proof; thus, the district court properly decided in defendant's favor on the Title VI regulation challenge to the siting of the new school."[118]

III. STATE ACTION AND LICENSING

While there are virtually no reported court decisions under the disparate impact rule involving permitting programs, there are instructive court decisions involving licensing under the state action rule. These cases can provide an analog for the causation requirement under the disparate impact rule.[119]

A. *State Action Requirement Generally*

The state action rule is used in civil rights cases, brought under either the Constitution or civil rights statutes, to bring private discrimination within the ambit of federal protection. Most federal Constitutional protections only apply to the government, not to private parties.[120] The problem in state action cases is, therefore, to tie private

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> improvements to streets in the area. . . . [T]his alternative was considered and found wanting. Although that restudy did conclude that the construction of a freeway was not the only feasible solution to the transportation problems of the area, it appears clearly in the record that plaintiffs' alternative was considered to be inadequate.

Damian, 608 F. Supp. at 127-28.

[118] *Elston*, 997 F.2d at 1413. Although one alternative site was discussed by the court, it was found to be an inadequate site since the land was not available to the school board. *See id.*

[119] For example, in *United States v. City of Black Jack, Missouri*, 508 F.2d 1179 (8th Cir. 1974), the Eighth Circuit said,

> [in a Title VIII suit, t]o establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. . . . The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated.

City of Black Jack, 508 F.2d at 1184-85 (citations and footnote omitted). It also indicated that its "holding is consistent with cases involving racial discrimination in other areas." *Id.* at 1185 n.2.

[120] *See, e.g.*, U.S. CONST. Amend. I ("*Congress* shall make no law respecting an establishment of religion, or protecting the free exercise thereof; or abridging the freedom

discriminatory action and the state together in order to bring about greater Constitutional or federal statutory protections.[121] Distinguishing state action from private action, however, is not always easy to do.[122] Under the state action rule, a state must have so involved itself with the private discriminatory action that the latter may fairly be attributed to the state.[123]

In answering the question whether an alleged infringement of federal rights was fairly attributable to the state, the Supreme Court stated, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[124] The fair attribution test has two requirements. "First, the deprivation [of civil rights] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is

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of speech . . . ." (emphasis added)); U.S. CONST. Amend. XIV, § 1 ("[N]or 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." (emphasis added)). The courts have examined and reaffirmed, time and time again, this state action requirement. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) ("In 1883, this Court in The Civil Rights Cases set forth the essential dichotomy between discriminatory action by the State, which is prohibited by the Equal Protection Clause, and private conduct, 'however discriminatory or wrongful,' against which that clause 'erects no shield,' (citation omitted) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)); Frazier v. Board of Trustees of Northwest Miss. Reg'l Med. Ctr., 765 F.2d 1278, 1283 (5th Cir. 1985) ("Most constitutional rights are secured from infringement by governments, not private parties."); Simkins v. Moses H. Cone Mem. Hosp., 323 F.2d 959, 966 (4th Cir. 1963) ("[P]rivate conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."); Knubbe v. State Mutual Assurance Co. of Am., 808 F. Supp. 1295, 1304 (D. Mich. 1992) ("The rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment are rights to protection against unequal or unfair treatment by the state, not by private parties.").

[121] *See Frazier*, 765 F.2d at 1285 n.12.

[122] While the principle is easily stated, the question of whether particular discriminatory conduct is private, on the one had, or amounts to "state action," on the other hand, frequently admits of no easy answer. "Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."

Moose Lodge, 407 U.S. at 637 (quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961)).

[123] *See Moose Lodge*, 407 U.S. at 637.

[124] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982), *quoted in* Rendall-Baker v. Kohn, 427 U.S. 830, 839 (1982) *and Frazier*, 765 F.2d at 1284.

responsible."[125] "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor."[126]

There are three possible scenarios where one can qualify as a state actor. First, he can be a state actor if "he is a state official."[127] Second, he can be a state actor if "he acted together with, or obtained significant aid from, state officials."[128] Finally, he can be a state actor if "his conduct is chargeable to the state."[129]

In *Daigle v. Opelousas Health Care, Inc.*,[130] the Fifth Circuit stated that "a general state involvement with the corporation or industry is not sufficient to support a claim."[131] There must be more: "'[t]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the later may be fairly treated as that of the State itself.'"[132] Moreover, "[t]he involvement must be directly related to the action that gives rise to the § 1983 claim. State action can be found 'only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains.' . . . The state's role must be active; approval or acquiescence in a private party's actions is not enough."[133]

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[125] Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1981).

[126] *Id.*

[127] Knubbe v. State Mutual Assurance Co. of Am., 808 F. Supp. 1295, 1301 (D. Mich. 1992).

[128] *Id.*

[129] *Id.*

[130] 774 F.2d 1344 (5th Cir. 1985).

[131] *Id.* at 1348.

[132] *Id.* (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

[133] *Id.* (footnotes omitted) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)). Originally part of the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a civil remedy for violations of the Fourteenth Amendment but does not create any substantive rights or law. Like Title VI, this very powerful section is extremely brief:

> Every person who, under of color of any statute, ordinance, regulation, custom or usage, of any State or Territory, 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.

42 U.S.C. § 1983 (1994). Remedial laws do not create substantive constitutional rights. *See* Albright v. Oliver, 510 U.S. 266, 272 (1994); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 749 (1999); Great Am. Fed. Savings & Loan Assoc. v. Novotny, 442 U.S. 366, 372 (1979).

B. Licensing

As noted above, Title VI was enacted pursuant to the Spending Clause so that the nondiscrimination prohibitions of the Constitution would apply to all recipients of federal financial assistance, not just to the states.

In a state action case involving licensing, the Supreme Court held that licensing (and regulation) in and of itself does not implicate the state in discrimination by the licensee.[134] To implicate the state, licensing must directly cause the discrimination complained of. Thus, whether an action is brought for unintentional discriminatory effects under the disparate impact rule or for intentional discrimination under the state action rule, causation is required and is the sine qua non of state liability.[135]

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[134] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972). *See also* Miner v. Commerce Oil Refining Corp., 198 F. Supp. 887, 891 (D.R.I. 1961) ("It is obvious that the defendant is not an agent or instrumentality of the State of Rhode Island. The fact that it held a license to construct and operate an oil refinery, issued by said Town of Jamestown pursuant to State law, did not make it an agency of the State and does not render its action, purportedly taken to protect its rights under said license, State action within the provisions of the Fourteenth Amendment and 42 U.S.C.A 1983."); Montanez v. Colegio De Tecnicos De Refrigeracion Y Aire Acondicionado De Puerto Rico, 343 F. Supp. 890, 896 (D.P.R 1972) ("[M]erely acting under state license or charter is not a state action within the context of the civil rights laws.").

[135] The purpose of the causation requirement under the disparate impact rule and under the state action rule is the same.

> If a thread of commonality is to be drawn from the various forms in which state action can manifest itself through the conduct of private parties, it is that attribution is not fair when bottomed solely on a generalized relation with the state. Rather, private conduct is fairly attributable only when the state has had some affirmative role, albeit one of encouragement short of compulsion, in the particular conduct underlying a claimant's civil rights grievance. "The purpose of this [close nexus] requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains."

Frazier v. Board of Trustees of Northwest Miss. Reg'l Med. Ctr., 765 F.2d 1278, 1286 (5th Cir. 1985) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)). *See also* Bennett v. Dyer's Chop House, Inc., 350 F. Supp. 153, 154 (N.D. Ohio 1972) ("If state action is to be proven in this case [involving a bar policy to exclude all women customers during certain hours] it must be on the basis of the control exerted by the State of Ohio through its Department of Liquor Control and the relationship between the defendant and this Department.") Indeed, causation is a basic requirement of the constitutional doctrine of standing.

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a

State environmental programs or departments, however, typically do not compel or even influence the existence, location, or distribution of private facilities through environmental permits,[136] and permits issued by the states are not financial assistance that further extends coverage and liability to permittees.[137]

The seminal state action licensing cases are *Moose Lodge No. 107 v. Irvis* and *Player v. Alabama Department of Pensions and Security*.[138] The causation principles enunciated in these cases, and followed in subsequent state action cases, apply equally well to environmental permitting under Title VI and the disparate impact rule.

> legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural or hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990) (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)) and Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 41-42 (1976)).

[136] This is unlike the situation in *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), for example, where government regulation *did* influence private facilities. In *Simkins*, state action was found where "the defendant hospitals operate as integral parts of comprehensive joint or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health" pursuant to the Hill-Burton Act. *Id.* at 967. The "Act itself and its legislative history reveal[ed] emphasis on the creation of a State-wide system of hospitals for the provision of hospital service to all the people of the State (which) indicates that the Hill-Burton program was not limited to the granting of financial aid to individual *hospitals*. It shows, rather, a congressional design to induce the States, upon joining the program, to undertake the supervision of the construction and maintenance of adequate hospital facilities throughout their territory. Upon joining the program a participating State in effect assumes, as a State function, the obligation of planning for adequate hospital care." *Id.* at 968 (emphasis in original). *See also* Smith v. Holiday Inns of Am., Inc., 336 F.2d 630, 635 (6th Cir. 1964) (finding state action where a motel was "part and parcel of a large, significant, and continuing public enterprise—the Capitol Hill Redevelopment Project").

[137] *See* Department of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605-06 (1986); Herman v. United Brotherhood of Carpenters and Joiners of America, 60 F.3d 1375, 1381-82 (9th Cir. 1995); New Jersey Dept. of Envtl. Protection and Energy v. Long Island Power Auth., 30 F.3d 403, 417 (3d Cir. 1994); Gottfried v. Federal Communications Comm'n, 655 F.2d 297, 312-13 (D.C. Cir. 1981); Montanez v. Colegio De Tecnicos De Refrigeracion Y Aire Acondicionado De Puerto Rico, 343 F. Supp. 890, 896 (D.P.R. 1972).

[138] 400 F. Supp. 249 (M.D. Ala. 1975).

1. *Moose Lodge*

In *Moose Lodge*, the African American plaintiff who was refused service at the local lodge of a national fraternal organization claimed that the refusal of service was state action for purposes of the Fourteenth Amendment (requiring intent) because the Pennsylvania Liquor Board had issued the Lodge a private club license that authorized the sale of alcoholic beverages on its premises.[139] The plaintiff did not argue that the Board had any discriminatory intent, but nonetheless "named both the Lodge and the Pennsylvania Liquor Authority as defendants, seeking injunctive relief [under 42 U.S.C. § 1983] that would have required the defendant liquor board to revoke Moose Lodges' license . . . ."[140] The Supreme Court found that merely issuing a license to the discriminating business did not make the state responsible for the business' discriminatory actions; the state was only responsible for its own discriminatory actions.[141]

> The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever . . . . Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations" in order for the discriminatory action to fall within the ambit of the constitutional prohibition.[142]

While Pennsylvania had licensed the discriminating business, licensing alone did not significantly involve the state with the private discrimination because licensing as such did not cause the private discrimination.[143] Nor did the state's comprehensive regulation of the business make the business' discrimination state action; again, because the state regulation did not cause the discrimination.[144]

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[139] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 165 (1972).
[140] *Id.*
[141] *See id.* at 172.
[142] *Id.* at 173 (citation omitted) (quoting Reitman v. Mulkey, 387 U.S. 369, 380 (1967)).
[143] *See id.* at 176-77.
[144] *See id.*

Nonetheless, the state was responsible for its own requirements that did cause discrimination, even if those requirements were facially neutral.[145] Because state regulations required Moose Lodge to adhere to that facility's own constitution and bylaws, both of which called for racial discrimination, the state essentially turned discriminatory private rules into state law by making them subject to government sanction.[146]

2. *Player*

Principles, similar to those found in *Moose Lodge*, can also be found in *Player*, a class action suit against the Alabama Department of Pensions and Security ("DPS") and six childcare institutions by "black children who have been, and who will be, in need of the services provided by DPS and the defendant homes."[147]

> Plaintiffs claimed that DPS discriminated against them and their class by a practice of segregated referrals to the child-care institutions in the state, provision of foster care in segregated settings, failure to ensure that the child-care institutions it licenses operate on a nondiscriminatory basis and failure to provide adequate foster care facilities for blacks. Plaintiffs further assert that DPS had discriminated against them and their class in its assistance to county courts and other agencies in placing children in child-care facilities and in its failure in general to discharge its duties toward black children on a level commensurate with the discharge of those duties toward white children.[148]

These practices were alleged to violate rights guaranteed by "the Constitution and certain laws of the United States," including the Equal Protection Clause of the Fourteenth Amendment and Title VI.[149]

As in *Moose Lodge*, the state licensed and comprehensively regulated the businesses that were engaging in the discriminatory activities. And, just as in *Moose Lodge*, licensing and regulation alone did not make the private discrimination state action. As the court stated,

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[145] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-79 (1972).
[146] *See id.* at 177-79.
[147] Player v. Alabama Dept. of Pensions and Security , 252-53 (M.D. Ala. 1975).
[148] *Id.* at 253.
[149] *Id.* at 253, 257.

> [n]one of the regulations or licensing requirements relate to the admissions practices of the homes. None define the types of children which can or cannot be accepted. The granting of the license, or the enforcement of the regulations, cannot be said to encourage or foster the discriminatory admissions policies. Under the principles of [*Moose Lodge*], *the issuance of the license and the enforcement of the licensing regulations do not, taken alone, make the actions of the homes state action.*[150]

Again, however, the state was responsible for its own discriminatory practices, particularly where the state directed the outcome. In this case, the state's discriminatory practices took the form of "[r]eferrals of children to homes by the DPS and the associated casework services and summaries [which] are valuable benefits that the state confers on needy children."[151] Thus, "[i]n failing to provide institutional care for black children, either through its own facilities or through contract, to the same extent that it does for white, the DPS has denied the plaintiff class the equal protection of the laws."[152] In addition, DPS did provide financial assistance to the homes, which also constituted a Title VI violation.[153]

IV. SUMMARY AND CONCLUSION

The question for environmental justice is, of course: how do these disparate impact requirements, and the causation requirement in particular, apply to environmental permitting under Title VI?

While the disparate impact rule has been applied to a variety of state programs under the civil rights acts, these programs have typically involved the state's own facilities and operations. Permitting, however, generally involves private facilities that usually are not subject to Title VI, because they typically do not receive federal financial assistance themselves and they are not owned and operated by the state recipient that is subject to Title VI. Accordingly, the application of the disparate impact

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[150] *Id.* at 261 (emphasis added).

[151] *Id.* at 257. DPS was the source of most referrals to virtually all child-care institutions in the state, and the only source for some. *See id.* at 256 & n.13. "[T]he provision of DPS case summaries and other background material, . . . in connection with a referral [was] a substantial direct benefit to the home as well as to the child." *Id.* at 257 n.16.

[152] *Id.* at 257.

[153] *See* Player v. Alabama Dept. of Pensions and Security, 400 F. Supp 249, 257-58.

rule under Title VI to permitting and to private facilities receiving permits is virtually unprecedented and even novel.

Environmental permitting does not cause pollution or polluting facilities. Rather, its purpose and effect is to reduce or limit the amount of pollution that would otherwise be emitted. Nor does environmental permitting in and of itself influence or determine the distribution of facilities, or cause an uneven or inequitable distribution of pollution or of facilities with environmental permits, independently of the particular standards or practices used to issue the permits. Siting has the effect of locating facilities in proximity to particular populations, whether minority or not, but state environmental departments typically do not site facilities. The simple fact that states issue permits that limit or reduce pollution and without which the facilities could not operate does not necessarily mean state permitting caused a particular distribution. It does, however, suggest a means by which the states might influence or control the distribution of facilities, even if it does not authorize or require the states to do so.

Although environmental permitting per se has no effect on the distribution of facilities, particular standards and practices used to issue permits may. Title VI and the disparate impact rule may be violated where a particular standard or practice used in issuing environmental permits causes facilities to be located in proximity to particular populations, or permit limits to be more lenient proximate to particular populations—if the standard or practice is not programmatically justified and there is no feasible, comparably effective alternative that has a less disproportionate effect.

The environmental justice issue isn't that the states or environmental programs actually cause an uneven or inequitable distribution of facilities or pollution, but rather that they don't prevent it—not just for minorities, but for everyone. Title VI and the disparate impact rule, however, do not require or authorize the states to prevent or counteract discrimination that they do not cause, and do not prohibit disparate environmental or other social conditions as such. Despite their presumed potential as environmental justice legal tools, given their requirements and the realities of environmental permitting, Title VI and the disparate impact rule actually appear to have limited utility as remedies for addressing environmental justice concerns or for achieving environmental justice objectives.