Can the Environmental Justice Movement Survive without Title VI of the Civil Rights Act

Daniel V. Madrid

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CAN THE ENVIRONMENTAL JUSTICE MOVEMENT SURVIVE WITHOUT TITLE VI OF THE CIVIL RIGHTS ACT?

"When you can't breathe, you have to fight. You can't die in silence."1

I. INTRODUCTION

A. South Camden Citizens in Action v. New Jersey Department of Environmental Protection: The Paradigm Case

The struggle for environmental justice persists in South Camden, New Jersey.2 South Camden Citizens in Action, a group of Waterfront South residents, seek to bring their claim for justice before the United States Supreme Court.3 At issue is the placement of a local cement factory, which the New Jersey Department of Environmental Protection (NJDEP) authorized to emit sixty tons of dust into the air annually.4 The legality of emitting this massive amount of pollution is alarming.5 More startling, however, is that this facility merely represents the most recent addition to a community already plagued by pollution-producing sites.6 With sixty-one percent of Waterfront South residents reporting respiratory ailments, the South Camden Citizens in Action argue that they simply cannot tol-


2. See id. at 27 (providing background to S. Camden Citizens in Action v. N.J. Dept’ of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001) [hereinafter South Camden III] lawsuit). Due to its demographics, Waterfront South serves as a classic example of a community experiencing the disparate effects of pollution and hazardous waste. Id. African-American and Hispanic groups constitute nearly ninety percent of South Camden citizens. Id. The community’s median household income is $15,000 a year, one of the poorest in the nation. Id.

3. See Shannon P. Duffy, Court Will Not Rehear Camden Cement Plant Case, PA. LAW WEEKLY, Jan. 21, 2002, at 3 (stating U.S. Supreme Court is plaintiffs’ last opportunity to prevent cement plant from operating in their neighborhood).

4. See Drake, supra note 1, at 27. The dust results from the cement factory’s process of grinding slag, a by-product of steel manufacturing that is added to cement. Id.

5. See id. (discussion emission of such pollution).

6. See id. (describing environmental hazards in South Camden). South Camden contains a trash-to-steam incinerator, a sewage treatment plant and two Superfund sites. See id.
erate these conditions anymore.\(^7\) While public interest groups, members of industry, governmental officials, and environmental law practitioners monitor this case, the community’s hope rests on whether the United States Supreme Court grants certiorari for *South Camden Citizens in Action v. NJDEP.*\(^8\)

### B. Environmental Justice

The environmental justice movement emerged from a number of grassroots organizations concerned with combating the harmful effects of hazardous waste facilities in minority communities.\(^9\) Advocates of the environmental justice movement contend that minority communities have been disproportionately chosen to site hazardous waste facilities as a result of environmental racism.\(^10\) Generally, these advocates define "environmental racism" as "racial discrimination in environmental policymaking and the unequal enforcement of environmental laws and regulations."\(^11\) In combating this phenomenon, the movement raises three major concerns.\(^12\)

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7. See id. The article suggests that the high percentage of respiratory ailments experienced by the citizens of South Camden may be linked to airborne pollutants released by the various facilities in the neighborhood. *Id.*


10. Daniel Kevin, “*Environmental Racism*” and Locally Undesirable Land Uses: A *Critique of Environmental Justice Theories and Remedies,* 8 VILL. ENVTL. L.J. 121, 121 (1997) (stating minority communities are chosen to site hazardous waste facilities due to racism). The article proposes two different definitions of the term “environmental racism.” See *id.* at 125. Under the first definition, commentators suggest that racism motivates those who site locally undesirable environmental land uses. See *id.* The second definition encompasses action not tied to purposeful discrimination or racial animus. See *id.* at 126. It also includes “any policy, practice, or directive that, intentionally or unintentionally, differentially impacts or disadvantages individuals, groups, or communities based on race or color.” *Id.*

11. See Kyte, *supra* note 9, at 258-63. The author defines “environmental racism” as “the deliberate targeting of people of color communities for toxic waste facilities and the official sanctioning of a life-threatening presence of poisons and pollutants in people of color communities.” *Id.*

12. See Kevin, *supra* note 10, at 122 (summarizing major concerns presented by environmental justice advocates).
First, advocates note that minority communities are more likely to be chosen as a site for locally undesirable environmental land uses (LULUs), thereby exposing these communities to more harmful environmental conditions. Second, racism, either generally or on the part of land developers, provides the explanation of this phenomenon. Finally, advocates seek to remedy the problem through judicial and legislative action.

Environmental justice advocates use two distinct methods to counter the harm caused by environmental racism: community activism and litigation. Presently, environmental justice litigation claims have achieved only limited success.

13. See id. (discussing main focus of environmental justice advocates).

14. Id. but cf. Michael Fisher, Environmental Racism Claims Brought Under Title VI of the Civil Rights Act, 25 ENVT'L L. 285, 291-97 (1995) (arguing minority communities are more likely to be chosen for locally undesirable environmental land uses [hereinafter LULUs]). Fisher presents and rejects the most popular arguments denying that minorities are disproportionately affected by environmental harm because of environmental racism, therefore making Title VI inapplicable to these claims. See id. at 291. The first argument avers that minority communities are heavily polluted because they lack political power to keep pollution out. See id. at 292. Second, market forces are responsible for the amount of pollution in the minority community. See id. This argument relies on the premise that differences in income, not race, explain the distribution of environmental hazards, and that discrimination based on poverty is not unconstitutional. See id. The final argument relies on the "coming to the nuisance" theory. See id. at 294. Advocates of this theory argue that hazardous waste sites attract minorities because of nearby jobs, affordable housing, and the greater availability of public transportation in such urban areas. See id.

15. Kevin, supra note 10, at 122. The author discusses various proposed and existing administrative and legislative remedies used to counter environmental racism. See id. at 128-33. He states that no existing state or national body has created remedies for environmental racism through legislation. See id. at 130. Proposed federal legislation nearly succeeded in requiring siting authorities to incorporate racial criteria in decision-making. See id. at 131 (discussing Environmental Equal Rights Act of 1993, H.R. 1924, 103d Cong. (1993)). The bill allowed citizens to challenge the placement of a waste facility in an already environmentally disadvantaged community. See id.

16. Julie H. Hurwitz & E. Quita Sullivan, Using Civil Rights Laws to Challenge Environmental Racism: From Bean to Guardians to Chester to Sandoval, 2 J.L. Soc’y 5, 5 (2001) (providing methods for counteracting environmental racism). Methods of battling environmental racism through environmental activism include grassroots lobbying, community involvement and adjustments to the environmental planning process. See Major Willie A. Gunn, From the Landfill to the Other Side of the Tracks: Developing Empowerment Strategies to Alleviate Environmental Injustice, 22 OHIO N.U. L. REV. 1227, 1231 (1996) (discussing methods of remedying environmental racism). The author discusses ways in which low income and minority communities coupled with government institutions can remedy the current situation. Id. The article discusses strategies that could potentially reach out to minority communities through education on environmental issues as well as increased governmental awareness and sensitivity toward minority injuries. Id. at 1288.

17. See Gunn, supra note 16, at 1273. Cases brought under both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act.
positive results, commentators and analysts have remained hopeful that Title VI of the 1964 Civil Rights Act will provide a basis for environmental justice claims. This optimism has been stymied by a number of recent cases holding that Title VI does not support a private cause of action for enforcing disparate-impact regulations.

This Comment evaluates the state of environmental litigation after two recent cases, Alexander v. Sandoval and South Camden Citizens in Action v. N.J. Dep't of Environmental Protection (South Camden III). The United States Supreme Court and the Third Circuit Court of Appeals suggest that Title VI claims will not provide environmental justice litigants with the success that they had once hoped for. This Comment concludes that litigation will play a much less significant role in the environmental justice movement.

Part II provides a historical background of the environmental justice movement. Part III discusses litigation strategies used in environmental cases brought under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964. Part III further evaluates the use of Title VI as a vehicle for environmental litigation. Part III concludes with a discussion of Sandoval and South Camden III illustrating the difficulties litigants have encountered using Title VI.
in environmental racism claims. Part IV discusses the ramifications of *Sandoval* and *South Camden III* and their effects on the future of the environmental justice movement.

II. A BRIEF HISTORY OF ENVIRONMENTAL JUSTICE

Dr. Benjamin Chavis is credited with coining the term "environmental racism." Dr. Chavis was responsible for organizing protestors in North Carolina in an attempt to prevent the construction of a disposal facility for poly-chlorinated biphenyls. Dr. Chavis and his fellow protestors disputed the choice of the predominately African-American Warren County as the site for the facility. Although Dr. Chavis and his organization of protestors ultimately proved unsuccessful in preventing the facility from being built, the incident attracted national attention.

A number of empirical studies analyzing the correlation between LULUs and the racial makeup of surrounding areas followed the Warren County demonstrations. In 1983, a General Accounting Office study found that African-Americans made up the majority of the population in three of four chosen hazardous waste sites located in various areas in the southern United States. The study

26. For a discussion of the facts and analysis of *Sandoval*, see infra notes 104-38 and accompanying text. For a discussion of the facts and analysis of *South Camden III*, see infra notes 139-85 and accompanying text.
27. For a discussion of the impact of *South Camden III* and *Sandoval*, see infra notes 186-95 and accompanying text.
28. See Kyte, supra note 9, at 259 (discussing Dr. Chavis's role in environmental justice movement).
29. See id. Dr. Chavis's efforts resulted in the collaboration of more than 500 local and national civil rights activists. Id. Like many areas allegedly affected by environmental racism, Warren County was a predominately black community. Id.
30. See Gunn, supra note 16, at 1228 (discussing background of Warren County Protest). Warren County had the highest African-American population in North Carolina. Id.
31. See Valerie P. Mahoney, *Environmental Justice: From Partial Victories to Complete Solutions*, 21 CARDOZO L. REV. 361, 363 (Oct. 1999) (noting Warren County protest brought environmental justice claims to forefront); see also Kyte, supra note 9, at 259 (discussing effects of Warren County protest on environmental activist movement). Through the protest, the activists developed a greater understanding and appreciation of the interrelatedness of environmental issues, quality of life and the racial make up of communities. See id.; see also Fisher, supra note 14, at 296 (citing Warren County as first time mainstream civil rights groups worked on environmental issue).
32. See generally Kyte, supra note 9, at 260-63 (providing information on environmental racism studies taking place after Warren County protest).
33. See id. at 260. The General Accounting Office study evaluated the racial and socio-economic status of communities surrounding four hazardous waste landfills located in southeastern United States. Id. The landfills, found in Alabama, North Carolina and South Carolina, were located in Environmental Protection
also noted that twenty-six percent of the area's population had income levels below the poverty line.\textsuperscript{34}

A later study examined whether the pattern of so-called "environmental racism" existed on a national level.\textsuperscript{35} In 1987, the United Church of Christ used U.S. Census data to evaluate the correlation between hazardous waste site locations and the racial composition of the surrounding communities.\textsuperscript{36} The study showed: (1) that race played a more significant role than income in the siting of hazardous waste facilities; (2) communities with the greatest number of commercial hazardous waste facilities had the highest composition of racial and ethnic residents; (3) communities with a commercial hazardous waste facility averaged twice the average minority percentage of the population as communities without such a facility.\textsuperscript{37} Based on the compiled data, the study concluded that the disproportionate numbers of racial and ethnic persons residing in communities with commercial hazardous waste facilities was not a random occurrence.\textsuperscript{38}

These studies sparked interaction between citizen groups and legislatures aimed at developing policies to ensure environmental justice.\textsuperscript{39} The movement further advanced with exposure gained from commentary in law publications and general media.\textsuperscript{40} In re-

\begin{quote}
Agency's Region IV. See Gunn, \textit{supra} note 16, at 1228-29 (describing location of study). Though African-Americans made up merely twenty percent of the population in these areas, they were in the majority in three of the four communities studied. \textit{Id.}

34. See Gunn, \textit{supra} note 16, at 1228-29. The study showed that African-Americans constituted between fifty-two and ninety percent of the population in three out of the four communities. See Fisher, \textit{supra} note 14, at 297. Though the fourth community was only three percent African-American, the surrounding four-mile radius was between sixty and ninety-two percent African-American. \textit{Id.} All of the communities had significant percentages of the population below the poverty line. \textit{Id.}

35. See Fisher, \textit{supra} note 14, at 297.

36. \textit{Id.} The study used an Environmental Protection Agency [hereinafter EPA] database and census data to compare the demographic makeup of the zip code areas containing 415 known commercial hazardous waste facilities to zip code areas without such facilities. \textit{Id.}

37. See Gunn, \textit{supra} note 16, at 1239 (discussing findings of UCC report).


40. See id. at 1229-30; see also Fisher, \textit{supra} note 14, at 301 (analyzing 1992 study released by National Law Journal addressing unequal enforcement of federal environmental laws between white and minority communities). The report ex-

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Response to the movement's increased exposure, the United States Environmental Protection Agency (EPA) issued a 1992 report suggesting policies that furthered environmental equity. In 1993, EPA released another report on hazardous chemicals stating, "the greatest amount of [Toxic Release Inventory] chemicals and the most toxic of the [these] chemicals are being released in communities that are least able to cope with them . . . – non-white, low-income, undereducated." In February 1994, President Clinton acknowledged the importance of environmental justice by promulgating Executive Order 12,898. This Order required all federal agencies to implement policies promoting environmental justice "to the greatest extent practicable and permitted by law." The Order had two major effects. First, the Order pressured local siting authorities to comply

1. that RCRA fines were 506% higher in white areas than in minority areas,
2. that the average of all enforcement fines was 46% higher in white areas than minority areas,
3. that while Superfund penalties were 9% higher in minority than in white communities, the former communities waited an average of 20% longer to have a site placed on the National Priority List (NPL), and
4. that while in white areas "treatment" if the waste at contaminated sites was chosen 22% more often than its mere containment, in minority areas the opposite was true - - containment was chosen 7% more frequently than treatment.

Id. at 301-02.

41. See Gunn, supra note 16, at 1229. The report was produced by an EPA Environmental Equity Workgroup comprised of officers from various regional offices. See id. The workgroup began its work in July, 1990 under the leadership of EPA Administrator William K. Reilly. See id. The report was released in May, 1992. See id.

42. See Fisher, supra note 14, at 300 (quoting Controversial Report on Health Effects in Poor Areas of Tennessee Released by EPA, 24 Env't Rep. (BNA) 1468 (Dec. 3, 1993)).


[The Order requires] all agencies to establish a mechanism to monitor and ensure compliance with Title VI whenever its programs have environmental consequences; programs that gather data about environmental racism; enforcement activity, such as EPA's investigations of the racial impacts of statutory schemes that govern the siting of polluting facilities; and continuing rhetorical encouragement and recognition that serves to legitimize the environmental justice movement and alert industry to the importance of the issue.

Fisher, supra note 14, at 315.
with environmental justice policies by committing federal investigative resources to the examination of environmental racism claims.\textsuperscript{45} Second, the Order fostered a supportive atmosphere for environmental racism claims under Title VI by instituting a system that makes information available to potential litigants.\textsuperscript{46}

While Order 12,898 greatly advanced the environmental justice movement, environmental racism litigants still faced two major obstacles.\textsuperscript{47} Section 6-609 of the Order limited citizens’ abilities to enforce certain provisions by stating that there is no right to judicial review against the United States pursuant to the Order.\textsuperscript{48} Furthermore, while the presidential directive accompanying the Order required specific federal agencies to comply with Title VI of the Civil Rights Act, it did not provide a means for judicial enforcement.\textsuperscript{49} The Order, therefore, caused adverse impacts to litigants by failing to provide a right of redress in administrative actions.\textsuperscript{50}

\section*{III. ENVIRONMENTAL JUSTICE LITIGATION}

\subsection*{A. A Look Back: Equal Protection Claims}

Environmental justice plaintiffs initially based environmental racism claims on the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{51} The Equal Protection Clause prohibits a state from denying equal protection of the law to any person within its jurisdiction.\textsuperscript{52} Under Equal Protection jurisprudence, when the government uses race or national origin in distributing benefits or burdens, such action is subject to a stringent strict scrutiny standard.\textsuperscript{53} Environmental justice litigants argued that government

\textsuperscript{45} See Fisher, \textit{supra} note 14, at 315 (discussing results of Clinton administration’s policies on environmental justice).

\textsuperscript{46} See \textit{id.} (discussing second effect of directive).

\textsuperscript{47} See Mank, \textit{supra} note 44, at 3 (discussing Executive Order’s limitations).

\textsuperscript{48} See \textit{id.} (citing Exec. Order 12,898, 3 C.F.R. 859 (1995)).

\textsuperscript{49} See \textit{id.} The Order pertains to agencies that affect human health or the environment and use federal money to provide funding for programs. See \textit{id.}

\textsuperscript{50} See \textit{id.} Litigants are unable to enforce the directive in a court of law. See \textit{id.} Furthermore, the directive does not expand a party’s rights under Title VI of the Civil Rights Act. See \textit{id.}

\textsuperscript{51} See \textit{id.} at 10 (discussing use of Equal Protection claims to combat environmental racism).

\textsuperscript{52} See U.S. CONST. amend. XIV, § 1. The Equal Protection Clause states, “No State . . . shall deny to any person within its jurisdiction the equal protection of the laws.” Id.

\textsuperscript{53} See Kevin, \textit{supra} note 10, at 146 (analyzing environmental racism claims under Equal Protection Clause). Under a strict scrutiny standard, a government agent must show that the proposed action is necessary to advance a compelling governmental interest. See \textit{id.} The action must also be narrowly tailored to further
agencies violated their Fourteenth Amendment rights by disproportionately allowing waste sites to be built in minority communities.  

Although the Equal Protection argument appeared strong, environmental racism litigants had difficulties with its practical application. Many Equal Protection claims proved unsuccessful because they required plaintiffs to overcome a high evidentiary burden of proof. In Washington v. Davis, the United States Supreme Court held that a showing of discriminatory intent was a necessary element for an Equal Protection claim. In Village of Arlington Heights v. Metropolitan Housing Development Co., the United States Supreme Court expanded the intent requirement by holding that plaintiffs must "introduce at least some circumstantial evidence that the defendant intended to discriminate against an identifiable minority group." In Arlington Heights, the Court determined that a plaintiff could prove discriminatory intent using the following five factors: (1) the official action's impact, (2) the decision's historical background, (3) the specific sequence of events leading up to the challenged decision, (4) any substantive or procedural departures from the normal decision-making process and (5) the legislative or administrative history of the challenged decision.

Inherent difficulties with Equal Protection claims in environmental justice cases became apparent in Bean v. Southwestern Waste

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55. See Kyte, supra note 9, at 263-68 (noting difficulties with using Equal Protection Clause).
56. See id. (discussing lack of success in using Equal Protection Clause as basis for environmental racism claims).
57. 426 U.S. 229, 239-45 (1976) (holding law or act is not unconstitutional where racially disproportionate impact occurs absent discriminatory intent).
58. See Fisher, supra note 14, at 303-06 (explaining seminal United States Supreme Court Equal Protection cases).
59. 429 U.S. 252 (1977). The case involved a challenge to the local housing authority's decision to disallow construction of racially integrated housing. See id. at 264.
61. See Arlington Heights, 429 U.S. at 266-69 (summarizing important factors to consider when evaluating claim of discriminatory intent); see Mank, supra note 44, at 10 n.37 (discussing Arlington Heights five-part test).
In Bean, a minority resident group attempted to enjoin the Texas Department of Health and the Southwestern Waste Management Corporation from building a solid waste facility. The community group argued that these parties engaged in a discriminatory pattern of placing facilities in minority communities. The community group supported their argument with statistical evidence suggesting that the overwhelming majority of waste sites were placed in communities consisting of predominately minority populations. The District Court of the Southern District of Texas held that plaintiff’s use of statistical evidence was insufficient to prove discriminatory intent. Plaintiff’s case failed for two reasons: first, the plaintiff lacked direct evidence supporting discriminatory intent, and second, the court found that the statistical data failed to prove a strong pattern of discriminatory treatment.

Environmental racism litigants faced similar difficulties in East-Bibb Twiggs Neighborhood Ass’n v. Macon Bibb Planning and Zoning Commission. In East-Bibb, the Eleventh Circuit Court of Appeals rejected plaintiffs’ claim that granting a sanitary landfill permit in an African-American community violated the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs, residents of a
predominately African-American community in Macon, Georgia, alleged that the decision to site a landfill in their community resulted from an ongoing pattern of racial animus on the part of the local Planning and Zoning Commission.\textsuperscript{70} Using the \textit{Arlington Heights} standard, the Eleventh Circuit Court of Appeals held that the statistical evidence of disparate impact was insufficient to support the Equal Protection claim.\textsuperscript{71}

B. The Present: Title VI as the Basis for Environmental Racism Claims

In response to the shortcomings of Equal Protection claims, environmental justice advocates have looked to Title VI of the Civil Rights Act of 1964 believing that, unlike Equal Protection claims, Title VI would not require plaintiffs to prove discriminatory intent.\textsuperscript{72} \textit{South Camden III} suggests that using Title VI may not be as effective as legal analysts once predicted.\textsuperscript{73} Part One of this section examines the language and structure of Title VI both generally and as it applies to environmental racism litigation.\textsuperscript{74} Part One will further focus on the pivotal issues that dictate the scope and effectiveness of Title VI.\textsuperscript{75} Part Two of this section discusses Title VI case law illustrating the benefits and difficulties in using Title VI as the basis for an environmental racism claim.\textsuperscript{76}

\begin{itemize}
  \item use permit did not relate to public health, safety, morality, or general welfare;
  \item The Commission’s decision to grant Mullis a conditional use permit constituted a taking without just compensation; and
  \item Mullis’s and the Commission’s choice of a landfill site denied them equal protection of the law because the decision affected more black persons than white persons. Mullis and the Commission moved to dismiss the residents’ action.
\end{itemize}

\textit{Id.}

\textsuperscript{70} See \textit{id.} at 1264-65. Nearly 3,367 black residents and 2,149 white residents lived on the property considered for the site. \textit{Id.} at 1264

\textsuperscript{71} See \textit{id.} at 1266-67. In evaluating the Commission’s actions, the court agreed with the district court’s finding that “the Commission carefully and thoughtfully addressed a serious problem and that it made a decision based upon the merits and not upon any improper racial animus.” \textit{Id.} at 1266.

\textsuperscript{72} See Mank, \textit{supra} note 44, at 12 (discussing importance of Title VI of Civil Rights Act of 1964).

\textsuperscript{73} See \textit{South Camden III}, 274 F.3d 771, 791 (3d Cir. 2001).

\textsuperscript{74} For a general discussion of the structure of Title VI, see \textit{infra} notes 77-95 and accompanying text.

\textsuperscript{75} For a discussion of interpretation issues affecting the use of Title VI in environmental racism litigation, see \textit{infra} notes 77-98 and accompanying text.

\textsuperscript{76} For a discussion of Title VI case law, see \textit{infra} notes 104-85 and accompanying text.
1. *Using Title VI to Enforce Environmental Justice*

Title VI prohibits discrimination based on race or national origin in federally funded programs and activities. Environmental racism litigants seeking relief under Title VI make the following argument: The EPA grants funding to state and local environmental agencies. In turn, these agencies are responsible for implementing the nation's environmental policies. An environmental justice litigant, therefore, has a cause of action under Title VI if one of these federally funded agencies implements environmental policies in a discriminatory manner.

Though the basic arguments of Title VI appear straightforward, enforcing Title VI through the statute is more complex. Sections 601 and 602 of the Civil Rights Act provide two potential mechanisms for enforcement. Section 601 provides that no person 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" covered by Title VI. In *Cannon v. University of Chicago*, the United States Supreme Court interpreted section 601 as allowing citizens to file private lawsuits challenging the discriminatory actions of any recipient of federal funds. A claim brought under section 601, how-

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78. *See* Fisher, *supra* note 14, at 287 (setting out basic Title VI argument).
79. *See id.* EPA establishes guidelines on pollution standards and permits waste treatment and disposal facilities. *See id.* EPA is also responsible for determining the placement of such facilities. *See id.*
80. *See id.* Discrimination by a federally-funded agency theoretically opens the party up to a civil suit under Title VI of the Civil Rights Act. *See id.*
81. *See id.* at 291 (presenting and discrediting basic Title VI arguments for environmental claims).
82. *See Mank, supra* note 44, at 3-4 (discussing methods of enforcement under §§ 601 and 602).
84. 441 U.S. 677 (1979). In *Cannon*, Petitioner, a female applicant to the University of Chicago Medical School, alleged that she was denied admission based on her sex. *See id.* at 680. Petitioner based her claim on Title IX of the Education Amendments of 1972. *See id.* The statute provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." *Id.* at 681-82 (citing 20 U.S.C. § 1681 (2002)). The Court recognized that "Title IX was patterned after Title VI of the Civil Rights Act of 1964." *Id.* at 694. The Court noted that the parallel language between Title IX and Title VI and the legislative history of Title IX allowed the Court to find an implied right of action. *See id.* at 694-98. The Court made this conclusion because Title VI had an established private remedy when Title IX was drafted. *See id.* at 696-97.
85. *See id.* at 717 (holding that private right of action exists in enforcing Title VI). Congress has declared that states cannot invoke sovereign immunity against
ever, requires plaintiffs to prove that recipients of federal funds engaged in intentional discrimination. The standard is, therefore, identical to the difficult intent requirement of the Equal Protection Clause.

Section 602 states that federal agencies shall issue regulations that specify how agencies should deal with recipients of federal funds who implement policies resulting in disparate impacts. Section 602 also provides federal agencies with guidelines on how to investigate and assess claims of racial discrimination. Specifically, section 602 gives federal agencies discretion in deciding whether to fund an agency that engages in discriminatory practices. Furthermore, section 602 authorizes EPA regulations that address disparate impact by forbidding federal recipients from using “criteria or method[s] of administering its program which have the effect of subject[ing] individual[s] to discrimination because of their race, color, national origin, or sex.”

An inconsistency between section 601 and 602 leads to difficulties in implementing Title VI. Under section 601, plaintiffs must prove that a recipient of federal funds has participated in intentional discrimination. Section 602 allows agencies to create regulations brought in federal court to enforce Title VI and that private plaintiffs have access to “remedies both at law and in equity.”

86. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (holding that § 601 prohibits only racial classifications that would violate Equal Protection Clause of Fifth Amendment).


88. 42 U.S.C. § 2000d-1. Section 602 authorizes federal agencies “to effectuate the provisions of [section 601] . . . by issuing rules, regulations, or orders of general applicability.” Id.; see also Mank, supra note 44, at 12 (discussing § 602).

89. See 42 U.S.C. § 2000d-1. The statute states, each Federal department and agency . . . is authorized and directed to effectuate the provisions of section 601 [42 USCS § 2000d (2002)] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.


90. See id. The relevant provision states, [c]ompliance with any requirement adopted pursuant to this section may be effected (1) by termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of failure to comply with such requirement . . . .

Id.

91. Montag & Trinkle, supra note 8, at 5 (citing 40 C.F.R. § 7.35(b) (2001)).

lations that effectuate the provisions of section 601. Agencies, however, have promulgated valid regulations under section 602 that prohibit recipients of federal funds from implementing policies that result in disparate impact discrimination. Resolving the distinctions between these differing standards has posed problems for Title VI plaintiffs because section 602 allows agency enforcement for disparate impact discrimination while section 601 simply provides a private cause of action for intentional discrimination.

a. Options for Challenging an Agency: Federal Lawsuit or Administrative Complaint

When seeking relief, an environmental justice complainant must decide whether to bring an administrative complaint or a federal lawsuit. Environmental justice advocates find lawsuits advantageous for various reasons. Lawsuits allow the litigant to take an active role in the investigation and provide for remedies unavailable in administrative complaints. Because of the desirable features of a lawsuit, the major issue becomes whether environmental justice plaintiffs have a private right of action under section 602 of Title VI.

b. Is There a Claim of Right? A Discussion of Rights and Remedies

Generally, a private right of action exists when legislatures expressly authorize persons injured in violation of regulatory statutes

94. See e.g., 40 C.F.R. § 7.35(b). The regulations state,
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, or HAVING THE EFFECT OF de-
feating or substantially impairing accomplishment of objectives of the program with respect to individuals of a particular race, color, national origin, or sex.
Id. (emphasis added).
96. See Mank, supra note 44, at 20.
97. See id. at 22-23. Though less costly, filing an administrative complaint has a number of disadvantages. See id. First, the complainant does not take an active role in investigation when filing an administrative complaint. See id. Second, the agency has no time restrictions in conducting the investigation. See id. Finally, administrative complaints offer more limited remedies. See id.
98. See id. at 23-24 (discussing advantages and disadvantages of bringing lawsuit).
to bring suit directly against the alleged violator. A difficult issue arises when a regulatory statute does not create this right, because the court must then interpret the statute to determine whether Congress intended to create both a private right of action as well as a private remedy. If the statutory intent does not support both a private right and remedy, the court is not at liberty to create one despite its desirability or compatibility with the statute.

Though the Supreme Court has established a private right of action under section 601, the plaintiff’s high evidentiary burden of proving intentional discrimination impedes this right. The crucial question, therefore, centers on whether a private right of action exists to enforce disparate-impact discrimination under section 602.

2. Title VI Caselaw: Does Section 602 Provide a Claim of Right?

a. Alexander v. Sandoval

In Sandoval, the United States Supreme Court addressed “whether private individuals may sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964.” The plaintiff in Sandoval challenged a Department of Transportation policy that made drivers’ license examinations exclusively in English. Plaintiff argued that the English-only policy violated section 602 because it had the effect of subjecting non-English speakers to discrimination based on national origin. The United States District Court for the Middle District of Alabama

100. Id. (citing Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979)).
101. Id. at 286-87. The Court stated that Congress alone can create private rights of action to enforce federal law. See id. at 286. Judges are relegated to searching for statutory intent to create a private right and remedy. See id.
103. Sandoval, 532 U.S. at 276 (stating that private right of action must therefore come from independent force from § 602).
104. Id. at 278. Petitioner, Alabama Department of Public Safety, was subject to Title VI of the Civil Rights Act of 1964 because they received financial assistance from the United States Department of Justice and Department of Transportation. See id.
105. Id. at 279. The change in policy followed Alabama’s decision to declare English the official language in a 1990 state constitutional amendment. See id. at 278-79. Petitioners argue that the decision to administer driver’s license examinations exclusively in English advanced public safety. See id. at 279.
106. Id. (stating respondent’s basic argument).
found this argument persuasive and enjoined the policy, ordering the Department to accommodate non-English speakers.\textsuperscript{107} On appeal, the Eleventh Circuit Court of Appeals affirmed the district court's decision, thereby rejecting defendant's argument that Title VI did not provide respondents a cause of action to enforce the regulation.\textsuperscript{108}

In a 5-4 decision, the United States Supreme Court held that Title VI of the Civil Rights Act of 1964 does not support a freestanding private right of action under section 602.\textsuperscript{109} Writing for the majority, Justice Scalia began the Court's analysis by reviewing three settled Title VI principles.\textsuperscript{110} First, Title VI, section 601 enables individuals to sue for both injunctive relief and damages.\textsuperscript{111} Second, section 601 reaches only cases of intentional discrimination.\textsuperscript{112} Third, regulations promulgated under section 602 of Title VI may validly proscribe activities that result in a disparate impact on racial groups, even when section 601 allows such activities.\textsuperscript{113} The Court declared that despite these three concessions, it does not follow that Congress intended to create a private right of action to enforce disparate impact regulations.\textsuperscript{114} The Court stated that a cause of

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\item \textsuperscript{107} See Sandoval v. Hagan, 7 F. Supp. 2d 1234, 1313-16 (M.D. Ala. 1998), rev'd, 532 U.S. 275 (2001). While the court appreciated the legislature's desire to foster a homogeneous people with American ideals, the means adopted exceeded the state's power. See id. at 1315.
\item \textsuperscript{108} See Sandoval v. Hagan, 197 F.3d 484, 487 (11th Cir. 1999), aff'g 7 F. Supp. 2d 1234 (M.D. Ala. 1998), rev'd, 532 U.S. 275 (2001). The court recognized that the appellant's stated justifications for the English-only policy were only a pretext and that the district court's conclusion that the policy results in unlawful disparate impact was correct. See id. at 510.
\item \textsuperscript{109} Alexander v. Sandoval, 532 U.S. 275, 293 (2001). The Court stated, "[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under section 602." Id.
\item \textsuperscript{110} See id. at 279. These aspects of Title VI emerged from prior Supreme Court decisions, Congressional amendments of Title VI and concessions of the parties to the case. See id.
\item \textsuperscript{111} See id. at 279-80 (citing Cannon, 441 U.S. 67 (1979)). The decision declared that a private cause of action existed under Title VI. See id. The parallel language of Title IX suggested that it contained a private cause of action also. Id.
\item \textsuperscript{112} See id. at 280. The Court stated that section 601 "proscribe[s] only those racial classifications that would violate the Equal Protection Clause of the Fifth Amendment." Id. (quoting language from Bakke); see also Guardians Assn. of N.Y. Police Dep't v. Civil Serv. Comm'n of New York City, 463 U.S. 582 (1983); see also Sandoval v. Choate, 469 U.S. 287 (1985) (stating that Title VI prohibits only intentional discrimination).
\item \textsuperscript{113} See Sandoval, 532 U.S. at 280. The Court states that though no holding supports this principle, they will assume its accuracy for the purpose of deciding the case. Id.
\item \textsuperscript{114} Id. at 284. The Court noted that this finding does not affect the cause of action under section 601's ban on intentional discrimination. See id. The Court
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action exists only when Congress creates regulations applying section 601's ban on intentional discrimination because those regulations construe the statute itself.115 Regulations supporting disparate-impact under section 602 would not support a claim of right unless section 602 had the authority to provide one.116

The Court subsequently examined whether section 602 displays Congressional intent to create both a private right of action and a private remedy.117 The Court stated that absent Congressional intent a cause of action does not exist.118 The Court further rejected the theory that "it is the duty of the courts . . . to provide such remedies as are necessary to make effective the congressional purpose [expressed by a statute]."119 The Court instead limited its search for Congress's intent to the text and structure of Title VI.120

In interpreting Title VI, the Court first noted that section 602 does not contain the rights-creating language that allowed the Court to find a claim of right under section 601 in Cannon.121 In particular, the Court found that while section 601 focuses on the person being protected, section 602 deals with the regulating agency and not with the person regulating.122 The Court concluded that this distinction in statutory language created "no implied

stated, "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." Id.

115. See id. (arguing regulations under § 601 support claim of right but regulations under § 602 cannot be enforced under § 601's claim of right).

116. See id. at 286 (arguing § 602 must have independent force to create private right of action to enforce disparate impact regulations).

117. See id. The Court assumed for the purpose of discussion that section 602 granted the authority to promulgate disparate-impact regulations. See id.

118. Sandoval, 532 U.S. at 280-87. "Without [intent], a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." Id. at 287 (quoting J.J. Case Co. v. Borak, 377 U.S. 426 (1964)).

119. Id. at 287 (abandoning Borak method of discerning and defining causes of action).

120. See id. at 288. To emphasize the Court's departure from past methods of interpreting private causes of action the Court stated, "Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink." Id. at 287.

121. See id. (noting that rights-creating language is absent from 602). The language of 601 states "[n]o person . . . shall . . . be subjected to discrimination" while 602 provides that "[e]ach Federal department and agency . . . is authorized and directed to effectuate the provisions of [601]." The Court distinguished the focus of the statute in section 601 on the person protected and the focus in section 602 where an agency is being regulated. See id. at 288-89.

122. See id. at 289. The Court reasoned that "the focus of 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection because it focuses neither on the individual being protected nor the individual regulating." Id. Rather, it focuses on the agency doing the regulating. See id.
The Court found, moreover, that the method of enforcing the authorized regulations under 602 precluded a finding of congressional intent to create a private right of action. The Court noted that section 602 grants agencies the power to terminate funding to a particular program that has violated section 602's regulations but only after a lengthy and involved process. The Court concluded that these intricate restrictions on an agency's actions suggest that a private right of action does not exist because "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."

The Court addressed respondent's argument that Guardians and Cannon provide support for a private cause of action to enforce disparate impact regulations. The Court rejected respondent's argument, stating that "[this] Court is bound by holdings, not language." The Court then declared that Cannon was decided under the assumption that respondents intentionally discriminated against petitioner. The Court further noted that Guardians sup-

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124. See id. (analyzing methods of enforcing § 602 for finding intent to create right).
125. See id. at 289-90 (setting out process for termination of funds). The Court interpreted the statute as requiring the following procedures. See id. First, the agency must advise the appropriate person or persons of the failure to comply with the requirement and further see if compliance can be secured through voluntary means. See id. After enforcement, the agency's action is subject to judicial review. Id. (citing 42 U.S.C. § 2000d-2 (2002)). To terminate funding, the agency must "file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action." Id. at 290 (citing 42 U.S.C. § 2000d-1 (2002)). Finally, the termination of funding does not take place until thirty days after the report has been filed. Id.
126. Id. at 290. The Court notes that there is no congressional intent that supports a private right of action under section 602. See id. at 291. This analysis, therefore, is not crucial to the Court's decision because the issue is not presented. See id.
127. See id. at 282-84 (rejecting argument because no Supreme Court case held that Title VI provides private cause of action for enforcing disparate-impact regulations). In Guardians, Black and Hispanic police officers argued that the New York Police Department hired and fired in a discriminatory manner. Guardians Assn. of N.Y. Police Dep't v. Civil Serv. Comm'n, 463 U.S. 582, 585 (1983).
128. Sandoval, 532 U.S. at 282 (rejecting claim that Guardians and Cannon support implied cause of action under § 602 to enforce regulations barring disparate-impact discrimination).
129. See id. (citing Cannon v. University of Chicago, 441 U.S. 677, 680 (1979)) (stating respondents admitted petitioner was denied admittance to school because she was female).
ported recovery of compensatory damages under Title VI only upon a showing of intentional discrimination.\textsuperscript{130} Though five justices voted to uphold disparate impact regulations, three stated that the case did not require them to decide whether a private right of action exists under the regulations.\textsuperscript{131} The Court concluded neither \textit{Cannon} nor \textit{Guardians} held that a private right of action exists.\textsuperscript{132}

The Court further rejected respondent’s argument that the regulations alone contain rights-creating language, thereby making them enforceable.\textsuperscript{133} The Court invoked a basic tenet of administrative law stating, “[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.”\textsuperscript{134} The Court thus concluded that respondent’s argument “skips an analytical step” because section 602 does not authorize such a right.\textsuperscript{135}

Similarly, the Court rejected respondent’s argument that subsequent amendments to Title VI ratified the Court’s decisions finding an implied private right of action to enforce disparate impact regulations.\textsuperscript{136} The Court first noted that none of its decisions established or even assumed that a private right of action exists.\textsuperscript{137} Furthermore, the Court determined that respondent’s argument for incorporation was flawed because neither amendment related to implied causes of action.\textsuperscript{138}

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\item See id. at 282-83 (discussing split decision in \textit{Guardians}).
\item See id. (stating that justices who found case did not address question).
\item See id. at 284. The majority noted that the dissent found \textit{Guardians} did not support a private right of action to enforce Title VI regulations. See id. at 284 n.4.
\item See \textit{Sandoval}, 532 U.S. at 291 (addressing respondent’s argument that rights-creating language create claim of right).
\item Id. (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 577 n.18 (1979)) (denying argument that language in regulation can create private cause of action).
\item Id.
\item See id. (dismissing respondent’s argument as unfounded).
\item See \textit{Sandoval}, 532 U.S. at 292 (discussing § 1003 of Rehabilitation Act Amendments of 1986 and § 6 of Civil Rights Restoration Act of 1987). The Court found that neither amendment created a private right of action through incorporation. See id.
\end{enumerate}
\end{small}
b. South Camden Citizens in Action v. N.J. Department of Environmental Protection

The plaintiffs in *South Camden* are residents of Waterfront South, a neighborhood composed primarily of African-American and Hispanic citizens. In 1999, St. Lawrence, a cement company and co-defendant in the case, purchased property to build a grinding facility. Pursuant to these plans, St. Lawrence contacted co-defendants, NJDEP, and applied for a permit for the facility.

On August 23, 2000, NJDEP held a hearing to inform the community about the St. Lawrence permit. Due to community concern about the facility, plaintiffs filed an administrative complaint with EPA and a request for a grievance hearing with NJDEP, based on Title VI of the Civil Rights Act of 1964. NJDEP did not respond to the request for the grievance hearing and subsequently issued St. Lawrence's final air permit on October 31, 2000.

The plaintiffs filed a complaint against NJDEP and NJDEP Commissioner Robert C. Shinn, Jr. in the United States District Court for the District of New Jersey, arguing that defendants violated Title VI by issuing the air permit without analyzing the racially disparate impacts of the facility. After evaluating briefs, expert reports and oral arguments, the district court issued an opinion.
granting the plaintiffs' request for a preliminary injunction.\textsuperscript{147} The court determined that section 602 and its implementing regulations contained an implied private right of action, thereby requiring NJDEP to perform a Title VI analysis.\textsuperscript{148}

On April 24, 2001, the United States Supreme Court's decision in \textit{Sandoval} impliedly eliminated the private right of action on which the district court based its decision in \textit{South Camden I}.\textsuperscript{149} After allowing the plaintiffs to amend their complaint to include section 1983 as an alternate basis of relief, the district court issued an order continuing the preliminary injunction accompanied by a supplemental opinion (\textit{South Camden II}).\textsuperscript{150} On June 12, 2001, the Third Circuit Court of Appeals granted St. Lawrence's request for expedited review of the claim.\textsuperscript{151}

In deciding whether to uphold the injunction, the Third Circuit Court of Appeals addressed "whether plaintiffs can advance a cause of action to enforce section 602 of Title VI and its implementing regulation through section 1983."\textsuperscript{152} In analyzing section 1983, the court stated that section 1983 extends beyond constitutional and equal rights violations and into rights created under federal

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\textsuperscript{146} 145 F. Supp. 2d 446 (D.N.J. 2001) (granting plaintiffs request for preliminary injunction based on finding of private cause of action under § 602).
\textsuperscript{147} South Camden III, 274 F.3d at 775-76; see also S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446 (D.N.J. 2001) [hereinafter \textit{South Camden I}] (holding that § 602 and its implementing regulations contain implied right of action).
\textsuperscript{148} South Camden III, 274 F.3d at 776 (citing \textit{South Camden I}) (finding plaintiffs entitled to relief and remanding matter to NJDEP for Title VI analysis).
\textsuperscript{149} See id. In response to the Supreme Court's decision, St. Lawrence moved to dissolve the injunction. \textit{Id.} The Supreme Court denied this motion. \textit{Id.} For a discussion of \textit{Sandoval}, see supra notes 104-38 and accompanying text.
\textsuperscript{150} South Camden III, 274 F.3d at 776 (citing S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505 (D.N.J. 2001) [hereinafter \textit{South Camden II}]). The court denied St. Lawrence's motion to dissolve the injunction and allowed the parties to brief the remaining claims, particularly on the issue of "whether plaintiffs' intentional discrimination charge and/or their section 1983 claim could provide an alternate basis for relief." \textit{Id.} The supplemental opinion accompanying the order relied on \textit{Powell v. Ridge}, which held that § 1983 could support a disparate-impact claim for violating regulations promulgated pursuant to § 602. \textit{Id.} (citing \textit{Powell v. Ridge}, 189 F.3d 387 (3d Cir. 1999)).
\textsuperscript{151} See id. (outlining procedural history of case). On June 15, 2001 the Third Circuit granted St. Lawrence's request to suspend the preliminary injunction pending appeal. \textit{See id.}
\textsuperscript{152} \textit{Id.} at 777. The court noted that to uphold the "extraordinary remedy" of injunctive relief, the moving party must demonstrate: (1) the reasonable probability of eventual success in the litigation, and (2) that it will be irreparably injured if relief is not granted. \textit{Id.} A court should also take into account the possibility of harm to other interested persons from the grant or denial of the injunction and the public interest. \textit{Id.}
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The court noted that a section 1983 remedy was not available in two circumstances: (1) "where Congress has foreclosed such enforcement of the statute in the enactment itself" and (2) "where the statute did not create enforceable rights, privileges, or immunities within the meaning of section 1983." The court framed the underlying issue as whether a regulation can create a right enforceable through section 1983 where the alleged right is in the regulation and not explicitly in the statute.

Initially, the Third Circuit denied the district court's finding that the United States Supreme Court and Third Circuit Court of Appeals have already answered this issue in the affirmative. The Third Circuit acknowledged the United States Supreme Court's holding in *Wright v. City of Roanoke Redevelopment & Housing Authority* that "valid federal regulations may create rights enforceable under section 1983." The Third Circuit, however, distinguished the case by noting that, in *Wright*, Congress had already conferred a specific right through the statute. The Third Circuit similarly distinguished their earlier decisions, *Alexander v. Polk* and *West Virginia Hospital v. Casey*. The Third Circuit distinguished *Polk* because the regulations at issue in that case did not attempt to create a federal right beyond any that Congress intended to create in

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153. *See id.* Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

*Id.* at 779 (quoting 42 U.S.C. § 1983 (1994)).


156. *Id.* at 782.


158. *South Camden III*, 274 F.3d at 782-84 (stating holding in *Wright*).

159. *See id.* (discussing reasoning in *Wright*).

160. 750 F.2d 250 (3d Cir. 1984) (holding first that Title VI directly reached only instances of intentional discrimination and second that actions having unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement purpose of Title VI).

161. 885 F.2d 11, 16-18 (3d Cir. 1989) (setting forth conditions that can lead to recognition of private right of action not explicitly created).
enacting the statute. In *Casey*, the court decided whether a plaintiff could assert a claim against state officials under section 1983 for alleged violation of the federal Medicaid statute. There, the court determined that because this was the question presented, the broader statement - that "valid federal regulations as well as federal statutes may create rights enforceable under section 1983" - was merely dicta.

The Third Circuit had a more difficult time reconciling *Powell v. Ridge*. In *Powell*, the Third Circuit Court of Appeals discussed *inter alia* two major issues: 1) whether a plaintiff had a private right of action available to enforce a regulation implementing Title VI and 2) whether section 1983 provided a private right of action for violating a Title VI regulation. Although the *Powell* court decided both questions affirmatively, the Third Circuit determined that the district court had overextended this holding. The Third Circuit found that *Powell* was decided on the premise that section 602 and the regulations at issue included a private right of action. The court suggested that in *Powell* they merely "assumed" that section 1983 created an enforceable right for Title VI regulations for the purpose of rejecting three of defendants' arguments. Furthermore, the Third Circuit stated that even if the *Powell* court had determined that the regulations created a private right of action under section 1983, the holding did not survive the Supreme Court's decision in *Sandoval*.

162. *South Camden III*, 274 F.3d at 783-84 (noting *Polk* court did not expressly analyze whether federal regulation could create enforceable § 1983 right).
163. Id. at 784 (quoting *Casey*). The court noted that in *Casey* the federal Medicaid statute, not regulations, created an enforceable right through section 1983. See id.
164. Id. (distinguishing *Casey* because that court relied only on *Polk* and *Wright* in determining that federal statutes and regulations may create rights under § 1983).
165. 189 F.3d 387 (3d Cir. 1999), cert. denied, 528 U.S. 1046 (1999); see *South Camden III*, 274 F.3d at 784-85 (discussing court’s holding in *Powell*).
166. See *South Camden III*, 274 F.3d at 784 (addressing issues on appeal).
167. Id.
168. See id. (discussing district court’s error in interpreting *Powell*).
169. See id. at 784-85. The court stated that *Powell* did not address "whether a regulation in itself can create a right enforceable under section 1983." Id. at 784. Instead, the court authorized section 1983 for countering defendant’s arguments that: (1) [d]efendants were not ‘persons’ amenable to suit under section 1983; (2) that the comprehensive enforcement scheme of Title VI precluded a section 1983 claim and (3) that precedent barring claims under Title IX of the Education Amendments of 1972 should bar the section 1983 claim. Id. (citing *Powell*, 189 F.3d 387, 400-03 (3d Cir. 1999)).
170. See id. at 785 n.9. The court also determined that *South Camden II* was not based merely on the Third Circuit’s decision in *Powell*, but on an independent
In reviewing other circuit court decisions, the Third Circuit noted the split on whether a regulation alone may create an enforceable right under section 1983. In Smith v. Kirk, the Fourth Circuit held that an administrative regulation cannot create an enforceable section 1983 interest not implicit in the enforcing statute. In Harris v. James, the Eleventh Circuit rejected plaintiffs' claim that section 1983 allowed them to enforce a right contained within the regulations of the Medicaid Act. In holding that the regulations did not create a right under section 1983, the court stated that the "nexus between the regulation and Congressional intent to create federal rights [was] simply too tenuous to create an enforceable right to transportation [for Medicaid recipients]."

The Third Circuit acknowledged the contrary finding in Loschiavo v. City of Dearborn. In Loschiavo, the Sixth Circuit held that administrative regulations may create rights under section 1983 because

examination of section 1983. See id. The court went on to perform its own analysis of the statute. See id.

171. See South Camden III, 274 F.3d at 785-88 (discussing decisions of Fourth, Sixth and Eleventh Circuits).

172. 821 F.2d 980, 984 (4th Cir. 1987) (considering whether § 1983 provides cause of action when state violated Social Security Act regulations by placing economic needs test on disabled person needing rehabilitation services).

173. See South Camden III, 274 F.3d at 786 (quoting Smith v. Kirk, 821 F.2d 980, 984 (4th Cir. 1987)) (noting United States Supreme Court has never held that administrative regulations create enforceable § 1983 interest).

174. 127 F.3d 993 (11th Cir. 1997). Harris v. James addressed a Medicaid regulation that required states to provide non-emergency transportation to health providers. See id. at 996. The plaintiffs argued that section 1983 allowed them to enforce these regulations. See id.

175. See South Camden III, 274 F.3d at 786 (explaining Eleventh Circuit's reasoning in Harris).

176. Id. at 787 (quoting Harris, 127 F.3d at 1009-10). In reaching this conclusion the court stated:

[S]o long as the statute itself confers a specific right upon the plaintiff, and a valid regulation merely further defines or fleshes out the content of that right, then the statute—"in conjunction with the regulation"—may create a federal right as further defined by the regulation. . . . [But], if the regulation defines the content of a statutory provision that creates no federal right under the three-prong test, or if the regulation goes beyond explicating the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provision, we think the regulation is too far removed from Congressional intent to constitute a 'federal right' enforceable under section 1983. To hold otherwise would be inconsistent with the driving force of . . . the Supreme Court's directive that courts must find that Congress has unambiguously conferred federal rights on the plaintiff.

Id. at 786-87 (alteration in original).

177. See id. at 787 (analyzing Loschiavo v. City of Dearborn, 33 F.3d 548 (6th Cir. 1994)).
cause regulations have the force of law. The Third Circuit rejected this approach as contrary to the Supreme Court's more recent emphasis on using statutory intent to determine whether federal rights exist.

Finally, the Third Circuit concluded that section 1983 could not support a right to be free of disparate impact because the United States Supreme Court stated that such a right does not exist under section 601 or 602 of the Civil Rights Act of 1964. Reiterating the principles of Sandoval, the Third Circuit stated that section 601 applies only to intentional discrimination. While EPA's regulations under section 602 speak of disparate impact, the United States Supreme Court in Sandoval stated that Congress did not intend for regulations under section 602 to create rights. Furthermore, if the United States Supreme Court found that section 601 prohibits only intentional discrimination, it cannot follow that section 602 proscribes the right to be free from disparate impact discrimination. Lastly, the Third Circuit stated that if Congress intended for a right to exist under section 602 they would have expressly created one. Considering the potentially far-reaching effects of this decision, the Third Circuit concluded that Congress had the duty to create the right, not a court or administrative agency.

178. See id. (stating holding of Loschiavo).
179. See id. at 788 (citing Wright v City of Roanoke City Redevelopment & Hous. Auth., 479 U.S. 418, 430 (1987)).
180. See South Camden III, 274 F.3d at 788 ("It can hardly be argued reasonably that the right alleged to exist in the EPA's regulations, namely to be free of disparate impact discrimination in the administration of programs or activities receiving EPA assistance, can be located in either section 601 or section 602 of Title VI.").
181. See id. (citing Alexander v. Sandoval, 532 U.S. 275, 280-81 (2001)).
182. See id. at 789 (stating § 602 limits agencies to effectuating rights created under § 601).
183. Id. at 789-90 (finding regulations are "too far removed from Congressional intent to constitute a 'federal right' enforceable under section 1983.") (quoting Harris v. James, 127 F.3d 993, 1009 (11th Cir. 1997)).
184. Id. at 790 (stating "if there is to be a private enforceable right under Title VI to be free from disparate impact discrimination, Congress, and not an administrative agency or a court, must create this right.").
185. See South Camden III, 274 F.3d at 790. The court noted that many parties filed amicus curiae briefs due to the case's far-reaching implications. See id. The court also recognized that over forty federal agencies have adopted disparate impact regulations. See id. Therefore, the impact of finding that section 1983 supports a claim of right under regulations would be pervasive. See id.
IV. Conclusion

A. Impact on Environmental Justice Litigation

*Sandoval* and *South Camden III* bar environmental litigants’ claims under Title VI and section 1983.185 *Sandoval* eliminates the theory that an implied right of action exists to enforce disparate-impact regulations under section 602.187 Though only a circuit court case, *South Camden III* potentially makes section 1983 unavailable for plaintiffs seeking to prove disparate-impact discrimination.188 The only remaining claim of right requires a plaintiff to prove intentional discrimination under section 601.189 As demonstrated in Equal Protection litigation, plaintiffs are unlikely to succeed under the burden of proving intentional discrimination.190

B. Future of Environmental Justice Movement

Without Title VI as an avenue for relief, environmental justice activists must consider other methods to promote the movement. Though the plaintiffs in *South Camden III* were not successful, their effort has further advanced the struggle for environmental justice.191 The attention from this case has sparked a statewide community group called New Jersey Environmental Justice Network.192 Containing citizens of various New Jersey cities, the group intends to use strength in numbers to fight existing NJDEP policies.193

Ripples from *South Camden III* have also reached the New Jersey state government.194 A public hearing evaluated a new rule requiring businesses interested in building pollution-generating plants to

185. See Montag & Trinkle, supra note 8, at 5 (stating that *South Camden III* precludes plaintiffs right to enforce disparate impact regulations in federal court).
186. See Montag & Trinkle, supra note 8, at 5 (stating that *South Camden III* precludes plaintiffs right to enforce disparate impact regulations in federal court).
187. For a discussion of *Alexander v. Sandoval*, see supra notes 104-38 and accompanying text.
188. For a discussion of *South Camden III*, see supra notes 139-85 and accompanying text.
190. For a discussion of environmental racism claims under the Equal Protection clause, see supra notes 51-71 and accompanying text.
192. See Drake, supra note 1, at 27 (discussing emergence of group after years of organizing).
193. See id.
194. See Ahearn, supra note 191, at 2.
first consult with residents of the surrounding community. Should the proposed rule become law, citizens of minority communities may begin to get the respect and consideration they have been seeking. Thus, although South Camden III may mark the demise of environmental racism litigation through Title VI, the fight for environmental justice through community and political activism remains an alternative avenue.

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195. See id. Though NJDEP drafted the rule three years ago, the new state administration has just recently held a public hearing on it. See id. New Jersey would be the first state to adopt such a rule. See id.