

THE AVAILABILITY OF PRIVATE SUITS TO ENFORCE ENVIRONMENTAL JUSTICE: PAST, PRESENT, AND FUTURE

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I. INTRODUCTION

For over twenty years legal and social commentators and advocates have recognized that low income and minority communities bear a disproportionate burden regarding pollution, hazardous waste siting, and other environmental hazards.¹ Among other findings, studies have shown that, African-American populations are more likely than other groups to be located near waste treatment facilities and other waste sites²; poor people of all races are more likely to live close to hazardous waste sites; and race is consistently a prominent factor in the location of commercial hazardous waste facilities³. This phenomenon is known generally as environmental injustice. Environmental racism focuses on a subset of the environmental injustice claims that relate specifically to disproportionate burdens that occur along racial lines. The environmental justice movement aims to eliminate these injustices.

One of the most controversial aspects of the environmental justice movement concerns the siting and permitting of locally undesirable land uses ("LULU's"). Common examples of LULU's are waste storage, treatment, and disposal facilities and other facilities that emit air and water pollution. Poor and minority communities are usually very attractive choices for individuals and organizations that are trying to find a site for a

¹ *Bean v. Southwestern Waste Management Corp.*, 482 F.Supp. 673 (D.C.Tex. 1979) was one of the first environmental justice cases. Community action groups also began protesting waste siting decisions in the late 1970's and early 1980's.

² *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities*; U.S. General Accounting Office (1983).

LULU. These communities are attractive because the property values are low and the communities usually lack the necessary political power to oppose the site. In addition, many of these communities already contain some LULU's, a fact that makes it more likely that the site will meet the relevant criteria for the permitting or siting decision. However, by adding more LULU's to a community, the relative burden upon that community becomes even greater.

II. PRIVATE ACTIONS TO ENFORCE ENVIRONMENTAL JUSTICE

There are several possible avenues open to a community that feels that it is the victim of environmental injustice through the siting and permitting of LULU's. The community may attempt to negotiate with the entity seeking the permit and attempt to receive some sort of compensation for the additional risk it is being asked to bear; the community may file an administrative grievance with an agency that has some responsibility for the permit, usually the EPA; or the community may file a lawsuit alleging a violation of state or federal law. One thing is essential to all of the possible solutions: the community must be informed. It must know the consequences of the proposed action and it must know its rights. After knowledge, the next most important weapon for the community is a legal basis through which it can assert its rights. A community that can use threats of legal action in conjunction with community action, protests, and threats of poor public relations is much more likely to succeed than a community that relies solely on non-legal measures. Aside from negotiation, the other

³ The United Church of Christ Commission for Racial Justice. *Toxic Waste in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities Surrounding Hazardous Waste Sites* (1987).

dismal record regarding the Title VI complaints it has received.⁸ As of January 2000 the agency had received at least ninety-four such complaints. Forty-eight were pending, with nineteen of those under investigation. Forty-five complaints had been rejected for technical reasons, and four have been dismissed.⁹ The EPA has never found a violation of its Title VI regulations.¹⁰

In the EPA's only substantive decision concerning its Title VI regulations, the agency dismissed a complaint filed by an overburdened African-American community challenging the granting of a permit to build a steel recycling plant in their community.¹¹ The agency concluded that there was no adverse effect because the permit would not cause the area to violate the National Ambient Air Quality Standards ("NAAQS").¹² This decision creates a burden that is very difficult for a complainant to meet because the EPA will rarely allow a permit to be issued in an area that is a non-attainment area for the NAAQS. In addition, administrative complainants enjoy fewer legal and procedural rights, such as the right to discovery and the right to appeal, in an administrative action than in a legal action filed in court.¹³ Without the right to discovery, administrative complainants cannot obtain information from the opposing side that may help the complainants prove their case. Without the right to appeal, an adverse decision is final even if the administrative tribunal made obvious mistakes in interpreting the law.

⁸ *Id.* at 52.

⁹ *Id.* Footnote 150. These are the most recent statistics I have encountered and I have not seen any indications of a favorable ruling in the meantime.

¹⁰ *Id.* at 51-52.

¹¹ *St. Francis Prayer Center v. Michigan Department of Environmental Quality*, Title VI Administrative Complaint File No. 5R-98-R5. (1998) (The "Select Steel" case).

¹² See Hurwitz and Sullivan at 59. It should be noted that if the plaintiff could meet this standard, they would also be able to mount a successful challenge to the permit under the Clean Air Act, thus making the administrative complaint a redundancy. See *infra* page 26.

B. ENVIRONMENTAL LAWS

Due to the severe limitations of an administrative complaint, plaintiffs in environmental justice suits should probably pursue their claims under federal or state law in an Article III court. Federal law offers the best hope for finding meaningful redress for environmental justice claims on a large scale. Communities and environmental justice advocates can challenge a permit decision under the National Environmental Policy Act ("NEPA"), the Clean Air Act ("CAA"), the Clean Water Act (CWA"), the Resource Conservation and Recovery Act ("RCRA"), and the Comprehensive Environmental Recovery and Cleanup Act ("CERCLA"). These acts each have a provision allowing citizen suits, thus an individual or community group can sue to enjoin the granting of a permit. However, environmental justice is not recognized under any of these statutes. Thus, under these statutes the plaintiff must prove that the proposed plant or facility would violate some form of substantive environmental law (usually a limit on pollution created by the plant). Under NEPA the plaintiffs can sue to force the decision-making agency to follow certain procedural guidelines, mainly the completion of environmental impact statements, but they rarely prohibit the agency from making its decision.

C. CIVIL RIGHTS LAWS

Title VI of the Civil Rights Act of 1964 was intended to prevent discrimination based on race or nationality in all programs that receive the support of the federal government. Section 1983 of the Civil Rights Act of 1871 was meant to provide redress for people who have their civil rights deprived by a state authority. The EPA is involved to some extent in most permitting and siting decisions, often because it provides funding

¹³ See Hurwitz and Sullivan at 59 & Footnote 156.

to a state agency that is responsible for granting permits.¹⁴ Title VI could be used to address civil rights violations by any state agency that receives funding from the federal government. A person in the United States could use § 1983 to address civil rights violations by any state actor.

From the beginning of the environmental justice movement, civil rights laws have been viewed as possessing the most promise for enforcing environmental justice claims, particularly in the context of siting decisions. Of course, the civil rights laws are available only to enforce claims of environmental racism (a shortcoming which will be discussed later) but race is so integrally connected to environmental justice and poverty generally that this factor usually does not present an obstacle to the litigation. There are four civil rights laws that were initially seen as possibilities for enforcing claims of environmental injustice: the Equal Protection clause of the fourteenth amendment; Section 601 of Title VI of the Civil Rights Act of 1964; Section 602 of Title VI; and Section 1983 of the Civil Rights Act of 1871.¹⁵ The Supreme Court has foreclosed the first three possibilities and the last is questionable. I will discuss each in turn.

1. *Equal Protection Clause of the Fourteenth Amendment*

Theoretically, a plaintiff could claim that he or she is not receiving equal protection under the laws because the laws are subjecting him or her to more environmental hazards than other similarly situated individuals (usually of another race).

¹⁴ See *supra*, note 4.

¹⁵ The reader should bear in mind that each of the laws discussed below is relevant to a host of other civil rights issues outside of the environmental justice movement. The issues related to § 602 and enforcing § 602 through § 1983 are particularly important in many areas because of their potential to allow redress for claims involving disparate impact discrimination. The question of enforcing regulations through § 1983 is relevant in almost every area of federal law where a regulation implements a statute. Thus, many of the cases that are discussed below arose in contexts that are far removed from environmental justice.

Under the Supreme Court's jurisprudence, a plaintiff must prove intentional discrimination in order to prevail under the Equal Protection clause.¹⁶ In *Arlington Heights* the Court specifically extended the intentional discrimination requirement to the context of land use decisions.¹⁷ However, in the same case the court also indicated that circumstantial evidence, particularly a pattern of disparate impact, can be evidence of intentional discrimination and may provide a starting point for the inquiry.¹⁸ The court went on to list other factors, including irregularities in the decision making process and events leading up to the decision, that may be seen as evidence of intentional discrimination. The obvious implication of this list, however, is that disparate impact alone will not usually be sufficient proof of intentional discrimination. Although disparate impact and other evidence can establish a prima facie case of intentional discrimination, the government can always rebut this claim by showing some other basis besides intentional racial discrimination that accounts for the decision. However, in *Arlington Heights*, the court did note that as long as racial discrimination was one of the motivating factors the rule in question violates the Equal Protection clause.¹⁹

It seems that much environmental injustice is not the product of intentional discrimination. The facility operator is merely following the path of least resistance. This path usually leads an undesirable facility to a poor, underrepresented neighborhood where property values are low and resistance is minimal. However, even in the few environmental justice cases where there is a high likelihood of intentional discrimination, the courts have been so exacting in their review of the evidence and deferential to the

¹⁶ *Washington v. Davis*, 426 U.S. 229 (1976) and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977)

¹⁷ *Arlington Heights* at 264-266.

¹⁸ *Arlington Heights* at 266-267.

agency's decision that no environmental justice claims have succeeded under the Equal Protection clause.

*Bean v. Southwestern Waste Management Corp.*²⁰ illustrates the difficulties environmental justice plaintiffs face in proving intentional discrimination.²¹ There the District Court for the central district of Texas denied a preliminary injunction because the court believed that the plaintiffs were unlikely to succeed on the merits. The plaintiffs alleged discriminatory intent in violation of the Equal Protection clause concerning a decision by the Texas Department of Health to site a solid waste facility 1700 feet from a predominantly minority high school and residential neighborhood. The plaintiffs followed the evidentiary guidelines enunciated in *Arlington Heights* by alleging a statistical pattern of disparate impact concerning the siting of hazardous waste sites in the Houston area and by alleging that there was no rational, permissible alternative basis for the decision to site the facility so close to the school. The court found the plaintiffs' statistical support to be statistically insignificant. The court agreed, however, that there did not seem to be a rational, non-racial motivation for this decision and went so far as to say that the decision was "insensitive" and did not make sense, but the court was unwilling to find intentional discrimination.²² The plaintiffs had also alleged that eight years earlier, when the school in question was predominantly Anglo-American, a similar siting decision had been rejected. The court acknowledged this fact but did not explain

¹⁹ *Arlington Heights* at 265.

²⁰ 482 F.Supp. 673 (D.C.Tex. 1979)

²¹ See also, *Harrisburg Coalition Against Ruining the Env't v. Volpe*, 330 F.Supp. 918 (M.D.Pa. 1971) and *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F.Supp. 880 (M.D. Ga. 1989).

²² *Bean* at 680.

why it did not give this fact any weight in its finding. Other environmental justice plaintiffs bringing equal protection claims will surely face similar obstacles.

2. Section 601 of Title VI

The Supreme Court has held that a private right of action exists under section 601 of Title VI.²³ Until the Supreme Court's decision in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), it was often assumed that section 601 prohibited both intentional and disparate impact discrimination. This assumption lent hope to the idea that it could be used to enforce environmental justice claims. Section 601 of Title VI provides that:

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

Washington and Lee University

In *Bakke* the Supreme Court held that section 601's prohibition on discrimination reaches only as far as the Equal Protection clause's prohibition on intentional discrimination.²⁴

Thus, it is no more useful than the Equal Protection clause as a means for private parties to assert claims of environmental injustice.

3. Regulations Promulgated Pursuant to Section 602 of Title VI

²³ *Cannon v. University of Chicago*, 441 U.S. 677, 689 (1979). In *Cannon*, the Supreme Court held that there was a private right of action under Title IX. The Court noted that Title IX was modeled after Title VI and thus, by inference, it is accepted that there is a private right of action under Section 601 of Title VI. See *Alexander v. Sandoval* 532 U.S. 275, 280 (2001).

²⁴ *Bakke* at 286. See also, *Guardians Ass'n v. Civil Service Com'n of City of New York*, 463 U.S. 582 (1983) (In a plurality opinion, seven justices agreed that the reach of Title VI was coextensive with the prohibitions under the constitution).

Until April of 2001, many environmental justice advocates thought that § 602 of Title VI of the Civil Rights Act of 1964 could be used to pursue a private cause of action in cases of environmental injustice.²⁵ All nine federal Circuit Courts of Appeals that had addressed the issue agreed that there was a private right of action to enforce regulations promulgated pursuant to § 602.²⁶ On April 24, 2001 the Supreme Court issued a decision in *Alexander v. Sandoval*, 531 U.S. 1049 (2001), that invalidated private causes of action under § 602 and dealt a substantial blow to the potential ability of private citizens to enforce claims of environmental injustice. To understand the *Sandoval* decision and its implications for the future of the environmental justice movement, one must first understand §§ 601 and 602 of Title VI of the Civil Rights Act.

As mentioned previously, the Supreme Court has held that individuals may sue to enforce § 601, however the Court has also held that this statute prohibits only intentional discrimination, not discrimination that merely has a disparate impact on members of one of the identified classes.²⁷ Section 602 directs federal agencies and departments that extend financial assistance to any program or activity to promulgate regulations that effectuate § 601. At least forty federal agencies, including the EPA, have promulgated regulations pursuant to § 602 that prohibit disparate impact as well as intentional discrimination in programs that receive their assistance.²⁸

²⁵ Section 602 provides: 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 [Section 601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of objectives of the statute authorizing financial assistance in connection with which the action is taken.

²⁶ Adele Kimmel, Rebecca Epstein, and James Ferraro, *The Sandoval Decision and Its Implications for Future Civil Rights Enforcement*, 76 FL.B.J. 24 (Jan. 2002)

²⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978).

²⁸ *South Camden Citizens in Action v. New Jersey Dept. of Environmental Quality*, 145 F.Supp.2d 446 (D.N.J. 2001). ("South Camden I").

In *Sandoval*, the Court began by assuming that regulations that proscribe disparate impact are valid, even though such regulations obviously prohibit activities that are permissible under § 601.²⁹ The Court held that § 602 lacked the language that the court had used to infer a private right of action under § 601.³⁰ The Court reasoned that § 601 applied to individuals. It stated that individuals shall not be subjected to discrimination, thus individuals subject to intentional discrimination can sue to prevent the discrimination. Section 602, however, focuses on the federal departments and agencies that promulgate regulations. Section 602 also lists several methods that agencies may use to enforce the regulations, mainly through withholding funding. Due to its focus on the agencies and the fact that it omitted a private right of action in its list of enforcement options, the Court reasoned that § 602 does not show a congressional intent to create a private right of action.³¹

Congress is the only body that may create a private right of action. Courts may interpret statutes in order to find congressional intent, but the courts may not create a right of action. Agencies may promulgate regulations that enforce congressional intent, but they may not create a private right of action. The Court followed the first of these rules and rejected the plaintiff's claim that previous cases had implied a right of action under § 602. The Court used the second of these rules to refute the claim that the agency regulations themselves evinced the intent to create a private right of action.³² If the enabling statute shows the intent to create a private right of action, the regulations promulgated under it may determine whether the right is enforceable in certain instances,

²⁹ *Sandoval* at 281.

³⁰ *Sandoval* at 288-289.

³¹ *Sandoval* at 289.

³² *Sandoval* at 291.

but the regulations cannot create a private right of action if the enabling statute does not.³³ Thus, regulations promulgated under § 602 may allow a private right of action for intentional discrimination, since Congress intended this right under § 601, but regulations promulgated under § 602 may not create a private right of action for disparate impact since § 601 has been interpreted as prohibiting only intentional discrimination.³⁴

4. *Enforcing Section 602 Through 42 U.S.C. § 1983*

After *Sandoval*, the only remaining option for pursuing environmental justice claims based on a disparate impact standard under current civil rights laws is to use 42 U.S.C. § 1983 as the basis for a right of action to enforce rights created by § 602. Section 1983 provides that:

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 in law, suit in equity, or other proper proceeding in redress.

Thus, if the courts allow it, a plaintiff may sue a state official under § 1983 alleging that the official deprived the plaintiff of rights secured to the plaintiff by the regulations promulgated pursuant to § 602. For environmental justice claims the plaintiff would

³³ *Sandoval* at 291.

³⁴ A private right of action, as discussed in this section, should be distinguished from an enforceable substantive right, as discussed in the next section. In order to sue for a particular grievance the plaintiff must have a substantive right and a private right of action to enforce it. A private right of action is the right to sue on a particular issue. It addresses the plaintiff's remedy. In other words, a plaintiff may have a substantive right to be free of discrimination, but if he does not have a right of action, he cannot sue to enforce that right. The purpose of § 1983, discussed below, is to create a private right of action to enforce certain substantive rights. In order for a plaintiff to sue under § 1983 to enforce a right, that substantive right must meet certain criteria in order to be considered an "enforceable right" within the meaning of § 1983. See *infra* section II.C.4.

most likely allege a violation of rights created by 40 C.F.R. § 7.35(b)³⁵ which was promulgated pursuant to § 602 and prohibits disparate impact discrimination.

Whether plaintiffs can sue under § 1983 for violations of § 602 will most likely depend on whether the courts believe federal regulations are "laws" that can create "rights" that are enforceable under § 1983. Although the Supreme Court has held that federal statutes can create rights that are enforceable through § 1983,³⁶ the Court has never specifically held that federal regulations can create enforceable rights. In *Guardian's Association* three Justices concurred that valid federal regulations having the force of law create enforceable rights.³⁷ In *Wright v. City of Roanoke Redevelopment and Hous. Auth.*³⁸ the majority seemed to hold that both statutes and their implementing regulations having the force of law create rights that are enforceable under § 1983.³⁹ The dissent in *Wright* expressed a concern that the majority was holding that once a "statute creates some enforceable right, any regulation adopted within the purview of the statute creates rights enforceable in federal courts . . ."⁴⁰ The lower courts, for the most part, have not given the holding of *Wright* the interpretation that the dissent feared. The most common interpretation of *Wright* is that it stands for the proposition that a federal regulation creates an enforceable right when the regulation is a valid implementation of congressional intent to create a right manifested in the authorizing statute.⁴¹ The

³⁵ *Infra*, note 4.

³⁶ *Maine v. Thiboutot*, 448 U.S. 1, 6-8 (1980).

³⁷ *Guardian's Association* at 638.

³⁸ 479 U.S. 418 (1987).

³⁹ In *Wright*, the Supreme Court allowed tenants in a low-income housing project to bring suit under § 1983 alleging that the housing authority violated a statutory rent ceiling by over-billing the tenants for their utilities. The utilities were not actually included in the statute as part of the rent, but the enabling regulations in effect at the time included utilities in the definition of rent.

⁴⁰ *Wright* at 438 (O'Connor, J. dissenting).

⁴¹ *South Camden Citizens in Action v. New Jersey Dept. of Env'l Protection*, 274 F.3d 771, 783 (3d Cir. 2001). ("*South Camden*").

distinction between the interpretation feared by the dissent and the one actually given by the lower courts is most significant regarding statutes such as § 601 and the implementing regulations under § 602 where, in implementing the commands of the statute (interpreted as forbidding "intentional discrimination"), the agency regulations go beyond the clear command of the statute and forbid practices that are not actually forbidden by the statute (i.e. "disparate impact") in an effort to achieve the goals of the statute.

The circuit courts that have addressed the issue of whether regulations can create rights that are enforceable through § 1983 have reached different conclusions. The Second, Sixth, and Ninth Circuits appear to believe that federal regulations are independently enforceable laws under § 1983⁴² while the Third, Fourth, and Eleventh Circuits appear to hold that they are not independently enforceable laws.⁴³

The *South Camden* decision in particular was a significant blow to the environmental justice movement because it established that regulations standing alone did not create enforceable rights under § 1983 in a circuit in which most people considered the issue to have been decided in favor of finding enforceable rights in regulations. In addition, the *South Camden* decision was an environmental justice case construing the EPA's § 602 regulations.⁴⁴

⁴² *King v. Town of Hempstead*, 161 F.3d 112 (2d Cir. 1998); *Loschiavo v. City of Dearborn*, 33 F.3d 548 (6th Cir. 1994); *Buckley v. City of Redding*, 66 F.3d 188 (9th Cir. 1995).

⁴³ *South Camden*; *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987); *Harris v. James*, 127 F.3d 993 (11th Cir. 1997).

⁴⁴ In *South Camden* a community organization challenged the New Jersey Department of Environmental Protection's ("NJDEP") decision to issue an air pollution permit to a facility that processed a by-product of steel in order to make it usable in a process that produces Portland cement. In the process, the facility will emit pollutants into the air. The facility will be built in an area that is 63% African-American, 28.3% Hispanic, and 9% white. The area in question, though one of twenty-three neighborhoods in the city, hosts 20% of the city's contaminated sites and has twice as many facilities permitted to issue air pollution as are found in a typical New Jersey zip code. The plaintiffs alleged that NJDEP failed to consider the disparate racial impact of this decision in violation of the EPA's regulations promulgated pursuant to § 602.

The facts of the *South Camden* case had been before the District Court for New Jersey prior to *Sandoval*. The plaintiffs had alleged a violation of § 602 and brought an action directly under that statute. The District Court granted a preliminary injunction fourteen days before the *Sandoval* decision.⁴⁵ In light of the *Sandoval* decision the court ordered the parties to brief the issue of whether a § 1983 action could be brought to enforce § 602. In a supplemental opinion, the District Court held that regulations standing alone can create enforceable rights and thus reaffirmed its injunction.⁴⁶ The court based its decision on Third Circuit precedent⁴⁷ and *Wright*.

In *South Camden*, the Third Circuit Court of Appeals reversed and held that the EPA's disparate impact regulations promulgated pursuant to § 602 cannot create a right that is enforceable through § 1983.⁴⁸ The court distinguished the facts before it from the facts of *Wright*. The court noted that the regulations at issue in *Wright* merely defined the right that congress had bestowed upon the plaintiffs through the statute.⁴⁹ According to the court's reasoning, a regulation that includes utilities within a statutory right to a maximum rent is a clarification of congressional intent whereas prohibiting disparate impact discrimination under a statutory right to be free of intentional discrimination goes beyond the right that congress intended to bestow. The court's argument is founded on a belief that only congress can create a right, thus regulations cannot create a right without the explicit support of a statute.⁵⁰

⁴⁵ *South Camden I*.

⁴⁶ *South Camden Citizens in Action v. New Jersey Dept. of Environmental Quality*, 145 F.Supp.2d 505, 529 (D.N.J. 2001). ("*South Camden II*").

⁴⁷ *W.Va. Univ. Hosp. v. Casey*, 885 F.2d 11 (3d Cir. 1989); *Alexander v. Polk*, 750 F.2d 250 (3d Cir. 1984).

⁴⁸ *South Camden* at 788.

⁴⁹ *South Camden* at 783.

⁵⁰ See *South Camden*, at 783.

Prior to the *South Camden* decision, there were three cases in the Third Circuit that seemed to indicate that a federal regulation can create a right that is enforceable under § 1983. The first two had been relied upon by the District Court. The Court of Appeals distinguished these opinions by stating that neither one addressed the specific issue of whether a federal regulation that goes beyond the mandate of its enacting statute can, standing alone, create a right. The plaintiffs in *South Camden* relied upon a third case, *Powell v. Ridge*.⁵¹ In *Powell*, the Third Circuit had held that § 602 created a private right of action,⁵² a holding that was obviously overruled by *Sandoval*. The *Powell* court also seemed to hold that § 1983 could be used to enforce rights created by § 602.⁵³ The *South Camden* court, however, held that the *Powell* court either assumed § 602 created a right enforceable through § 1983 or allowed § 1983 to enforce the right of action created under § 602. The former interpretation could not create binding precedent because there was not an explicit holding on the issue, and the *Sandoval* decision overruled the basis of the latter interpretation.⁵⁴

The *South Camden* court relied on decisions in the Fourth and Eleventh Circuits that also have held that regulations standing alone cannot create enforceable rights. In *Smith v. Kirk*⁵⁵ the Fourth Circuit Court of Appeals held that a regulation cannot create a right that is not present in the enacting statute in a case where the statute announced a broad, unenforceable policy goal and the regulations under it contained more mandatory language. In *Harris v. James*⁵⁶ the Eleventh Circuit Court of Appeals held that a

⁵¹ 189 F.3d 387, cert. denied 528 U.S. 1046 (3d Cir. 1999).

⁵² *Powell* at 400.

⁵³ See *Powell* at 401-402.

⁵⁴ *South Camden* at 785 and note 9. In note 9, the court expressed skepticism towards the reasoning of this latter interpretation of *Wright* irrespective of the significance of *Sandoval*.

⁵⁵ 821 F.2d 980, 982 (4th Cir. 1987).

⁵⁶ 127 F.3d 993, 1009 (11th Cir. 1997).

regulation creates an enforceable right only when it merely defines or clarifies a right that Congress intended to create in the enacting statute. The court arrived at this conclusion after finding that the *Wright* holding was based on a finding of congressional intent to create the right in question.⁵⁷ The court also partly based its conclusion on the fact that the *Wright* majority did not reject the view of the *Wright* dissent that a regulation cannot create a right that Congress did not intend to create through the enacting statute.⁵⁸

Other circuits have either ruled that regulations can create rights that are enforceable through § 1983 or have made statements that seem to indicate that the court believes that regulations can create enforceable rights under § 1983. In *Loschiavo v. City of Dearborn*, the Sixth Circuit Court of Appeals concluded that valid federal regulations do create enforceable rights.⁵⁹ The court was rather brief in its assessment of the issue. It noted that *Maine v. Thiboutot*⁶⁰ had held that statutes can create enforceable rights and concluded that since regulations also have the force of law, they, too, must create enforceable rights. The District Court for the Eastern District of Michigan, which is within the Sixth Circuit, followed *Loschiavo* in an environmental justice case and held that Title VI, and by implication, its regulations create rights that are enforceable under § 1983.⁶¹ Although the *Lucero* court found for the defendants based on other considerations, the holding on the § 1983 issue combined with the *Loschiavo* holding

⁵⁷ *Harris* at 1008.

⁵⁸ *Harris* at 1007.

⁵⁹ *Loschiavo* at 551.

⁶⁰ 448 U.S. 1 (1980).

⁶¹ *Lucero v. Detroit Public Schools*, 160 F.Supp.2d 767, 781-784 (E.D.Mich. 2001). The plaintiffs had alleged that the defendant school board's decision to build an elementary school whose attendees would be predominantly of Hispanic and African-American backgrounds on a contaminated sited violated, *inter alia*, plaintiffs' rights to be free of disparate impact discrimination under the Department of Education's § 602 regulations. 34 C.F.R. 100.3(2)-(3). The court eventually denied the plaintiffs' motion for a preliminary injunction because the plaintiffs failed to demonstrate that the new school would pose an unreasonable risk to the students and thus the plaintiffs were unlikely to succeed on the merits. *Lucero* at 795 & 805.

indicate that the Sixth Circuit is currently the only jurisdiction where precedent suggests that an environmental justice plaintiff can bring a cause of action alleging a violation of disparate impact regulations.

In *King v. Town of Hempstead*, 161 F.3d 112 (2d Cir. 1998), the Second Circuit assumed for the purposes of the case that valid regulations can create an enforceable right.⁶² This decision, while possibly an indication of the Second Circuit's opinion on the issue, is obviously not binding precedent. In *Buckley v. City of Redding*⁶³ the Ninth Circuit also held that a regulation can create an enforceable right.⁶⁴ However, the court explicitly states only that the statute grants an enforceable right, even though the specific right that the plaintiff complains of is granted via the implementing regulation.⁶⁵ Thus, under a narrow interpretation, the court's holding may stand for nothing more than that a regulation that clarifies or defines a statutory right can be enforced under § 1983. The *South Camden* court interpreted *Buckley* similarly to *Wright* as standing only for the proposition that a regulation can define a right that is created by the enacting statute; however, this interpretation is not binding precedent in the Ninth Circuit. Thus, a plaintiff in the Ninth Circuit could plausibly argue that *Buckley* allows any valid regulation to confer an enforceable right.

III. THE FUTURE OF PRIVATE ENFORCEMENT

A. ENFORCING § 602 REGULATIONS THROUGH § 1983

⁶² *King* at 115. The court found that the regulation in question was not relevant to the facts of the case and thus struck down the plaintiff's claim on other grounds.

⁶³ 66 F.3d 188 (9th Cir. 1995).

⁶⁴ *Buckley* at 192.

⁶⁵ *See, Buckley* at 192. The plaintiffs were forbidden from using their personal watercraft at a city facility. The regulation stated that all boats of similar horsepower to one another should have equal rights. The purpose of the act was to enhance opportunities for recreational boating.

The Supreme Court will probably eventually decide the issue of whether a regulation can create a right that is enforceable through § 1983. The Circuit Courts have reached differing conclusions on the issue and it is an important issue in many areas of the law, most significantly in the Civil Rights context. It should be noted that several of the Justices who are currently on the Court have expressed an opinion on the issue. In his dissenting opinion in *Sandoval*, Justice Stevens stated that future litigants who wanted to sue to enforce § 602 regulations "in all likelihood must only reference § 1983 to obtain relief."⁶⁶ In *Wright*, Justice O'Connor issued her oft-cited dissent in which she expressed her belief that a regulation should not be allowed to create a right.⁶⁷

Aside from the factors mentioned above, there are two other factors that a court will consider in assessing whether regulations, and specifically the § 602 regulations, are laws that can create a right enforceable through § 1983. First, a regulation must have the force of law before it can create a right. In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), the Court enunciated a test to determine whether a regulation has the force of law. The test requires that (1) the laws are substantive, meaning that they affect individual rights and obligations; (2) Congress granted the issuing agency the authority to create the regulation; and (3) the regulations were promulgated in accordance with all applicable procedural regulations.⁶⁸ Secondly, the Supreme Court has often stated that § 1983 prohibits violations of federal rights, not federal laws.⁶⁹ In *Blessing* the court enunciated

⁶⁶ *Sandoval* at 300 (Stevens, J. dissenting). Justices Souter, Ginsburg, and Breyer joined this opinion. Justice Stevens expressed a similar opinion in *Guardians Ass'n* in which he was joined by Justices Brennan and Blackmun, neither of whom are currently on the Court.

⁶⁷ *Wright* at 438 (O'Connor, J. dissenting). Justices Scalia, Powell, and Rehnquist joined this opinion, however Powell is no longer on the Court.

⁶⁸ *Chrysler* at 301-303.

⁶⁹ See *Blessing* at 340; *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989). Any provision that meets the *Chrysler* test is a law. All rights (as that term is used in this paper) come from

a three-part test to determine whether a federal law creates an enforceable right. The test requires that the plaintiff prove (1) an intent that the provision in question benefit the plaintiff; (2) that the right asserted is not so vague and amorphous as to strain judicial competence; and (3) that the provision imposes a binding obligation on the State as opposed to a mere preference.⁷⁰

When a court addresses the issue of whether § 602 regulations create enforceable rights, its reasoning will probably follow that of either the *South Camden* court or that of the *Loschiavo* court. *Loschiavo*, of course, follows the reasoning of *Thiboutot* in which the court stated that "laws" as the term is used in § 1983 is not limited to any particular subset of laws.⁷¹ The § 602 regulations would obviously meet the *Chrysler* criteria and thus have the force and effect of law.⁷² Under the *Loschiavo* approach, the court would then apply the *Blessing* analysis to determine whether the regulation secures a right as § 1983 requires.

The *South Camden* approach requires an extra step that the *Loschiavo* court did not require: that Congress intended to bestow the particular right upon the plaintiff through the enacting statute, in this case § 601 and § 602. When deciding whether a law creates a right, the Supreme Court has focused its attention upon congressional intent.⁷³ The *South Camden* approach requires that the regulation must be merely clarifying or defining the right that Congress intended to create in the enacting statute. In this respect,

laws. However, all laws do not create rights. The *Blessing* test and other considerations discussed in this section (i.e. Congressional intent) are evaluated in order to determine whether a law creates a right.

⁷⁰ *Blessing* at 340. The *Blessing* court actually phrased the first requirement as "Congress must have intended" that the regulation benefit plaintiff. *Id.* at 340. However, other courts have not used the term "Congress" in this section of the analysis. See *Wright* at 430.

⁷¹ *Thiboutot* at 4.

⁷² The District Court applied *Chrysler* analysis and reached this conclusion in *South Camden II*.

⁷³ See e.g. *Blessing v. Freestone*, 520 U.S. 329, 341 (1997); *Suter v. Artist M.*, 503 U.S. 347, 357 (1992); *Wright* at 432..

the *South Camden* approach seems to be more in line with Supreme Court precedent because it recognizes the importance of congressional intent and *Loschiavo* does not explicitly consider congressional intent. Under this approach the court would probably look to its interpretation of § 601 as banning only intentional discrimination and thus find that the ban on disparate impact to be beyond Congress's intent.

There is, however, an argument that the first prong of the *Blessing* test incorporates congressional intent into the analysis.⁷⁴ Thus a court could follow the *Loschiavo* approach and still reach this issue that the Supreme Court has found to be so important. The main difference is that the court would be reaching the issue of intent as part of the analysis of whether Congress intended to benefit the plaintiff and not as a threshold issue of whether Congress intended to create the specific right in question. In enacting Title VI, Congress intended to prohibit racial discrimination against individuals.⁷⁵ The Supreme Court has interpreted Title VI as prohibiting intentional discrimination.⁷⁶ However, Congress did not specifically define discrimination in the statute. In *Bakke* Justice Brennan noted that Congress eschewed a static definition of discrimination in favor of language that was more open to administrative interpretation.⁷⁷ This leaves room for a court to hold that Congress intended to benefit the plaintiffs by freeing them from discrimination generally through Title VI. The regulations would merely be effectuating Congress's intent. Furthermore, the regulations themselves would show clear intent by the agency to benefit the plaintiffs by freeing them from disparate impacts. The regulations' mandate that people be free from disparate impact

⁷⁴ See *infra*, note 65.

⁷⁵ *South Camden II* at 530.

⁷⁶ See *supra* at 8 & note 25.

⁷⁷ *Bakke* at 337; see *South Camden II* at 530.

discrimination should provide sufficient specificity to effectuate meaningful judicial review and thus meet the second prong of the *Blessing* test. Also, the regulations are obviously binding on the states (as opposed to creating a mere preference), thus satisfying the third prong.⁷⁸

This method of analysis, though appealing to advocates of environmental justice and civil rights in general, still seems less likely to prevail than an analysis similar to that of *South Camden*. First, it does not focus on Congress's specific intent to create the right in question, a factor that seems to carry weight in *Wright*. Second, it goes beyond the explicit holding in *Wright* and *Blessing*. It seems to be exactly the sort of reasoning that the *Wright* dissent feared. Although the *Wright* dissent is obviously not binding, it does indicate that three Justices would oppose this sort of approach.⁷⁹

B. LEGISLATIVE REFORM

If the Supreme Court forecloses the possibility of enforcing § 602 regulations through § 1983, there will be no way to remedy claims of environmental injustice through current civil rights laws. Given the likelihood of this outcome and the importance of private avenues to actions in the enforcement of environmental justice, environmental justice advocates must look to other currently available legal avenues and possibly the creation of new legal avenues in their pursuit of environmental justice.

⁷⁸ See *South Camden II* at 536-542. (There the district court applied the *Blessing* analysis in order to find that the EPA's § 602 regulations created an enforceable right. The court found that the regulations met each of the three prongs of the *Blessing* analysis. The circuit court in *South Camden* overruled this decision on other grounds and thus never discussed the district court's application of *Blessing*.)

⁷⁹ One other criticism of *South Camden* is that it relies heavily upon the *Wright* dissent and thus may be more of an attempt to pander to Supreme Court Justices than an attempt to follow binding legal precedent.

Since the underlying problem in the environmental justice movement is based on socio-economic status and race, it seems that the best solution is legislative reform that directly addresses the problem. There are two possible avenues to such a solution: reform of current civil rights laws and the enactment of legislation that is directly targeted at the problem of environmental injustice. Congress could enact legislation indicating that § 601 is intended to prohibit disparate impact discrimination as well as intentional discrimination. Congress could also enact legislation that specifically states that each federal agency is permitted to interpret discrimination in enacting its regulations and each agency's determination can create an enforceable right. Either of these methods would make many civil rights claims, particularly environmental racism claims, easier to enforce under federal law. However, this approach is probably not politically feasible, particularly in light of the fact that a major reason that discrimination was not originally defined in Title VI is that Congress seems to have had trouble agreeing upon a definition. Delegating specific authority to define discrimination to the federal agencies may encounter additional problems with the non-delegation doctrine.⁸⁰

This approach, as well as all civil rights-based approaches to environmental justice, is also limited to claims of environmental racism. Thus, an impoverished white community could still be forced to bear disproportionate environmental burdens without hope of redress. One of the ironies of environmental injustice is that, even though race is often the factor that is most strongly correlated to the siting of undesirable facilities,⁸¹ the cause of the problem seems to stem from factors other than race. Thus, although race is

⁸⁰ The non-delegation doctrine states that Congress is the body responsible for making laws and thus they may not delegate that authority to another section of the government. However, the line between creating laws and interpreting congress's mandate is often fuzzy.

the factor that is cited when a party seeks redress under the civil rights laws, race may not be the root of the problem. Indeed, many opponents of the environmental justice movement say that civil rights laws are not applicable because the decision to site an undesirable facility is rooted not in race, but in low property values and absence of resistance that are prevalent in poor communities. The disparate impact along racial lines exists only because of the correlation between race and poverty.

This argument illustrates the need for comprehensive environmental justice legislation that accounts for all relevant factors. Such legislation would mandate that agencies consider race, poverty, and the environmental burden already borne by the community in question when making siting and permitting decisions. President Clinton's Executive Order Number 12,898 is an example of legislation that accounts for most of these factors.⁸² However, Clinton's Order did not create any enforceable rights and it specifically stated that it was not creating a private right of action.⁸³ Ideally, the legislative branch could enact a mandate and include the right for private parties to seek judicial review in order to enforce the legislation. However, this type of legislation is probably not feasible in the current political climate.

C. ENVIRONMENTAL LAWS

⁸¹ See, Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 Ca. L.R. 775, 789 (1998).

⁸² Executive Order 12,898, 1994 WL 43891 (Pres. 1994); Stating that "To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the National Performance review, 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 States"

⁸³ *Id.*, § 6-609. Since only Congress can create an enforceable right or a right of action, it is obviously beyond the powers of an executive order to do so.

Given the somewhat bleak outlook for using civil rights laws to achieve environmental justice and the low probability that legislative reform will solve the problem in the near future, plaintiffs and environmental justice advocates would be wise to pursue claims under current environmental laws if possible. Environmental law claims may not go to the heart of the problem because they cannot be used to oppose the fact that a poor, minority neighborhood is bearing a disproportionate burden. However, because environmental laws are under-enforced in poor communities, equal enforcement among all communities would reduce the problem of environmental injustice.

Unequal knowledge and use of environmental laws has contributed to the current problem. White people and the wealthy will often use environmental laws to persuade the owners of an undesirable facility not to locate in their neighborhood.⁸⁴ When permit seekers know that they will face challenges under environmental laws in one neighborhood but not in another, they are more likely to try to locate their facility where they can avoid legal costs. Although there is little environmental law available to challenge the substance of a permitting decision, there are legal means under environmental laws that make a neighborhood unattractive to potential LULU's.

All of the major environmental statutes include a provision for citizen suits. Thus, a citizen can act as a "private attorney general" and sue in federal or state court to force a permit-granting agency to comply with applicable regulations or force a permittee to comply with its permit.⁸⁵ Under NEPA,⁸⁶ a community can challenge an agency's determination of the environmental impact that a facility will have on the area. Usually

⁸⁴ See, Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 Ent.L. 285, 307-308 (1995).

⁸⁵ 42 U.S.C. § 7604; 33 U.S.C. § 1365; See Fischer at 302.

⁸⁶ See section II.B. for the names of abbreviated environmental statutes.

the plaintiff can challenge either the agency's method of determining the environmental impact or the agency's conclusion (as is often made) that there will be no environmental impact. Unfortunately, the agency will often go back and use different techniques to arrive at the same conclusion, thus making a NEPA challenge equal to a delay tactic. However, these delays are expensive. When a facility knows that it will face such a challenge in a wealthy neighborhood, it will seek out a neighborhood where it can avoid such a challenge. If poorer neighborhoods had the knowledge and resources to raise similar challenges, they would not be as attractive when compared to the wealthier neighborhood. The permit seeker may decide that the project is not worth the costs after factoring in inevitable challenges and decide not to pursue the project.

A similar argument can be made for other challenges under environmental laws. Although discharges of pollutants are legal with a permit, businesses may be concerned that citizens and environmental groups will claim that they are exceeding the limits imposed by their permits. Businesses must account for the possibility of such challenges. If poor communities are able to raise such challenges on a level equal to wealthier communities then, once again, the relative attractiveness of the poorer community to the permit-seeker decreases.

In some cases, a community group may be able to challenge the issuance of a permit. For example, under the CAA⁸⁷ a community group can challenge the issuance of a permit to emit air pollution and under the CWA a community can challenge the issuance of a permit to discharge effluents into the water. The CAA limits air pollution by mandating that the air in a given "zone" meet the National Ambient Air Quality Standards ("NAAQS"). If a new facility would cause an area to fail to meet the NAAQS,

then a permit will not be issued. In order to prevail on a CAA claim the community would have to show that if the agency issues the permit the area would no longer meet the NAAQS. Under the CWA, a permit seeker must show that the effluent emissions from the proposed facility will not exceed maximum amounts set forth in federal regulations.⁸⁸ A community that is downstream of the facility could challenge the issuance of the permit on the grounds that it would discharge effluents in amounts that would exceed the applicable regulations.

One problem with causes of action under environmental statutes is that a successful challenge requires knowledge of the technical subject matter as well as a mastery of the applicable environmental laws. Estimating and measuring pollutants is a technical process, the outcome of which is often dependant upon different scientific methods of interpretation. Civil rights groups lack expertise regarding environmental laws and are especially ill equipped to handle the technical details of the complaint. Environmental groups have both the legal and technical resources to represent a community in this sort of action.

However, mainstream environmental groups usually focus their efforts on areas that are more "pristine" than impoverished minority neighborhoods. There have even been suggestions that some hostility exists between environmental groups and civil rights groups.⁸⁹ However, cooperation between the two groups does seem to be increasing.⁹⁰ If environmental groups direct more of their efforts towards environmental justice, they

⁸⁷ 42 U.S.C. §§ 7401 et seq.

⁸⁸ 33 U.S.C. § 1311.

⁸⁹ Fisher, at 302-303.

⁹⁰ Fisher, at 303.

could mount successful opposition to permits in some instances and create a threat of opposition that would deter permit seekers in other instances.⁹¹

IV. CONCLUSION

Civil rights legislation was once seen as the most promising way to address claims of environmental injustice. Unfortunately, the viability of current civil rights legislation as a valuable tool in addressing claims of environmental injustice is slowly dying at the hands of the judiciary. The Supreme Court has ruled out the Equal Protection Clause as well as §§ 601 and 602 of the Civil Rights Act of 1964 as possible ways for private citizens to enforce environmental justice. The last option, using § 1983 to enforce § 602 regulations, is currently available in only one circuit. It is questionable in several others and has been explicitly denied in three circuits. It is not likely that the Supreme Court will explicitly allow this remedy.

The environmental justice movement needs to find a new means to allow private citizens and community groups to defend themselves. In the long run, legislative change is the only way to ensure an equitable distribution of the environmental and human health harms that must be borne by a modern society. However, those who are currently suffering from the adverse effects of environmental injustice cannot wait for the long run. Nor can those who will be the victims of disparate impact discrimination in the near future. In the short run, environmental justice advocates must use current environmental legislation to the fullest extent practicable to ensure that the path of least resistance does

⁹¹ As stated earlier, however, the prospect of opposition is an important factor in siting and permitting decisions but it is not the only one. Facility owners are also drawn to the low property values that are prevalent in poorer neighborhoods. This factor would be difficult to eliminate through any means short of legislation aimed specifically at eliminating environmental injustice.

not continually lead to the doorsteps of the nation's poor. This avenue will require that environmental groups direct more of their resources towards environmental justice.

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