

How the Sandoval Ruling Will Affect Environmental Justice Plaintiffs

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COMMENT

HOW THE SANDOVAL RULING WILL AFFECT ENVIRONMENTAL JUSTICE PLAINTIFFS

JOHN DiBARI[†]

INTRODUCTION

Despite any transgressions resulting from the current political climate, our government rarely insidiously and overtly discriminates against its people on the basis of race. Unfortunately, discrimination still plays a role in our society, but its presence has become harder to detect. The ubiquitous presence of environmental hazards in minority communities is evidence of this discrimination. This Comment intendeds to show how minority communities have fought against such discrimination, how the Supreme Court has recently altered that fight, and where communities are left in their quest to eradicate unfair treatment.

I. ENVIRONMENTAL JUSTICE

Environmental justice represents the methods of dealing with environmental racism.¹ “Environmental racism” refers to the inequitable distribution of environmental hazards² to

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¹ Michael D. Mattheisen, *Applying the Disparate Impact Rule of Law to Environmental Permitting Under Title VI of the Civil Rights Act of 1964*, 24 WM. & MARY ENVTL. L. & POLY REV. 1, 3 (2000).

² This includes the distribution of “garbage dumps, air pollution, lead poisoning, toxic waste production and disposal, pesticide poisoning, noise pollution, occupational hazard, and rat bites.” LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL

minority communities.³ Studies demonstrate that minority communities are subject to locally undesirable land uses more often than predominantly white communities.⁴ For instance, according to the United Church of Christ study, that was published in 1987, three out of the five largest commercial hazardous waste landfills were located in areas populated predominantly by minorities.⁵

JUSTICE MOVEMENT 54 (Richard Delgado et al. eds., 2001) [hereinafter COLE & FOSTER]. Furthermore, the authors cite the 1992 *National Law Journal* study which found that "[t]here is a racial divide in the way the U.S. government cleans up toxic waste sites and punishes polluters. White communities see faster action, better results and stiffer penalties than communities where blacks, Hispanics and other minorities live. This unequal protection often occurs whether the community is wealthy or poor." *Id.* at 57 (alteration in original).

³ The term "environmental racism" is credited to the former executive director of the Commission for Racial Justice and former executive director of the National Association for the Advancement of Colored People (NAACP), Rev. Dr. Benjamin Chavis, as he was preparing to present a report in 1987. See Richard J. Lazarus, "Environmental Racism! That's What It Is.", 2000 U. ILL. L. REV. 255, 257 (2000). Dr. Chavis is also credited with using the term in 1993 where he defined it as "the deliberate targeting of communities of color for toxic waste facilities and the official sanctioning of the presence of life-threatening poisons and pollutants in communities of color." Sandra Geiger, Article, *An Alternative Legal Tool for Pursuing Environmental Justice: The Takings Clause*, 31 COLUM. J.L. & SOC. PROBS. 201, 201 n.3 (1998) (citing *Environmental Racism: Hearings Before the House Subcomm. on Civil and Constitutional Rights, Comm. on the Judiciary*, 103d Cong. 3-4 (1993) (statement of Benjamin F. Chavis, Exec. Dir., Comm'n on Racial Justice)). Although Dr. Chavis coined the term, others have tried to define it as well. See Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602, Can a Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631, 636 (2000) (quoting Professor Robert Bullard who defined environmental racism as "[a]ny policy, practice, or directive that, intentionally or unintentionally, differentially impacts or disadvantages individuals, groups, or communities based on race or color; as well as the exclusionary and restrictive practices that limit participation by people of color in decision-making boards, commissions, and staffs") (alteration in original) (citations omitted).

⁴ See COLE & FOSTER, *supra* note 2, at 176-83 (citing numerous articles and studies from around the nation showing an overwhelming trend that minorities bear the burden of environmental hazards but also noting that some studies found income level to be the defining characteristic as opposed to race).

⁵ See Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787, 790-91 n.9 (1999) (citing a 1987 Study, "Toxic Wastes and Race in the United States," conducted by the Commission for Racial Justice, United Church of Christ (UCC), which found that race played a significant role in the siting of commercial hazardous waste facilities & a 1983 U.S. General Accounting Office (GAO) study entitled "Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of the Surrounding Communities," which found that African-Americans constituted a majority of the population in three out of four communities where landfills were located in eight southeastern states) (citations omitted).

Several paths lead to environmental justice. In some cases, groups of citizens band together to fight environmental hazards.⁶ In other cases, legislators and corporations consider the interests of minority and low-income communities when they develop plans for the municipality, city, or state. In addition, administrative agencies have recognized the problem of environmental racism and they have attempted to ensure their policies neither inadvertently nor adversely affect minority populations.⁷

Despite these efforts, environmental racism still exists. The primary reason for the continued existence of environmental racism is the nearly impossible burden of proof faced by environmental justice plaintiffs. Environmental justice plaintiffs must prove either a facially discriminatory intent or an actionable discriminatory effect, i.e., an effect so disproportionate that the only possible justification is a discriminatory intent. With the burden so high, courts continually shut their doors to environmental justice plaintiffs. Recently, the Supreme Court added to the burden of achieving environmental justice by removing an alternative avenue of relief. In *Alexander v. Sandoval*,⁸ the Court held that § 602 of the 1964 Civil Rights Act did not create a freestanding private cause of action for plaintiffs to enforce regulations promulgated thereunder.⁹ For reasons discussed below, many environmental justice plaintiffs had previously relied on this private cause of action to seek redress. This Comment will evaluate other causes of action available to these plaintiffs in the wake of the *Sandoval* decision, how those causes of action differ from § 602, and the impact the Court's decision will have on minority communities.¹⁰

⁶ See, e.g., *New York Urban League, Inc. v. State of New York*, 71 F.3d 1031 (2d Cir. 1995) (per curiam); *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 145 F. Supp. 2d 446, 452 (D. N.J. 2001).

⁷ In 1983, the Supreme Court noted that "every Cabinet Department and about 40 federal agencies had adopted standards interpreting Title VI [of the 1964 Civil Rights Act] to bar programs with a discriminatory impact." *Guardians Ass'n. v. Civil Serv. Comm'n*, 463 U.S. 582, 619 (1983).

⁸ 532 U.S. 275, 293 (2001).

⁹ *Id.*

¹⁰ This Comment will focus mainly on environmental justice plaintiffs fighting undesirable land uses. The arguments and law regarding the causes of action, however, are applicable to most other environmental justice disputes.

A. *The History of the Environmental Justice Movement*

The quest for environmental justice began as an offshoot of the 1960s civil rights movement. Environmental justice, however, did not receive national attention until the early 1980s, when a series of protests occurred in Warren County, North Carolina. The citizens of Warren County, who were protesting the siting of a polychlorinated biphenyl landfill in a predominantly African-American county, finally gave the movement national exposure.¹¹ Subsequently, environmental justice has been the subject of a variety of studies¹² and volumes of academic discourse;¹³ it has also been addressed in several cases involving citizens trying to prevent environmentally adverse policies from affecting their community.¹⁴ The President of the United States has even recognized environmental racism. In 1994, then President Clinton issued Executive Order No. 12,898, entitled *Federal Actions to Address Environmental*

¹¹ See Carolyn Graham & Jennifer B. Grills, *Environmental Justice: A Survey of Federal and State Responses*, 8 VILL. ENVTL. L.J. 237, 239 (1997); Adam Swartz, *Environment Justice: A Survey of the Ailments of Environmental Racism*, 2 HOW. SCROLL SOC. J. REV. 35, 36 (1994).

¹² See Mank, *supra* note 5, at 790; see also Michele L. Knorr, *Environmental Injustice: Inequities Between Empirical Data and Federal, State Legislative and Judicial Responses*, 6 U. BALT. J. ENVTL. L. 71, 77-80 (1997) (citing a GAO study, a United Church of Christ study, a 1992 *National Law Journal* study, which found that minority and low income communities receive a greater share of pollutants but these violators are required to pay less stringent fines than those in Caucasian communities, and a 1994 World Council of Churches study, which found environmental injustice with examples of environmental dangers in relation to minority communities) (citations omitted).

¹³ See generally, Geiger, *supra* note 3; Mattheisen, *supra* note 1; Swartz, *supra* note 11.

¹⁴ See *New York City Env'tl. Justice Alliance v. Giuliani*, 50 F. Supp. 2d 250, 252-53 (S.D.N.Y. 1999) (alleging that the sale and destruction of community gardens would have an adverse impact on black and Hispanic communities); *S. Bronx Coalition for Clean Air v. Conroy*, 20 F. Supp. 2d 565, 569-70 (S.D.N.Y. 1998) (discussing the issuance of a permit to operate a 3,000 ton per day solid waste station in the Harlem River Yard site); *Chester Residents v. Seif*, 944 F. Supp. 413 (E.D. Pa. 1996) (discussing citizens who challenged the Pennsylvania Department of Environmental Protection's ("PADEP") issuance of a permit for the operation of a waste disposal facility in a primarily African-American community when the PADEP had already done so several times in the previous few years), *rev'd* 132 F.3d 925 (3d Cir. 1997), *vacated*, 524 U.S. 974 (1998); *Coalition of Concerned Citizens v. Damian*, 608 F. Supp. 110, 112-13 (S.D. Ohio 1984) (discussing plaintiffs' argument that the planning and siting of a proposed highway had a disproportionate impact on minority citizens); *Bean v. S.W. Waste Mgmt. Corp.*, 482 F. Supp. 673, 674-75 (S.D. Tex. 1979) (fighting the approval of a permit to operate a solid waste facility in Harris County, Texas).

*Justice in Minority Populations and Low-Income Populations.*¹⁵
This order provided,

To 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 in the United States¹⁶

While the order did not have the effect of law, nor could it be enforced, it served to provide guidance for federal agencies in the exercise of their rule-making powers.

Despite the increasing national attention given to environmental racism, it is far from being universally accepted. The majority of critics believe the problem is not as extreme or severe as portrayed by environmentalists.¹⁷ Furthermore, critics contend that in most cases any potential risks of harm are outweighed by the tangible economic benefits brought to the community by siting decisions. On this point, environmentalists argue that environmental justice policies, necessary for the protection of the health and welfare of minority communities, outweigh any possibly derived economic benefits.¹⁸

B. Development of Litigation Strategies

1. The equal protection clause of the Fourteenth Amendment & § 601 of the 1964 Civil Rights Act Are Not Practical Solutions

The movement for environmental justice is based on the

¹⁵ See Mank, *supra* note 5, at 793.

¹⁶ Exec. Order No. 12,898, 3 C.F.R. 859-60 (1994), *reprinted in* 42 U.S.C. § 4321 (1997).

¹⁷ See Mank, *supra* note 5, at 792-93. Indeed, there are studies that lend credit to this position. See Knorr, *supra* note 12, at 82-83 (identifying (1) a March 1994 Washington University Center for the study of American Business study which questioned the solutions presented by environmental justice supporters and argued that research does not support claims of discriminatory siting; (2) a 1994 University of Massachusetts at Amherst study that criticized the 1987 United Church of Christ study and found that commercial hazardous waste facilities were more likely to be located in middle-class Caucasian neighborhoods; and (3) a 1995 General Accounting Office study that concluded minorities and low-income populations do not bear a greater amount of municipal solid waste landfills) (citations omitted).

¹⁸ See Mank, *supra* note 5, at 793 & n.15.

ideals of the civil rights movement of the 1960s,¹⁹ and as such, plaintiffs have framed their claims as violations of the Equal Protection Clause of the Fourteenth Amendment.²⁰ The burden of proof in a discrimination cause of action under the Equal Protection clause is high. The Supreme Court has held a plaintiff must prove the defendant acted with intent to discriminate above and beyond a discriminatory effect or impact.²¹ The Court then elaborated upon the meaning of intent in *Personnel Administrator v. Feeney*²² when it stated that a "[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effect on an identifiable group."²³ Under this definition, a showing of a disparate impact is just one of many factors that a court must consider in determining intentional discrimination. In addition to whether an official action " 'bears more heavily on one race than another,' " ²⁴ in *Arlington Heights v. Metropolitan Housing Development Corp.*, the Court set forth several other factors to be considered to find intentional discrimination.²⁵ Indeed, there have been several instances where a court has refused to see disparity rise to the level of intentional

¹⁹ See Richard J. Lazarus, Symposium, *Civil Rights in the New Decade: Highways and Bi-ways for Environmental Justice*, 31 CUMB. L. REV. 569, 570-72 (2000-01) (illustrating the overlap of civil rights and the environmental movement by pointing out the site of a proposed landfill in a small town along Route 80, where Dr. Martin Luther King walked after "Bloody Sunday" in 1965).

²⁰ The Fourteenth Amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

²¹ See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-66 (1977); *Washington v. Davis*, 426 U.S. 229, 238-39 (1976).

²² 442 U.S. 256 (1979).

²³ *Id.* at 279 (citations omitted).

²⁴ 429 U.S. at 266 (quoting *Davis*, 426 U.S. at 242 (1976)).

²⁵ *Id.* at 266-67 (deciding that the following factors particularly indicate a clear pattern of adverse policy decisions that are unexplainable on grounds other than race and should be taken into account: (1) substantive departures from the routine decision-making process; (2) the historical background of the particular decision; (3) the specific sequence of events leading up to the decision; and (4) the legislative and administrative history).

discrimination.²⁶ The burden placed on the plaintiffs makes defending such allegations as simple as offering a plausible reason for the decision, even though it might not be the actual motivation.²⁷

Plaintiffs have also turned to §§ 601 and 602 of the 1964 Civil Rights Act to seek redress.²⁸ A necessary qualification for § 601 and its effectuating provision, § 602, however, is that plaintiffs may bring suit only against those subject to the conditions and mandates of Title VI, in other words, recipients of federal funds.²⁹ Unfortunately, § 601 has been held to require the same showing of intentional discrimination as a cause of action under the equal protection clause.³⁰ Therefore, the evidentiary hurdles for environmental justice plaintiffs loom just as large in the civil rights context as in the equal protection context.

2. Use of § 602 of Title VI of the 1964 Civil Rights Act

Due to the difficulties of satisfying the burden of proof under § 601, environmental justice plaintiffs have turned to the administrative agency regulations implementing § 602 to allege a discriminatory disparate impact. § 602 explicitly gives federal agencies the power to adopt regulations to enforce compliance with § 601.³¹ On that basis, some courts, prior to *Sandoval*,

²⁶ See *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1149–50 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992); *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County & Zoning Comm'n*, 706 F. Supp. 880, 885–87 (D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); *Bean v. S.W. Waste Mgmt. Corp.*, 482 F. Supp. 673, 677–78 (S.D. Tex. 1979).

²⁷ See Amanda C.L. Vig, *Using Title VI to Salvage Civil Rights from Waste: Chester Residents Concerned For Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), 67 U. CIN. L. REV. 907, 914–15 (1999) (asserting that defendants can use compliance with National Environmental Policy Act as a pretext for actions or can confuse juries and/or judges with elaborate, complicated, and misleading statistics); see also Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1, 11 (1999) [hereinafter Mank, *Is There a Private Cause of Action*] (stating that most siting boards and developers can almost always offer a race-neutral justification for a site).

²⁸ See cases cited *infra* note 32.

²⁹ See Bradford C. Mank, *Title VI, THE LAW OF ENVIRONMENTAL JUSTICE* 28, 28 (Michael B. Gerrard, A.B.A. 1999) [hereinafter Mank, *Title VI*].

³⁰ See, e.g., *Rozar v. Mullis*, 85 F.3d 556, 563 n.9 (11th Cir. 1996) (stating that both Title VI and the equal protection clause require a showing of intentional discrimination).

³¹ See 42 U.S.C. § 2000d-1 (1994). It provides in relevant part:

allowed a private cause of action for plaintiffs to allege a disparate impact³² in violation of agency regulations.³³

The courts have dealt with § 602 issues by developing a specific procedure to allocate the burdens of proving or disproving a disparate impact on the respective parties.³⁴ In *Powell v. Ridge*, the Third Circuit stated that several courts of appeals had determined that the burdens of proof, allocated between the plaintiff and defendant in a Title VI dispute should closely resemble the burden shifting scheme developed in cases dealing with Title VII of the Civil Rights Act of 1964.³⁵

To satisfy a prima facie case, plaintiffs has the burden of showing the alleged disparate impact resulted from a facially neutral policy.³⁶ To accomplish this, the plaintiff must initially define the "area" or community affected.³⁷ Next, the plaintiff

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of § 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

Id.

³² See *Powell v. Ridge*, 189 F.3d 387, 394 (3d Cir. 1999) (quoting *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1421 (11th Cir. 1985)).

³³ See, e.g., *Burton v. City of Belle Glade*, 178 F.3d 1175, 1204 (11th Cir. 1999) (permitting plaintiffs to obtain injunctive relief by showing the challenged action had a disparate impact on groups protected by the statute); *Villanueva v. Carere*, 85 F.3d 481, 486-87 (10th Cir. 1996) (affirming district court's ruling that plaintiffs had not satisfied their burden on their claim of disparate impact); *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1038 (2d Cir. 1995) (finding plaintiffs were unlikely to succeed based on the factual findings presented); *City of Chicago v. Lindley*, 66 F.3d 819, 830 (7th Cir. 1995) (reversing the district court's conclusion that a disparate impact existed); *Larry P. by Lucille P. v. Riles*, 793 F.2d 969, 983 (9th Cir. 1984) (affirming district court's ruling that defendant violated Title VII).

³⁴ See *Powell*, 189 F.3d at 393, 394.

³⁵ See *id.* For examples of cases brought under Title VII, see *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Allen v. Entergy Corp., Inc.*, 193 F.3d 1010 (8th Cir. 1999), which discussed Title VII's applicability to an ADEA analysis; *Riles*, 793 F.2d at 982, which alleged violations of Title VI; and *Johnson v. Uncle Ben's, Inc.*, 657 F.2d 750 (5th Cir. 1981).

³⁶ *Ferguson v. City of Charleston*, 186 F.3d 469, 480 (4th Cir. 1999) (citing *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993)), *rev'd*, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

³⁷ See *Bean v. S.W. Waste Mgmt. Corp.*, 482 F. Supp. 673, 679 (S.D. Tex. 1979) In *Bean*, the district court decided whether to group Houston in halves or quadrants or to focus on census tract data. If the court had used the halves or quadrants method, a majority of the waste facilities would be located in minority

must establish a causal link between the disputed practice and the identified adverse effect.³⁸ If the defendant can show the disparate effect would have occurred regardless of the practice, the plaintiff has failed to make a prima facie case.³⁹ If, however, the plaintiff does fulfill their prima facie case, the burden shifts to the defendant to show “ ‘a substantial legitimate justification’ ”⁴⁰ or a “legitimate, nondiscriminatory reason”⁴¹ for the allegedly discriminatory practice.⁴² If or when the defendant shows a justification, the plaintiff still has an opportunity to win by showing the existence of less discriminatory means to accomplish the same objective.⁴³ If the plaintiff prevails, injunctive or declarative relief is the applicable remedy.

II. THE SANDOVAL DECISION

*Alexander v. Sandoval*⁴⁴ did not deal with environmental issues, but the impact of the decision will be felt directly by environmental justice plaintiffs. In *Sandoval*, non-English speaking residents of Alabama felt discriminated against because an Alabama law mandated that all driver's license tests be in written in English.⁴⁵ They sued the Alabama Department of Public Safety and James Alexander, the director, to enjoin the policy under § 602 of the 1964 Civil Rights Act.⁴⁶ The Court decided that the Alabama Department of Public Safety was a recipient of funds from the United States Department of Justice

neighborhoods. Although the court noted that the census tracts may have underestimated the affected area, it applied that standard since the plaintiffs did not identify the area impact by the siting. An alternative to the census tract method is the ZIP code method as used by the General Accounting Office in their 1983 study and the United Church of Christ's 1987 study. *Id.*

³⁸ See *Elston v. Talladega County Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

³⁹ See *id.*

⁴⁰ *N.Y. Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995) (quoting *Ga. State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985)).

⁴¹ *NAACP v. Med. Ctr., Inc.*, 657 F. 2d 1322, 1333 (3d Cir. 1981).

⁴² See Mattheisen, *supra*, note 1 at 23 (noting that a disparate impact may be justified if there is a “programmatically reason” for the decision to be considered “business necessity’ ”) (citations omitted).

⁴³ See *N.Y. Urban League*, 701 F.3d at 1036; *Ga. State Conference*, 775 F.2d at 1417.

⁴⁴ 532 U.S. 275, 279 (2001).

⁴⁵ *Id.* at 278–79.

⁴⁶ *Id.* at 278.

and Department of Transportation and was therefore subject to the restrictions of Title VI.⁴⁷ The claimants argued that this facially neutral policy led to a discriminatory disparate impact based on national origin, thereby violating federal agency regulations which forbid state agencies receiving federal funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin" ⁴⁸

A. *The Majority's Holding*

Writing for the majority, Justice Scalia noted that the Court was not ruling on whether the Department of Justice or Department of Transportation regulations were authorized by § 602, but rather whether there was a private cause of action to enforce the regulations.⁴⁹ For purposes of rendering a decision in the present case, the Court assumed the validity of the implementing regulations.⁵⁰

A narrow majority of the Court held that at no point in time did Congress intend for a private cause of action under § 602.⁵¹ The Court further noted that it never had previously created a private right of action.⁵² Therefore, in the 5-4 ruling, the Supreme Court found that § 602 of the statute did not confer a private cause of action and dismissed the claims on this ground.⁵³

While Justice Scalia pointed out that it is "beyond dispute" § 601 only prohibits intentional discrimination⁵⁴ and noted the Court's failure to uphold the validity of the regulations both in

⁴⁷ *Id.*

⁴⁸ *Id.* (quoting Department of Justice § 602 implementing regulations as found in 28 C.F.R. § 42.104(b)(2) (2000) and the comparable Department of Transportation regulations as set forth in 49 C.F.R. § 21.5(b)(2) (2000)).

⁴⁹ *Id.* at 279.

⁵⁰ *Id.* at 282.

⁵¹ *Id.* at 288-89 (finding Congress's lack of intention of private enforcement in § 602's language limiting agencies to enforcement of only those rights created by § 601).

⁵² *Id.* at 282-83 (referring to the fractured decision in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) and finding that three out of the five justices who voted to uphold the validity of the disparate impact regulations reserved the question as to whether there was an opportunity for private enforcement).

⁵³ *Id.* at 293.

⁵⁴ *See id.* at 280-81 (affirming the principle as set forth in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), that § 601 only proscribes racial classifications that would violate the Equal Protection Clause or the Fifth Amendment).

this case and in a prior decision,⁵⁵ it is perhaps more troubling than the Court's actual holding to see the Court indicating that it might view federal agency regulations prohibiting a disparate impact under Title VI as having a flimsy legal foundation, and therefore subject to invalidation.⁵⁶ If this were to occur, federal agencies would not be able to proscribe policies implemented by federal fund recipients that result in a disparate impact.

B. *The Dissent's Argument*

The dissent by Justice Stevens contended that § 602 provides for a private cause of action, as evidenced by the legislative history behind § 602 and prior Supreme Court decisions and rationales.⁵⁷ The dissent also noted that similarly situated plaintiffs could alternatively bring suit under 42 U.S.C. § 1983, which is a key principle the majority failed to touch upon.⁵⁸ A § 1983 action would allow plaintiffs recourse against state actors, whether or not federally funded.⁵⁹ Furthermore, Justice Stevens argued "that a violation of regulations adopted pursuant to Title VI may be established by proof of discriminatory impact in a § 1983 action against state actors and also in an implied action against private parties."⁶⁰

Justice Stevens derived this opinion from an interpretation of the fractured ruling in *Guardians Ass'n v. Civil Service*

⁵⁵ See *id.* at 281–82 (noting that although five justices in *Guardians* voted to uphold the regulations prohibiting disparate impact, it was not the Court's holding).

⁵⁶ *Id.* at 285 ("It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits . . ."). Justice Scalia also referred back to *Guardians*, in which Justice O'Connor stated in his concurrence, "If, as five members of this Court concluded in *Bakke*, the purpose of Title VI is to proscribe only purposeful discrimination . . . , regulations that would proscribe conduct by the recipient having only a discriminatory effect . . . do not simply 'further' the purpose of Title VI; they go well beyond that purpose."

⁵⁷ See *id.* at 292–316.

⁵⁸ 42 U.S.C. § 1983 (1994) in relevant part provides:

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

Id.

⁵⁹ *Sandoval*, 532 U.S. at 301 (Stevens, J., dissenting).

⁶⁰ *Id.* at 301 n.6.

Comm'n.,⁶¹ and another prior Supreme Court decision.⁶² He believed that all the Justices in the "*Guardians* majority contemplated the availability of private actions brought directly under the statute,"⁶³ and cited his own opinion from *Guardians* to note that relief would have been available under § 1983 in that specific situation as well.⁶⁴

III. PLAINTIFFS' POTENTIAL ROUTES TO RECOURSE

A. *Political: Amend the Statute*

Although the *Sandoval* Court ruled there was no private cause of action to enforce § 602, Congress can overrule that decision by altering the language of the statute. Congress could expand the scope of § 602 with a statement providing that agency regulations promulgated under § 602 may be enforced through a private cause of action. Alternatively, it could expand the scope of § 601 to include a prohibition against policies leading to a disparate impact. This alternative would require a build-up of the environmental plaintiffs' lobbying presence in Washington, especially given environmental justice issues are not high on the list of congressional priorities.

On a broader scale, Congress has considered a national law to promote environmental justice throughout the nation. The Environmental Justice Act was proposed with the objective of "establish[ing] a program to ensure nondiscriminatory compliance with environmental, health, and safety laws and to ensure equal protection of the public health"⁶⁵ Although not enacted, the consideration of this law helped to gain recognition for the issue of environmental justice.

Yet environmental justice plaintiffs are not completely without remedy, as various federal and state laws provide some

⁶¹ 463 U.S. 582 (1983).

⁶² *Sandoval*, 532 U.S. at 299 n.5.

⁶³ *Id.*; see *Guardians*, 463 U.S. at 607 (White, J., plurality opinion) (finding that absent a showing of discriminatory intent, a private plaintiff is only allowed injunctive and non-compensatory relief); *id.* at 634-35 (Marshall, J., dissenting) (concluding that compensatory relief is available to private plaintiffs absent a showing of discriminatory animus). *But see id.* at 638-39, 643-45 (Stevens, J., dissenting) (finding private individuals could recover compensatory damages for Title VI violations and upholding the effects standard set forth by federal agencies).

⁶⁴ See *Sandoval*, 532 U.S. at 299 n.5.

⁶⁵ 138 CONG. REC. 7480 (statement of Sen. Gore).

protection for environmental protection and well-being.⁶⁶ These statutes allow individuals to sue violators and seek injunctive relief, monetary damages, or both.

B. Judicial: Alternatives to § 602

1. Section 1983 and Causes of Action Thereunder

While the *Sandoval* dissent discussed suit under 42 U.S.C. § 1983,⁶⁷ more recently, Judge Orlofsky authorized a suit under this statute in *South Camden Citizens in Action v. New Jersey Dep't of Environmental Protection*.⁶⁸ In *South Camden I*, defendants sought to end a preliminary injunction against the New Jersey Department of Environmental Protection (NJDEP) and NJDEP Commissioner Robert Shinn, which granted St. Lawrence Cement Company's application for air permits to operate its proposed facility.⁶⁹

Five days after the *South Camden I* court awarded a preliminary injunction against the NJDEP, the Supreme Court issued the *Sandoval* decision.⁷⁰ Subsequently, Judge Olorofsky decided that although the district court was bound by the Supreme Court's decision disallowing a private right of action under § 602, there was nothing to prevent the court from allowing a suit alleging a violation of the § 602 implementing regulations under 42 U.S.C. § 1983,⁷¹ and again granted a preliminary injunction.⁷²

⁶⁶ See generally Clean Water Act, 33 U.S.C. § 1251 (1994); Federal Water Pollution Control Act and Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992(d) (1994); The Clean Air Act, 42 U.S.C. § 7521 (1994); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 (1994).

⁶⁷ See 532 U.S. at 299-300 (Stevens, J., dissenting).

⁶⁸ See 145 F. Supp. 2d 505 (D. N.J. 2001) (The *South Camden I* court was the first federal court to rule on a Title VI disparate impact case after the Supreme Court's *Sandoval* decision [hereinafter *South Camden I*]; see also *Lucero v. Detroit Pub. Sch.*, 160 F. Supp. 2d 767, 784 (E.D. Mich. 2001) (concluding that plaintiffs could bring suit for an alleged violation of the U. S. Department of Education's § 602 implementing regulations under § 1983). See generally Bradford C. Mank, *Using § 1983 to Enforce Title VI's Section 602 Regulations*, 49 U. KAN. L. REV. 321, 323 (2001) [hereinafter Mank, *Using § 1983*] (noting that regardless of the Supreme Court's ruling on private causes of action for § 602 violations, plaintiffs would still have a chance to bring suit under § 1983).

⁶⁹ *South Camden I*, 145 F. Supp. 2d at 508-09.

⁷⁰ *Id.*

⁷¹ *Id.* at 509.

⁷² *Id.*

To reach this conclusion, the court went through an exhaustive analysis of the availability of a § 1983 claim in this context. First, the court applied the analysis set forth in *Golden State Transit Corp. v. City of Los Angeles* to decide whether a § 1983 remedy was available to plaintiffs.⁷³ Under *Golden State Transit*, a “[p]laintiff must assert the violation of a federal right”⁷⁴ and show that Congress did not foreclose a remedy under § 1983 by providing a “comprehensive enforcement mechanism for protection of a federal right.”⁷⁵ The *South Camden I* court decided that § 602 and the subsequent regulations promulgated by the EPA created a federally protected right after applying the three-part *Blessing v. Freestone* test.⁷⁶ The *South Camden I* court found that Title VI was meant to benefit individuals who were subjected to racial discrimination, and that the plaintiffs fit in the class of persons Congress intended the law to reach.⁷⁷ In addition, the court found the specific language of the EPA’s implementing regulations revealed an intent to benefit those specific types of plaintiffs.⁷⁸ The court noted, therefore, that protecting the asserted right to be free from discrimination would not strain judicial competence.⁷⁹ Finally, the court concluded that Title VI and the EPA’s implementing regulations mandated that the state fulfill its obligations as required under § 1983.⁸⁰

⁷³ *Id.* at 519–20.

⁷⁴ *Id.* at 529.

⁷⁵ *Id.* at 519 (quoting *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989)).

⁷⁶ *South Camden I*, 145 F. Supp. 2d at 529; see *Blessing v. Freestone*, 520 U.S. 329, 340–41 (1997) (citing three factors that courts traditionally looked at to decide whether a statutory provision led to a federal right). Those three factors are: (1) whether Congress intended the provision to benefit the plaintiff; (2) whether the plaintiff could demonstrate that the asserted protected right was not so “vague and amorphous” that its enforcement would strain judicial competence; and (3) whether the statute unambiguously imposed a binding obligation on the states. *Id.*

⁷⁷ *South Camden I*, 145 F. Supp. 2d at 536.

⁷⁸ *Id.* at 536–37 (citing EPA regulation under 40 C.F.R. § 7.30, which instituted a general prohibition against “discrimination . . . [on the basis] of . . . race, color, [or] national origin” and 40 C.F.R. § 7.35(b) which issued a specific prohibition to federal fund recipients from “using criteria or methods . . . substantially impacting the accomplishment of the objectives of the program with respect to . . . race, color, national origin, or sex”).

⁷⁹ *Id.* at 540 (citing several cases where federal courts developed the framework for disparate impact litigation in the context of Title VI).

⁸⁰ *Id.* at 542 (explaining that the use of “shall” in both Title VI and in the EPA’s implementing regulations and the conditioning of federal funds on compliance

The next hurdle the court had to overcome to conclude that § 1983 was a viable alternative was whether Congress explicitly or implicitly foreclosed the plaintiffs' ability to enforce the EPA regulations under § 1983.⁸¹ After looking at Supreme Court jurisprudence addressing the enforceability of federal rights under § 1983⁸² and reviewing the EPA's Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits,⁸³ the court found that "[the] generalized enforcement power of the EPA . . . is insufficient to meet the high threshold the Supreme Court has established . . . which may be deemed so comprehensive that they demonstrate a Congressional intent to foreclose recourse to Section 1983."⁸⁴

The only remedy provided by Congress for violations of § 602 is to terminate federal funding in order to prevent the proliferation of any programs or policies that lead to discrimination under governmental auspices. As the Supreme Court decided in *Wright v. Roanoke Redevelopment & Housing Authority*,⁸⁵ the power to cut off federal funds is "insufficient to indicate a congressional intention to foreclose Section 1983 remedies."⁸⁶ In contrast, the Court in *Middlesex County Sewage Authority v. National Sea Clammers* viewed the enforcement provisions of the Federal Water Pollution Control Act as creating many specific statutory remedies, including citizen suit provisions, civil and criminal penalties, and compliance orders as enough to remove enforcement by § 1983.⁸⁷ Similarly, in *Smith v. Robinson*, because the Education of the Handicapped Act allowed for several tailored local administrative procedures to be followed by judicial review, the Court decided that to allow a plaintiff to go straight to court with a § 1983 claim would render all those procedures worthless.⁸⁸ Thus, there does not seem to be much argument against the *South Camden I* court's decision

indicate Congress's desire to make the obligations mandatory).

⁸¹ See *id.* at 542-43.

⁸² See *id.* at 544 (concluding that the Supreme Court found a "remedial scheme sufficiently comprehensive to supplant § 1983" in only two cases: *Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981), and *Smith v. Robinson*, 468 U.S. 992 (1984) (citation omitted)).

⁸³ 65 Fed. Reg. 39650, 39673 (June 27, 2000).

⁸⁴ *South Camden I*, 145 F. Supp. 2d at 546.

⁸⁵ 479 U.S. 418 (1987).

⁸⁶ *Id.* at 428.

⁸⁷ See 453 U.S. 1, 13-14 (1981).

⁸⁸ See 468 U.S. 992 (1984).

that Congress did not install such a comprehensive system for enforcement in Title VI as to remove the possibility of a § 1983 claim against state officials violating federally protected rights.

Notwithstanding the approval of the *Sandoval* dissent and Judge Orlofsky's thorough discussion of the use of § 1983 within the context of § 602's implementing regulations, the Third Circuit recently reversed the district court's determination that the regulations promulgated under § 602 can be effectuated under a § 1983 suit.⁸⁹ Despite a vigorous dissent, the circuit court concluded that "a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute."⁹⁰ It seems as though the Third Circuit agreed with Justice Scalia's contention in *Sandoval* that "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself."⁹¹ That is, agencies may not authorize a private cause of action by way of an implementing regulation, and agency regulations are not federal rights enforceable through § 1983, unless Congress intends otherwise.

The Third Circuit distinguished several cases the district court had relied upon to support its proposition that federal regulations may be the basis for federal rights enforceable through § 1983. The first case distinguished by the circuit court was *Wright v. City of Roanoke Redevelopment & Housing Authority*.⁹² According to the circuit court, *Wright* held that a federal right is created by a statutory provision only in combination with the relevant regulations.⁹³ Next, the Third Circuit distinguished three of its previous cases to show there was no precedent for the district court's decision.⁹⁴ The court

⁸⁹ See *S. Camden Citizens in Action v. N.J. Dep't. of Env'tl. Prot.*, 274 F.3d 771, 790-91 (3d Cir. 2001) [hereinafter *South Camden II*].

⁹⁰ *Id.* at 790.

⁹¹ *Sandoval*, 532 U.S. at 291.

⁹² 479 U.S. 418 (1987).

⁹³ See *South Camden II*, 274 F.3d at 783. The issue in *Wright* was whether HUD regulations specifying how much rent could be charged to public housing tenants created a federal right enforceable by § 1983. According to the Third Circuit, the *Wright* court found that the statutory provision of creating a ceiling on tenants' rent clearly authorized the HUD regulations implementing that ceiling and that the statute was undeniably meant to benefit the plaintiffs. The Third Circuit then said, "inasmuch as the [Section 602] disparate impact regulations go far beyond the intentional discrimination interdiction in section 601, the district court's reliance on *Wright* was misplaced." *Id.*

⁹⁴ See *id.* at 783-85 (distinguishing *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999), *cert. denied*, 528 U.S. 1046 (1999)); *W. Va. Univ. Hosp. v. Casey*, 885 F.2d 11

then noted the split in authority between the other Circuits, and decided to follow the Fourth and Eleventh Circuits.⁹⁵ The court declined to follow the Sixth Circuit's decision and reasoning as set forth in *Loschiavo v. City of Dearborn*.⁹⁶ In *Loschiavo*, the Sixth Circuit allowed a § 1983 action to proceed against a violation of FCC regulations after deciding that the regulation was designed to benefit the plaintiffs, was mandatory, and was not beyond judicial enforcement.⁹⁷

Although there is a split in authority between circuits addressing the issue as to whether § 1983 is available to enforce § 602 regulations, the majority of courts addressing the issue have sided with the Third Circuit. At present, district courts in Florida, New York, and Oregon have determined that Congress did not intend for § 602 to create a federally protected right.⁹⁸

(3d Cir. 1989); *Alexander v. Polk*, 750 F.2d 250 (3d Cir. 1984)). The Circuit court found that the *Powell* court did not expressly answer the question whether a regulation standing alone could create a federal right that could be enforced under § 1983, but rather "assume[d]" it could. *Id.* at 784–85. Similarly, the Circuit court found that the *Alexander* court had "simply concluded" that the regulation at issue created a federal right. *Id.* at 783. In that case, the statute created a right to supplemental food for those who qualified, whereas the right deemed enforceable under § 1983 was the right to a fair hearing upon termination of benefits. The Third Circuit also found that their previous decision in *Casey* was not on point in this case because the question in *Casey* was whether the statute itself created a federal right under § 1983. *Id.* at 784.

⁹⁵ *Id.* at 785–86 (citing *Harris v. James*, 127 F.3d 993 (11th Cir. 1997) & *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987) for the idea that an administrative regulation cannot create an enforceable federal right if the regulation goes beyond the scope of the statutory provision). The *South Camden II* court also noted that *Smith* found no federal right to have vocational rehabilitation services through the implementing regulations of the Social Security Act, and that *Harris* found a Medicaid regulation which required the provision of non-emergency transportation to and from providers to be too removed from the Congressional intent for it to be enforceable right under § 1983. *Id.* at 786.

⁹⁶ 33 F.3d 548 (6th Cir. 1994). The Third Circuit also found the lower court's reliance on *Buckley v. City of Redding*, 66 F.3d 188 (9th Cir. 1995) to be misplaced as it found the Ninth Circuit in *Buckley* to have relied on the federal statute and the implementing regulations together, as opposed to the implementing regulations alone, to find an enforceable federal right. *Id.* at 785. In *Buckley*, the Ninth Circuit found that the Act unambiguously conferred a federal right and decided that the Act was designed to benefit the plaintiffs, the Act was mandatory to the states, and that it was not too amorphous for the judiciary to enforce. *See Buckley v. City of Redding*, 66 F.3d 188, 192 (9th Cir. 1995).

⁹⁷ *Loschiavo v. City of Dearborn*, 33 F.3d 548, 552–53 (6th Cir. 1994).

⁹⁸ *See Ceaser v. Pataki*, No. 98 Civ. 8532, 2002 U.S. Dist. LEXIS 5098, at *11 (S.D.N.Y. Mar. 25, 2002) (concluding that because the regulation promulgated pursuant to § 602 went beyond what was proscribed by § 601, no federal right was created for purposes of § 1983); *Foster Children Bonnie L. v. Bush*, 180 F. Supp. 2d

Despite the majority of decisions agreeing there is no enforceable right, the fact of a split in Circuit authority means there is a glimmer of hope for environmental justice plaintiffs. It is worthwhile, therefore, to expand upon what a plaintiff must prove in order to win relief against a state actor.

First, a plaintiff must assert a claim against a “‘person’ who ‘under color of state law’ deprived plaintiff of ‘rights, privileges, or immunities secured by the Constitution and laws’ of the United States.”⁹⁹ In *South Camden I*, the court first determined whether defendant Robert Shinn was considered a “person” within the context of § 1983.¹⁰⁰ To do so, the court considered the rule set forth in *Will v. Michigan Dep’t of State Police*,¹⁰¹ which provided that when sued for monetary damages, “neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983”; therefore, such defendants are immune from suit under § 1983.¹⁰² The *South Camden I* court recognized a secondary holding in *Will*, providing that when sued for prospective injunctive relief, state officials were considered ‘persons’ under the statute.¹⁰³ Because the *South Camden I*

1321, 1344 (S.D. Fla. 2001) (relying on *Sandoval*’s determination that § 602 does not have any “rights-creating” language and determining that there is no good reason to allow a private § 602 cause of action against state actors and not against private individuals); *Lechuga v. Crosley*, No. 01–450, 2001 U.S. Dist. LEXIS 23589, at *13 (D. Or. Nov. 14, 2001) (finding “[t]he regulation adopted pursuant to Section 602 was not specifically intended to benefit individuals and, therefore, did not create a federal right enforceable by individuals.”). *But see* *Robinson v. State of Kansas*, 295 F.3d 1183, 1187 (10th Cir. 2002) (agreeing with Steven’s dissent in *Sandoval* by holding that prospective injunctive relief can be sought through 42 U.S.C. § 1983 against state officials for violations of § 602 regulations); *White v. Engler*, 188 F. Supp. 2d, 730, 744–45 (E.D. Mich. 2001) (applying the same test as the district court in *South Camden I* to determine the regulation in issue set forth an enforceable right under § 1983).

⁹⁹ *South Camden I*, 145 F. Supp. 2d at 519 (quoting 42 U.S.C. §1983 (1994)).

¹⁰⁰ *Id.* at 525.

¹⁰¹ 491 U.S. 58 (1989).

¹⁰² *South Camden I*, 145 F. Supp. 2d at 525 (citing *Will*, 491 U.S. at 71). The Eleventh Amendment has long established that States are immune from being sued in federal court by any private person or corporation. *See* U.S. CONST. amend. XI. The Supreme Court decreed, however, many years ago in *Ex Parte Young*, 209 U.S. 123 (1908), that state officials and agencies may be sued in federal court. *See* *Quern v. Jordan*, 440 U.S. 332, 344–45 (1979) (stating that Congress could abrogate the States immunity from monetary judgements, but § 1983 was not an example of this Congressional power).

¹⁰³ *See South Camden I*, 145 F. Supp. 2d at 525 (citing *Will*, 491 U.S. at 58 & *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999)). This law also is based on the Supreme Court’s ruling in *Ex Parte Young*, 209 U.S. 123 (1908), which held that state officials

plaintiffs were suing for injunctive relief, Shinn was a considered a 'person' under § 1983.¹⁰⁴

The next issue was whether the EPA implementing regulations constituted enforceable "rights secured by the Constitution and laws."¹⁰⁵ To make this determination, the court looked to see whether rights were created by either the EPA's § 602 implementing regulations specifically or federal agency regulations generally.¹⁰⁶ Again relying on Supreme Court precedent, the *South Camden I* court held that the defendants' alleged violation of EPA's Title VI implementing regulations may have violated a federal right.¹⁰⁷

After an exhaustive summary of the law, the *South Camden I* court granted the preliminary injunction to plaintiffs pursuant to a § 1983 cause of action enforcing EPA regulations.¹⁰⁸

Justice Stevens' dissent in *Sandoval* did not articulate what a plaintiff would have to prove in a § 1983 cause of action, except to say that a violation of regulations adopted pursuant to Title VI may be established by proof of a discriminatory impact.¹⁰⁹ Therefore, it is fair to assume that he meant to uphold the idea of a private cause of action pursuant to the federal agency regulations implementing § 602 and retain the lower disparate impact burden of proof.

acting in their official capacities, "when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" See *Powell*, 189 F.3d at 401 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)).

Municipalities, municipal officials, and local governmental units do not have the Eleventh Amendment immunity granted to States preventing their liability for monetary damages, declarative judgments or injunctive relief. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978).

¹⁰⁴ See *South Camden I*, 145 F. Supp. 2d at 525.

¹⁰⁵ *Id.* at 526 (finding that for plaintiffs to be able to bring suit, the Supreme Court has interpreted the language of § 1983 to mean that plaintiffs must assert the violation of a federal right and not just a federal law).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 529 (citing *Wright v. City of Roanoke*, 479 U.S. 418 (1987)). The court also applied a three part test as set forth in *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-03 (1979), which held that regulations have the "force and effect" of law if they: (1) are substantive, (2) Congress granted the issuing agency the authority to promulgate such regulations, and (3) the regulations were instituted pursuant to Congressionally imposed procedural requirements. The court concluded that the EPA's regulations fulfilled the three requirements and did therefore operate with the "force and effect of law." *Id.* at 528-29.

¹⁰⁸ *Id.* at 542.

¹⁰⁹ *Sandoval*, 532 U.S. at 301, 312 (Stevens, J., dissenting).

Section 1983 has been criticized as an avenue of relief for environmental justice plaintiffs. Critics have interpreted Supreme Court cases and other court cases as standing for the proposition that in equal protection claims, a finding of intentional discrimination is necessary to succeed.¹¹⁰ In the cases analyzed, the plaintiffs did not bring suit alleging violations of a statute or a federally protected right, and courts have viewed claims as potential equal protection violations against state actors under § 1983.¹¹¹ Similarly, when plaintiffs have sued for alleged violations of statutes deemed to have comprehensive enforcement schemes under § 1983, courts have analyzed such claims as requiring a showing of intentional discrimination as required in the context of the Equal Protection clause.¹¹²

Another issue potentially undermining the availability of § 1983 as a way to enjoin policies resulting in a discriminatory disparate impact, is whether the § 602 regulations create federally protected rights. Although beyond the scope of this paper, there is an issue as to whether a court should apply the *Cort v. Ash* test¹¹³ or the *Blessing v. Freestone* test¹¹⁴ to

¹¹⁰ See Geiger, *supra* note 3, at 210–11 (1998) (citing *Washington v. Davis*, 426 U.S. 229 (1976), which held that success under a § 1983 claim requires a showing of intentional discrimination); see also *Bean v. S.W. Waste Mgmt. Corp.*, 482 F. Supp. 673, 681 (S.D. Tex. 1979) (dismissing the complaint despite finding that the evidence presented, although showing the facility's location was both "insensitive and illogical," was not enough to show intentional discrimination and therefore dismissed the complaint).

¹¹¹ See Geiger, *supra* note 3, at 210–11.

¹¹² See *Notari v. Denver Water Dept.*, 971 F.2d 585, 588 (10th Cir. 1992) (allowing § 1983 claim to go forward alleging a violation of the Equal Protection claim); *Foster v. Wyrick*, 823 F.2d 218, 221 (8th Cir. 1987) (finding that Title VII had a comprehensive enforcement section and therefore plaintiff could not assert a Title VII disparate impact claim under § 1983, but was allowed to assert an equal protection claim); *Merwine v. Bd. of Trs.*, 754 F.2d 631, 635, 639 (5th Cir. 1985) (separating § 1983 intentional discrimination and Title VII disparate impact discrimination); *Peters v. Lieuallen*, 746 F.2d 1390, 1393 (9th Cir. 1984) (affirming district court's dismissal of plaintiffs' § 1983 claim because he failed to show that defendants acted with intentional discrimination); *Harless v. Duck*, 619 F.2d 611, 618 (6th Cir. 1980) (grouping the XIV Amendment and § 1983 together to find that the statistical evidence was enough to show an intentional violation of both as to some of defendant's practices and remanded for further examination of other practices).

¹¹³ 422 U.S. 66, 78 (1975) (creating a four-prong test to determine whether a private right of action exists under a statute expressly providing for one).

¹¹⁴ 520 U.S. 329, 338 (1997) (creating a three-prong test to determine whether plaintiffs have the right to sue under § 1983).

determine whether § 602 creates a federally protected right and allows a plaintiff to enforce that right under § 1983. This is a different inquiry than the question posed in *Sandoval*, where the Supreme Court considered whether Congress intended for a private cause of action or whether the Court had previously interpreted § 602 as conferring a private cause of action.¹¹⁵ A § 1983 claim is evaluated under different criteria, as it does not confer a federally protected right, but is instead a “vehicle to seek a federal remedy for violations” of federal rights by state actors.¹¹⁶ In this context, § 602 must be analyzed to determine whether it creates federally protected rights, which private plaintiffs may then seek to vindicate under § 1983.

2. The Takings Clause and Causes of Action Thereunder

Both federal and state governments enjoy the power of eminent domain, which allows the government to condemn private property and to allocate it for public use.¹¹⁷ Once this power is utilized, however, “just compensation” must be paid to the property owner.¹¹⁸ The state has the power to regulate property use through its police powers, even if the subsequent regulation substantially decreases the value or diminishes the owner’s use of the property.¹¹⁹ Arguably, minority communities are not full participants in the political process. As such, the Takings Clause should be interpreted to “bar Government from forcing some people alone to bear public burdens which, in all

¹¹⁵ See *supra* notes 53, 57 and accompanying text.

¹¹⁶ *Foster*, 823 F.2d at 221 (citing *Irby v. Sullivan*, 737 F.2d 1418, 1427–28 (5th Cir. 1984)).

¹¹⁷ See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”) This is applicable to the state governments through the XIV Amendment.. See also U.S. CONST. amend. XIV § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law”). Eminent domain is defined as “[t]he power to take private property for public use by the state, municipality, and private persons or corporation authorized to exercise functions of public character.” BLACK’S LAW DICTIONARY 523 (6th ed. 1991).

¹¹⁸ See U.S. CONST. amend. V; *Nolan v. CA Coastal Comm’n*, 483 U.S. 825, 831 (1987) (stating “Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them”) (emphasis added).

¹¹⁹ The State may also regulate property uses that the common law would recognize as a public nuisance without providing compensation regardless of the effect on the value of the land. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1010 (1992) (citing *Mugler v. Kansas*, 123 U.S. 623 (1887)).

fairness and justice, should be borne by the public as a whole."¹²⁰

The Takings Clause, as applied in the environmental justice context, could compensate property-owning plaintiffs for governmental action (referred to as the siting of an undesirable land use) that constructively 'takes' the plaintiff's property by destroying the owner's economic use and enjoyment of the land due to leaks, smell, contamination, etc.¹²¹ This type of governmental action could also be considered a physical taking if any contaminants traveled through the air, water, or soil and rendered the affected property uninhabitable.¹²²

The threshold issue for a claim challenging a siting decision under the Takings Clause is whether the case is ripe for review.¹²³ Ripeness is a key issue in whether a federal court has subject matter jurisdiction over the claim and is able to render a decision.¹²⁴ For a case to be ripe, there must be a final and reviewable decision regarding the application of the governmental regulation to the plaintiff's property. Secondly, the plaintiff must show that all state procedures for obtaining compensation for the taking have been utilized.¹²⁵

¹²⁰ Geiger, *supra* note 3, at 225 (quoting Professor William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 877 (1995)).

¹²¹ *Id.* at 232. Although violations of the Takings Clause occur when the government has not given a private person compensation for "taking" his property, injunctive relief is also available to plaintiffs to prevent any unnecessary injury. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (allowing temporary injunctive relief from any impediment due to the state regulation); *see also* Brody v. Vill. of Port Chester, 261 F.3d 288 (2d Cir. 2001) (reversing the district court's grant of a temporary injunction finding that condemnee did not suffer an actual or threatened injury and that the public interests outweighed the condemnee's interests).

¹²² *See* Geiger, *supra* note 3, at 232 (recognizing the state's legitimate interest, but arguing that it is "inherently unjust to ignore the tremendous burden that is placed upon residents in communities affected by polluting facilities").

¹²³ Numerous cases have failed for not being ripe for review. *See id.* at 226-27.

¹²⁴ *See, e.g.*, Digital Props., Inc. v. City of Plantation, 121 F.3d 586, 591 (11th Cir. 1997).

¹²⁵ Geiger, *supra* note 3, at 227 (citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985)). This leads to the conclusion that a plaintiff may not have standing until after the taking has occurred. *Id.* at 230. *See* Sinclair Oil Co. v. County of Santa Barbara, 96 F.3d 401, 407 (9th Cir. 1996) (finding plaintiff's taking clause claims unripe when facially challenging a claim for depriving landowner of economic use); Langley Land Co. v. Monroe County, 738 F. Supp. 1571 (M.D. Ga. 1990) (finding that the proposed condemnation of plaintiff's land was not final nor was it a taking and therefore there was no standing for plaintiffs to bring suit). Furthermore, the court said, "[a]ny injury that

Jurisprudence on this issue has been separated into two categories: regulatory takings and physical takings.¹²⁶ According to *Lucas v. South Carolina Coastal Council*,¹²⁷ a plaintiff seeking compensation for a regulatory taking must prove that the regulation rendered the property economically idle or prohibited all economically beneficial use of the land.¹²⁸ As for a physical taking, the only requirement is a “permanent, physical occupation” of the land as a result of the government action.¹²⁹ Arguably, toxins and particulate matter released from undesirable land uses constitute permanent invasions, entitling property owner plaintiffs to compensation.¹³⁰ With regard to a

may be inflicted is too uncertain and hinges upon too many contingencies to be justiciable.” *Id.* at 1575 (emphasis added).

¹²⁶ See Geiger, *supra* note 3, at 231 (stating that a regulatory taking occurs when a government imposes condition limits or prohibits the plaintiff’s beneficial use of the land, a physical taking occurs when the government physically appropriates private land for public use, and arguing that this distinction is key to the ultimate success of the claim); see also *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (stating that a taking includes instances when the government deprives a landowner of the right to exclude others); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (invalidating a statute which required landlords to allow cable television companies to install their equipment on the landlord’s property).

¹²⁷ 505 U.S. 1003 (1992).

¹²⁸ *Id.* at 1019. The court may also take into account the purposes and economic effects of the government actions. An inquiry is made into the legitimacy of the state interests in implementing the regulation leading to the taking as well as the reduction in value of claimant’s land. See *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (finding that in order for a land use regulation to be a taking, it must “not substantially advance the state’s interests” or “den[y] an owner economically viable use of his land”) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978)); see also *Florida Rock Indus. v. U. S.*, 18 F.3d 1560, 1564–65 (Fed. Cir. 1994) (stating that a regulation having the effect of completely depriving the property owner of economic use of the land is the equivalent of a physical taking and thus no balance of interests is necessary). See generally *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992). Although the government can defend the regulation by asserting that it is prohibiting a nuisance, that defense has a balancing aspect to it as well.

¹²⁹ See Geiger, *supra* note 3, at 235–36 (noting that some courts have extended the rule to include “constructive” takings when a government action interferes not with the land directly, but with the property owner’s fundamental rights); see also *Dolan*, 512 U.S. at 384.

¹³⁰ See Geiger, *supra* note 3, at 237 (analogizing the Supreme Court’s ruling in *Causby v. U.S.*, 328 U.S. 256 (1946), where the Court held that continuous invasions of the owner’s airspace constituted a taking within the Fifth Amendment, to continuous invasion of toxins and chemicals released by undesirable land uses into the air, soil, and water of adjacent property owners); see also *Ortega Cabrera v. Mun. of Bayamon*, 562 F.2d 91, 101 (1st Cir. 1977) (stating that if the garbage dump had the effect of preventing plaintiffs’ enjoyment of any use of a creek on their land, they might have a “strong” case that the government destroyed the value of that

regulatory taking, it would be very difficult to prove that having an undesirable land use nearby substantially lowered or completely destroyed any economic value of the land.

C. *Administrative: Alter the Way the EPA Handles Disparate Impact Claims*

For the last few years, the EPA has operated under the agency's "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits."¹³¹ Pursuant to these guidelines, a plaintiff must file a signed complaint with the EPA within 180 days of the alleged discriminatory acts.¹³² The EPA then engages in preliminary fact-finding to determine the validity of a discriminatory disparate impact complaint.¹³³ The plaintiff has no role in the investigation or adjudication of the complaint. If the EPA's Office of Civil Rights (OCR) finds insufficient evidence, there is no procedure for the complainant to appeal the OCR's findings.¹³⁴ If the OCR determines that there has been a violation of § 602, it first attempts to secure voluntary compliance with the offending party.¹³⁵ If that fails, the OCR then has the authority to terminate federal funding to the violator. Unlike the frustrated complainant, however, the

portion of the land); *Adelung v. Township of Jackson*, Civ. No. 79-2613, 1982 U.S. Dist. LEXIS 18173, at * 21-23 (D. N.J. Oct. 22, 1982) (unpublished opinion) (finding that plaintiffs should be given the opportunity to prove a partial taking through the loss of their water wells and other property damage as a result of leaked chemicals from defendant's landfill); *Dutton v. Crest Hill*, 547 F. Supp. 38, 39-40 (N.D. Ill. 1982) (giving plaintiffs a chance to prove that the flooding of their lands with sewage water from defendants' plant interfered with their property to a degree that it amounted to an easement); *Clark v. United States*, 8 Cl. Ct. 649, 649, 652 (1985) (finding that plaintiff could prove a taking by showing the seepage of chemicals amounted to an easement that subjected the land to a servitude which partially destroyed its value).

¹³¹ EPA: Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits (August 28, 2000) [hereinafter *Interim Guidance*] at <http://www.epa.gov/civilrights/docs/interim.pdf> (searched Oct. 12, 2001).

¹³² *Worsham*, *supra* note 3, at 648.

¹³³ *See id.* at 649 (stating that the EPA will undertake a five step analysis to determine the validity of a disparate impact claim by identifying the population affected by the permit, determining the racial/ethnic composition of the population, determining what other permitted facilities should be factored into the analysis, and then, using all of that information, comparing the racial characteristics of the adversely affected population with the non-affected population).

¹³⁴ *See Mank*, *Title VI*, *supra* note 29, at 29.

¹³⁵ *Worsham*, *supra* note 3, at 649-50.

recipient may ask for a judicial review of the OCR's decision.¹³⁶ Unfortunately, a plaintiff who proceeds under a formal § 602 administrative proceeding cannot receive damages or injunctive relief,¹³⁷ and therefore, the EPA is not able to impose those types of relief.

Although private plaintiffs do not have a role in the complaint process, the EPA investigatory process may force compliance or kill a project if put into motion before the undesired facility is built.¹³⁸ Moreover, although an EPA investigation into a Title VI violation may not result in a positive outcome for the plaintiffs, it is time consuming, which in turn raises costs.¹³⁹ If a community was passionately opposed to the siting of an undesirable land use and was willing to devote the time and effort to oppose it, then the delay and subsequent increased cost might be enough to alter the siting location. In other instances, that delay might be enough for the corporation to scrap their plans and relocate to another community.¹⁴⁰

D. Differences Between Suit Under § 602 and Other Avenues for Relief

As the Supreme Court has determined, there is no longer a private cause of action for enforcement of federal agency Title VI disparate impact regulations. Even more disturbing is the potential invalidation of regulations promulgated under Title VI.¹⁴¹ Assuming, however, the validity of the regulations, environmental justice plaintiffs may not be able to turn to those regulations in hopes of fighting discrimination.

In order to use § 602, a plaintiff must allege a disparate impact against a recipient of federal funds. Compared with the standard of intentional discrimination under the Equal Protection Clause, alleging disparate impact is relatively easy.

¹³⁶ 40 C.F.R. § 7.130 (b)(2)(i), (ii) (2001). The recipient has 30 days after the receipt of the formal finding of noncompliance to request a hearing before an EPA administrative law judge.

¹³⁷ *Chester Residents v. Seif*, 944 F. Supp. 413, 417 (E.D. Pa. 1996), *rev'd*, 132 F.3d 925 (3d Cir. 1997), *vacated as moot*, 524 U.S. 974 (1998).

¹³⁸ *See Mank, Title VI, supra* note 29, at 48.

¹³⁹ *See id.*

¹⁴⁰ *See id.* (citing the abandonment of plans of a plastics factory by Shintech in "Cancer Alley", Louisiana, due to the length of time the EPA took to reach a final decision on the Title VI complaint).

¹⁴¹ *See supra* text accompanying note 58.

Yet it is still difficult to prove disparate impact as statistics can be interpreted in various ways and no standard exists to define an adversely affected "group," "area," or "impact."¹⁴² A second major problem for plaintiffs is that defendants may still prevail, even following the establishment of a prima facie case of disparate impact by proving a justification for the policy.¹⁴³ This would relieve liability regardless of whether the alleged justification was the driving force in siting the undesirable land use in a predominantly minority area as opposed to somewhere else.

Although § 601 and the equal protection clause are still available causes of action, they will continue to stand unused due to the heavy burden of proof. As the dissent in *Sandoval* pointed out, and the district court in *South Camden* elaborated on, however, there still may be hope for a cause of action alleging only a disparate impact under § 1983. The main difference between the two causes of action is that instead of showing that the defendant is a recipient of federal funds under § 602, under § 1983 the plaintiff must show that the defendant is a person acting under state authority. As we have seen in the *South Camden* cases, state officials acting in their official capacities are considered "persons" when the plaintiff seeks injunctive relief. Presumably, agencies or officials acting under state law are (in most cases) the equivalent to state recipients of federal funds; therefore, there is no difference between the two causes of action in that regard.¹⁴⁴ It seems as though unless the Court

¹⁴² ZYGMUNT J.B. PLATER, ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 1150 n.11 (2d ed. 1998) (posing the following questions: (1) how far back in time should a court go in analyzing past siting decisions; (2) which individuals should be considered "minorities"; (3) what percentage of a neighborhood block need be affected for the entire block to be considered "affected"; and (4) what the baseline geographic unit should be).

¹⁴³ See *supra* notes 42-45. Furthermore, in all fairness, the question whether "it [is] racism for corporate managers to seek out (1) the most inexpensive land, and (2) areas where they will face the least effective political opposition and the most desperate welcome for jobs and economic activity" should be asked. PLATER, *supra* note 142, at 1150.

¹⁴⁴ Michele L. Knorr, *Environmental Injustice: Inequities Between Empirical Data and Federal, State Legislative and Judicial Responses*, 6 U. BALT. J. ENVTL. L. 71, 96 (1997) (finding that most states receive "much of their environmental budgets from the federal government through statutes such as the CAA, CWA, CERCLA, and RCRA". See generally Susan E. Leckrone, *Turning Back the Clock: The Unfunded Mandate Reform Act of 1995 and Its Effective Repeal of Environmental Legislation*, 71 IND. L. J. 1029 (1996).

invalidates the federal agency implementing regulations which prohibit disparate effects, environmental justice plaintiffs have not lost much ground. As with § 602 causes of action against state officials, plaintiffs pursuing claims under § 1983 are more likely to receive injunctive relief rather than money damages.¹⁴⁵

The cause of action utilizing the takings clause of the Fifth Amendment allows plaintiffs compensation for policies already enacted which render the property owner's land useless or interfere with the property owner's rights to the land itself, or its use and enjoyment. This is not the most suitable action for communities looking to prevent undesirable land uses from entering their community, but it might be useful to those plaintiffs who have suffered due to the effects of an adverse land use for some time.

It seems that minority groups and communities need to band together and increase their political power to amend the statute or alter the way the EPA handles complaints administratively.¹⁴⁶ There have been several grassroots movements that have been able to win victories sporadically,¹⁴⁷ but more sweeping changes require a greater unified front. Realistically, such a concerted effort is easier said than done due to conflicting goals among members of the community. Although some members of the community may not want the undesirable land use, there are others who welcome it and the revenues and jobs it offers to the community.¹⁴⁸ Furthermore, as Robert Bullard pointed out, the majority of black communities do not have the resources to fight long-term battles against unpopular facilities.¹⁴⁹

¹⁴⁵ As previously discussed, this rule does not apply to municipal officials and therefore they could be liable for money damages.

¹⁴⁶ See COLE & FOSTER, *supra* note 2, at 165 (citations omitted).

¹⁴⁷ For example, a group of women in South Central Los Angeles joined together and successfully fought off a proposed solid waste incinerator. See Cynthia Hamilton, *Concerned Citizens of South Central Los Angeles*, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR, at 207, 218 (Bullard ed., 1994).

¹⁴⁸ See Mank, *Title VI*, *supra* note 5, at 46-47 (showing that when the Shintech corporation proposed building a \$700 million plastics facility along Louisiana's "Cancer Alley", there was a large amount of support for the factory since it would have employed 2000 temporary construction workers, 165 permanent employees, and 90 permanent contract employees); see also ROBERT BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 90 (1990).

¹⁴⁹ See BULLARD, *supra* note 148, at 18. A campaign of that nature is very time consuming, requires a good deal of organization, and it requires the services of

CONCLUSION: IS THE *SANDOVAL* DECISION THE FATAL BLOW TO ENVIRONMENTAL JUSTICE?

Although the *Sandoval* decision demonstrated the Court's inclination against expanding the scope of Title VI, the decision is not the end of the fight. It closed one avenue for plaintiffs to assert their claims, but they are not left completely helpless. Even more harmful to plaintiffs than the Supreme Court's recent decision, is the possibility that the § 602 implementing regulations may be found invalid. Even if the implementing regulations are valid, another problem may be that they do not in themselves create a federal right enforceable under § 1983. If this is to be, the Supreme Court will not only have bound the hands of private plaintiffs, but those of the federal agencies who have identified the problem and begun to combat it.

Regardless of the legal theory under which environmental justice plaintiffs bring suit, communities working together to block the placing of adverse facilities in their neighborhoods can be a powerful weapon. Still, in most situations these communities need judicial and legislative assistance to effectively fight the imbalanced distribution of societal harms among different racial and economic classes.

lawyers, toxicologists, hydrologists, and environmental engineers. *Id.* This sentiment was echoed by Reverend Horance Strand when the Chester, PA situation. He said:

Environmental racism is not totally, 'I'm doing this because you are black.' It is, 'I'm doing this because there are certain conditions which exist in your community that make you open game.' They know that a well-to-do white community can put up a fight. The poor and the black don't have those resources. We have never controlled the economy.

See Matthew P. Weinstock, *Tired of Being Dumped On*, 56 OCCUPATIONAL HAZARDS 48 (1994).