South Camden Citizens in Action: Siting Decisions, Disparate Impact Discrimination, and Section 1983

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For the first time, plaintiffs used EPA regulations that prohibit disparate impact discrimination to block the siting of a pollutant-producing facility in an environmentally burdened, minority community. In a ruling with the potential to radically alter the way in which siting decisions are made in this country, a federal district court in New Jersey found for the South Camden plaintiffs—despite the fact that the facility would have complied with the applicable environmental standards. While the Supreme Court eliminated the cause of action under which the plaintiffs had proceeded, the district court subsequently allowed the plaintiffs to proceed under a different cause of action. In the most important civil rights case of the past year, the Third Circuit reversed, holding that agency regulations alone could not create rights enforceable under Section 1983. The South Camden litigation curbs effective enforcement of civil rights law, leaves state programs free to violate federal funding conditions, and, in some circuits, leaves prospective environmental justice plaintiffs unable to remedy a violation of their right to be free from disparate impact discrimination.

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* B.A., Oberlin College 1998. J.D. candidate, University of California at Berkeley, Boalt Hall, 2003. I would like to thank Olga Pomar, Luke Cole, and Kevin Bundy, who worked on behalf of the South Camden plaintiffs, for taking time to speak with me about the case. I am also indebted to ELG's Carrie Williamson, Matt Chapman, Nathan Brodeur, and, especially, Dave Owen, for their help with preparing this piece for publishing. A.M.D.G.
INTRODUCTION

For more than a decade, advocates of environmental justice have sought sympathetic fora in which to pursue their concerns. Largely due to doctrinal limitations, success within the courts has proven elusive. The requirement of proving intentional discrimination raises the bar for bringing suits under the Equal Protection Clause. Common law claims, such as nuisance or "toxic tort" personal injury suits, are potentially divisive and involve problems of proof unique to low income or minority communities. Procedure-oriented environmental statutes, while allowing a community time to organize in opposition to a siting decision, are themselves unable to prevent a siting. In light of this situation, many commentators focused their attention on EPA regulations promulgated pursuant to Title VI of the Civil
Rights Act of 1964. These regulations prohibit funding recipients from engaging in activities that create *discriminatory effects*—and, many hoped, had the potential to radically alter the siting of pollutant-producing facilities in this country.

For a week, these hopes were validated. In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, an already environmentally-burdened minority community used EPA Title VI regulations to block NJDEP's issuance of air permits to a pollutant-producing facility. The *South Camden* plaintiffs had, for the first time ever in federal court, won the recognition that civil rights law prohibiting adverse disparate impact requires *more* than compliance with environmental statutes.

So began the legal roller coaster. Five days after the District Court's decision in *South Camden*, the Supreme Court's 5-4 decision in *Alexander v. Sandoval* denied the existence of a private right of action under Section 602 of Title VI, thereby foreclosing the primary legal theory on which the *South Camden* plaintiffs had predicated their case. Justice Stevens' dissent, however, stated that 42 U.S.C. § 1983 would allow litigants to vindicate rights created by regulations promulgated under Section 602. The District Court then issued a supplemental opinion allowing the plaintiffs in *South Camden* to proceed under Section 1983 and denying the defendants' motion to stay the Court's original injunction. The case proceeded on appeal to the Third Circuit. In the most important civil rights case of the last year, the Third Circuit reversed the District Court's ruling,

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2. 145 F. Supp. 2d 446 (D.N.J. 2001) [hereinafter *South Camden I*].


4. Id. at 300 (Stevens, J., dissenting).

5. 145 F. Supp. 2d 505 (D.N.J. 2001) [hereinafter *South Camden II*].
holding that regulations, "alone," could not create rights enforceable through Section 1983. This Note discusses the implications of the South Camden litigation and the Supreme Court's decision in Sandoval—a series of cases that will shape the future of environmental justice advocacy.

I

LEGAL BACKGROUND

A. Title VI and its Implementing Regulations

Title VI of the Civil Rights Act of 1964 regulates state programs that receive financial assistance from the federal government. Section 601 of Title VI prohibits discrimination against individuals on the basis of race, color, or national origin. Section 602 requires agencies that distribute federal funds, such as EPA, to promulgate regulations that implement Section 601 and create a framework for processing complaints of racial discrimination.


7. 42 U.S.C. § 2000d (1994) ("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.").


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 achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

Nowhere in Title VI does Congress define the term "discrimination." As Justice Brennan observed, "[t]he legislative history shows that Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine." Regents of Univ. of California v. Bakke, 438 U.S. 265, 337 (1978). Justice Stevens described the structure of Title VI in Sandoval:

[This legislative design reflects a reasonable—indeed inspired—model for attacking the often-intractable problem of racial and ethnic discrimination. On its own terms the statute supports an action challenging policies of federal grantees that explicitly or unambiguously violate antidiscrimination norms (such as policies that on their face limit benefits or services to certain races). With regard to more subtle forms of discrimination (such as schemes that limit benefits or services on ostensibly race-neutral grounds but have the predictable and perhaps intended consequence of materially benefiting some races at the expense of others), the statute does not establish a static
Shortly after the enactment of Title VI, a presidential task force produced model Title VI regulations that precluded funding recipients from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination." Following the initial promulgation of regulations adopting an impact standard, every Cabinet department and about forty federal agencies adopted standards interpreting Title VI to bar programs with a discriminatory impact. The Supreme Court has recognized that federal agencies may promulgate, pursuant to Section 602, regulations precluding state actions that have a disparate effect with regard to race.

In 1973 EPA enacted regulations contemplating a purely discriminatory effect standard. The siting of facilities is specifically mentioned in 40 C.F.R. § 7.35(c):

A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from,
denying them the benefits of, or subjecting them to discrimination under any program to which this Part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

EPA has had a troubled relationship with its own Title VI regulations.\(^{13}\) Although it has recently moved to reduce its significant backlog of pending administrative complaints,\(^{14}\) EPA's Office of Civil Rights has issued just one decision on the merits.\(^{15}\) EPA's most recent attempts to clarify its administrative enforcement procedure, the Draft Guidances for Recipients of Funding and Investigation of Title VI Complaints ("Draft Guidances" or "Guidances"), have been the source of a great deal of controversy.\(^{16}\) It is clear, however, that the agency's administrative proceedings provide little chance for effective citizen involvement. An administrative complainant has no right to participate in the agency's investigation, aside from providing EPA with information at the agency's request.\(^{17}\) Nor does a prevailing complainant receive direct compensation or attorneys'
fees.\textsuperscript{18} Finally, although EPA is mandated to render a decision within 180 days of accepting a Title VI complaint for investigation, this time limit is not enforced or adhered to.\textsuperscript{19} Accordingly, plaintiffs seeking to enforce EPA's Title VI regulations require access to federal courts.

B. Section 1983

\textit{Sandoval} stands for the proposition that there is no implied right of action to enforce regulations promulgated pursuant to Section 602 of Title VI. There is, however, another way for a plaintiff to challenge, in federal court, the issuance of a permit under EPA's Title VI regulations: 42 U.S.C. § 1983. Section 1983 states that:

\begin{quote}
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 an action at law, suit in equity, or other proper proceeding for redress.
\end{quote}

In 1980, the Supreme Court interpreted the phrase "and laws" literally, holding "that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law."\textsuperscript{20} In its subsequent decisions, however, the Court has emphasized that Section 1983 may only be invoked to assert a violation of a federal \textit{right}, not merely a violation of a federal law.\textsuperscript{21}

The Supreme Court has considered agency regulations when determining whether such a federal right had been violated. In \textit{Wright v. Roanoke Redevelopment & Housing Authority},\textsuperscript{22} the Court considered whether tenants could bring a Section 1983 action based on an allegation that the defendant Housing Authority violated both the Brooke Amendment, a statute that imposed a rent ceiling, and the statute's implementing regulations, which required the Housing Authority to include a

\begin{footnotesize}
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  \item[18.] See 40 C.F.R. § 7.130(a) (2001).
  \item[19.] 40 C.F.R. § 7.115(c)(1); Cole, Civil Rights, supra note 17, at 321 (stating that "[EPA] has never met this statutory deadline in environmental justice cases").
  \item[20.] Maine v. Thiboutot, 448 U.S. 14 (1980).
  \item[21.] See Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989).
  \item[22.] 479 U.S. 418 (1987).
\end{itemize}
\end{footnotesize}
reasonable utility allowance in tenant’s rent.23 The Wright Court rejected the defendant’s argument that neither the statute nor the regulations created a right enforceable through Section 1983.24

The Supreme Court now uses a three-part test, partly derived from the Wright decision,25 to determine whether a provision gives rise to a federal right enforceable under Section 1983.26 This “federal rights test” was most recently articulated in Blessing v. Freestone: (1) “Congress must have intended that the provision in question benefit the plaintiff;” (2) “the plaintiff must demonstrate that the right assertedly protected by the statute is not so ‘vague and amorphous’ that its enforcement would strain judicial competence;” and (3) “the statute must unambiguously impose a binding obligation on the States” (e.g., the provision “must be couched in mandatory, rather than precatory terms”).27

II

THE INITIAL SOUTH CAMDEN DECISION

A. Waterfront South and the St. Lawrence Cement Company

In addition to a sewage treatment plant, an incinerator, scrap yards, a power generator, and a host of other industrial facilities, the 2,132 residents of Waterfront South shared their neighborhood with two Superfund sites, four sites being investigated by the EPA for possible release of hazardous substances, and fifteen additional sites known by the New Jersey Department of Environmental Protection (“NJDEP”) to be contaminated.28 Ninety-one percent of the residents of the community are persons of color.29 The median per capita income

23. Id. at 419.
24. Id. at 429-30.
27. 520 U.S. at 340-41.
28. For a full account of the environmental burden borne by the residents of South Camden, see S. Camden Citizens in Action v. N.J. Dep’t of Envtl. Prot., 145 F. Supp. 2d 446, 459-60 (D.N.J. 2001) [South Camden II].
29. Id. at 451. The demographic composition of Waterfront South does not resemble that of its surrounding communities. “Waterfront South is located in the City of Camden, which is part of Camden County, New Jersey.” Id. at 459. “According to 1990 census figures, the residents of Camden County are 75.1% non-Hispanic white, 16.2% African-American, and 7.2% Hispanic.” The residents of New Jersey are 79.4% non-Hispanic white and 20.6% non-white. Id.
is less than a third of that of the surrounding county. The neighborhood also suffers from disproportionately high rates of cancer and respiratory ailments.

The St. Lawrence Cement Company ("SLC") proposed to open a Waterfront South facility to grind and process granulated blast furnace slag. The facility would emit a range of pollutants into the community's air, including particulate matter, mercury, lead, manganese, nitrogen oxides, carbon monoxide, sulphur oxides, and volatile organic compounds. Approximately 35,000 inbound and 42,000 outbound SLC truck deliveries would have passed through the neighborhood on an annual basis.

SLC signed a lease for the site in Waterfront South in March 1999 and quickly initiated negotiations with NJDEP. NJDEP designated the company's application "administratively complete" on November 1, 1999, allowing SLC to begin construction of the facility at its own risk. NJDEP issued draft air permits for the facility on July 25, 2000. After a public hearing, but before NJDEP responded to public comments or

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30. Id. at 459 ("In 1990, the median household income of residents of Waterfront South was $15,082, and the per capita income was $4,709. Over fifty percent of the residents of Waterfront South live at or below the federal poverty level."). In comparison, "In 1990 the median household income of residents of Camden County was $40,027, and the per capita income was $15,773." Id.
31. Id. at 461. The initial findings of plaintiff's expert's study, which were not challenged, reveal that in Camden County:

(1) the age-adjusted cancer rate for black females is higher than 90% of the rest of the state; (2) the age-adjusted cancer rate for black males is higher than 70% of the rest of the state; (3) the rate of cancer is significantly higher for black males than for white males; (4) the age-adjusted rate of death of black females in Camden County from asthma is over three times the rate of death for white females from asthma in Camden County; and (5) the age-adjusted rate of death of black males in Camden County from asthma is over six times the rate of death for white males from asthma in Camden County.

Id.
Furthermore, the self-reported asthma rate for Waterfront South residents is more than twice the self-reported rate of asthma in other parts of the City of Camden. Id.

32. Id. at 453. Blast furnace slag is a by-product of the steel production process; SLC turns it into a cement additive. Id.
33. Id. at 453-54.
34. Id. at 455. The District Court noted:

The NJDEP advised SLC, by letter dated September 2, 1999, well before SLC began construction, that 'due to the fact that St. Lawrence will be operating in an economically depressed area which has a substantial minority population, the Department will evaluate the need to conduct and Environmental Justice analysis. Inexplicably, the NJDEP never undertook such an analysis.'

Id. at 501 n.14. (emphasis added).
35. Id. at 452.
issued final permits, the plaintiffs filed an administrative complaint with EPA's Office of Civil Rights. On the same date, the plaintiffs filed a complaint with NJDEP, requesting a grievance proceeding pursuant to EPA's Civil Rights Regulations. No action was taken by the Office of Civil Rights in response to the filing of the administrative complaints. The plaintiffs then brought suit in District Court alleging, among other things, that the procedure NJDEP used to grant SLC's draft permits violated EPA's implementing regulations promulgated under Section 602 of Title VI.

When evaluating the company's permit applications, NJDEP considered whether, based on emissions projections and modeling data, the facility would cause or significantly contribute to a violation of the National Ambient Air Quality Standards ("NAAQS") established by EPA pursuant to the Clean Air Act. The modeling results revealed that emissions of particulate matter of 10 microns or less (PM-10) would not exceed the PM-10 NAAQS. Based on the modeling, the company also demonstrated that the proposed facility's emissions of lead, manganese, and radioactive materials would comply with applicable state and federal requirements. Because NJDEP only has jurisdiction over permitting for stationary source pollutants, the company was not required to obtain permits from NJDEP for emissions generated by the truck traffic to and from the facility.

36. Id.
37. Id.
38. Id.
39. Id. at 471. The plaintiffs also brought a claim for intentional discrimination under Section 601 of Title VI, as well as Equal Protection and Fair Housing Act claims; however, at oral argument, the plaintiffs indicated that their application for preliminary injunctive relief was based primarily on their Section 602 claims.
40. Id. at 471.
41. Id. at 457. As the District Court explained:

with the passage of the Clean Air Act, codified at 42 U.S.C. §7401 et seq., Congress delegated the authority to establish primary and secondary NAAQS to the EPA. The Administrator of the EPA sets the NAAQS, the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety as are requisite to protect the public health.

Id. at 456-57 (citing 42 U.S.C. §7409(b)(1)).
42. Id. at 468. Due to the delay in the enactment of the PM-2.5 NAAQS caused by the American Trucking litigation, see infra note 89, SLC was not required to, and did not, model the emissions of particulate matter of 2.5 microns or less (PM-2.5). Id. at 468.
43. Id. at 469.
44. Id. ("Truck emissions...are monitored by the New Jersey Department of Motor Vehicles. Compliance is measured by annual individual tailpipe inspections and random roadside inspections.")
B. The Plaintiffs' Prima Facie Case

In its initial opinion, the District Court concluded that, at the preliminary injunction stage, the plaintiffs had made out a prima facie case of disparate impact discrimination on the basis of race—in spite of the District Court's finding that the facility would be in compliance with the applicable NAAQS.

1. Adverse Impact

The District Court concluded that NJDEP had misconstrued the meaning of EPA's interpretation of its Title VI regulations. Specifically, the court concluded that NJDEP had erroneously relied on NAAQS as "the sole and determinative measure of adversity of impact." According to the court, Select Steel, the first and only decision by EPA's Office of Civil Rights regarding a Title VI administrative action, required that funding recipients consider factors independent of compliance with environmental statutes when measuring adversity.

The court also rejected the defendants' argument that EPA's Draft Guidances indicated that NAAQS compliance contravenes a finding of adversity. Instead, the court concluded that the Draft Investigation Guidance advised the Office of Civil Rights to take a much broader and more comprehensive approach in evaluating adversity of impact. Specifically, the court found that the Office of Civil Rights should begin investigations of Title VI complaints by determining the "universe of sources" affecting the complainant community; that such an approach was

45. Id. at 490.
46. Id. at 486. The District Court described the Select Steel decision in these terms:

[the decision in Select Steel does not stand for the blanket proposition that compliance with the NAAQS is always enough to assure that the impacts of a facility are not sufficiently 'adverse' as to trigger Title VI, but only for the proposition that such a showing creates a presumption of non-adversity.

Id. at 487. (emphasis added).

Moreover, the District Court reasoned, the Office of Civil Rights's own methodology in Select Steel went well beyond the mere consideration of evidence of compliance with the NAAQS: "The EPA OCR conducted a comprehensive analysis of not only the proposed facility's emissions in Select Steel, but also of the health conditions in the complainants' community, and the emissions of other NAAQS and non-NAAQS regulated facilities in the area." Id.

47. Id. at 489. (understanding the "universe of sources" to be "not only those pollutants identified with the permitted activities, but also other sources of environmental stressors").
corroborated by the Guidance's Preamble; and that the Draft Recipient Guidance reminds funding recipients that identifying "potential and existing impacts may involve a broad spectrum of concerns." Having rejected the defendants' characterization of "adversity," the District Court went on to conclude that the methodology EPA described in the Guidances and used in Select Steel "mandates consideration of the totality of circumstances and cumulative environmental burdens"—and was inconsistent with NJDEP's contention that it was under no obligation to consider SLC's truck traffic when assessing adverse impact. The court held that the plaintiffs had demonstrated that "the permitting and operation of the SLC facility, when considered in the context of the current health conditions and existing environmental burdens in the Waterfront South community, was likely to adversely affect their health to a degree that meets the standard of 'adversity' under Title VI." The contextualizing details which the District Court found relevant were: (1) that the Waterfront South community already suffered significant disproportionate rates of cancer and asthma; (2) that NJDEP failed to consider the health consequences of the cumulative environmental burden faced by the community; (3) that the area is in "severe noncompliance" with ozone NAAQS; and (4) that SLC's proposed facility would emit a level of PM-2.5 exceeding that which EPA's own research indicates is safe.

2. Disparity and Causation

The District Court was also called upon to calculate "disparity"—and to decide at what level such disparity constitutes a violation of Title VI. The plaintiffs relied on an expert report to support their claim that pollutant-producing facilities in New Jersey are disproportionately located in communities of color. The court held that the plaintiffs' expert's

48. Id. ("EPA has remained mindful that no single analysis or definition of adverse disparate impact is possible due to the differing nature of impacts.") (citing 65 Fed. Reg. 39,650, 39,654 (June 27, 2000)).
50. Id. at 490.
51. Id.
52. Id.
53. Id. at 491-92. The report presented data regarding: (1) the number of air pollution emitting facilities in New Jersey; (2) the racial composition of New Jersey ZIP Code areas; and (3) the average number of EPA-regulated facilities per ZIP Code in New Jersey. The report concluded that Waterfront South's ZIP Code contained 230% of the state-wide average of air pollution emitting facilities and 185% of the
analysis revealed "a statistically significant association between the permitting and placement of environmentally regulated facilities in New Jersey and the percentage of minority residents in those communities." The District Court also held that the NJDEP's permitting practices were causally linked to the adverse, disparate impact about which the plaintiffs complained.

III
SANDOVAL AND THE SUPPLEMENTAL SOUTH CAMDEN OPINION

The District Court's conclusion that the plaintiffs had made a prima facie case of disparate impact under Title VI was the first of its kind. As important, however, was the court's finding that an implied private right of action existed under Title VI's implementing regulations. Five days later, in a decision which the Sandoval dissent labeled "unfounded in our precedent and

state-wide average of EPA-regulated facilities. After performing a regression analysis of the relationship between EPA-regulated facilities and the percentage of non-whites in a ZIP Code area, the plaintiffs' expert concluded that "the odds that there is no relationship between the percentage of non-white residents and the number of facilities in a ZIP Code area are less than 3 in 10 million." Id. at 492.

The court accepted the plaintiffs' expert's definition of the impacted community as the ZIP Code including the Waterfront South neighborhood, despite the fact that the court had earlier described Waterfront South as the area corresponding with a specific U.S. census tract. Id. at 458. And, while the court described "adversity" as those health problems experienced by the plaintiff community that were caused by the proposed facility, the court's "disparity" analysis was not, however, a comparison of the demographic profile of the area suffering adverse health effects—the census tract corresponding to Waterfront South—and the demographics of unaffected areas in the state of New Jersey. Instead, the court accepted plaintiffs' expert's report regarding the disproportionate placement of environmentally regulated facilities in New Jersey's minority communities as sufficient evidence of disparity.

54. Id. at 493. The District Court also concluded that plaintiffs' expert had used an "appropriate statistical measure" to calculate disparity—both the databases and the methods of statistical analysis employed by the plaintiffs' expert had been identified in the EPA Guidelines as appropriate for assessing disparity of impact in permitting decisions pursuant to Title VI. Id. at 493.

55. Id. at 494. The defendants had challenged causality, arguing that the plaintiffs' expert had failed to consider all the factors that go into siting decisions (e.g., access to transportation, cost of real estate, etc.) and that "even assuming the statistical evidence that plaintiffs have produced is accurate, those statistics are not the result of some defect in NJDEP's permitting process" but the result of decisions made by private entities on the basis of "sound business principles." Id. The court rejected these arguments for three primary reasons: (1) because the agency failed to consider its obligations under Title VI, the Court concluded that there was a defect in NJDEP's permitting process; (2) in promulgating Title VI regulations, EPA assumed that there was a causal connection between a program's permitting practices and distribution of polluting facilities; and (3) without a state permit, facilities like those proposed by SLC would not be allowed to operate. Id. at 494-95.

56. Id. at 473-474.
hostile to decades of settled expectations," the Supreme Court held that no such implied private right of action exists.

The Sandoval majority analyzed two sources of law to determine whether Congress intended to create a private right of action under Section 602: (1) Supreme Court precedent interpreting Title VI; and (2) the text and structure of Title VI itself. Writing for a familiar five-member majority, Justice Scalia concluded that: "[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under §602. We therefore hold that no such right of action exists." In a vituperative dissent that he read from the bench, Justice Stevens challenged the majority's treatment of the applicable precedent and stated that the majority's opinion was "something of a sport": "[I]n the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference §1983 to obtain relief." Following the lead of Stevens' dissent in Sandoval, the District Court issued a supplemental opinion concluding that Sandoval did not preclude the plaintiffs from seeking to vindicate rights created by the EPA's implementing regulations under Section 1983. The court cited Wright v. City of Roanoke for the proposition that valid regulations may create rights enforceable under Section 1983. The court then applied the federal rights test to EPA's disparate impact regulations and concluded that the regulations were indeed enforceable under Section 1983.

IV

THE THIRD CIRCUIT DECISION

Reversing the District Court's supplemental opinion, the Third Circuit held that:

an administrative regulation cannot create an interest enforceable under section 1983 unless the interest already is implicit in the statute authorizing the regulation, and that

58. Id. at 282-87.
59. Id. at 287-91.
60. Id. at 293.
61. Id. at 300 (Stevens, J., dissenting).
63. 479 U.S. 418 (1987); see supra notes 22-24 and accompanying text.
65. See supra note 27 and accompanying text.
inasmuch as Title VI proscribes only intentional discrimination, the plaintiffs do not have a right enforceable through a 1983 action under the EPA's disparate impact discrimination regulations.67

A. The Majority Opinion

The Third Circuit's characterization of Wright differed dramatically from that of the District Court. The Third Circuit concluded that "a majority of the Supreme Court never has stated expressly that a valid regulation can create such a right,"68 and held that "Wright does not hold that a regulation alone—i.e., where the alleged right does not appear explicitly in the statute, but only appears in the regulation—may create an enforceable federal right."69 Rather, the Third Circuit argued that the "Court's focus in Wright was on tying Congress' intent to create federal rights through the statute to the particular federal right claimed. It was of paramount importance that Congress intended to create such a right in the statute, with the regulation then defining the right that Congress already conferred through the statute."70

The Third Circuit then analyzed its own precedent, and a case from the Ninth Circuit, and found that these cases did not justify the District Court's conclusion that valid regulations may create rights enforceable under Section 1983.71 It then cited

67. S. Camden v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 774 (3d. Cir 2001)[South Camden III].
68. Id. at 781.
69. Id. at 783.
70. Id. at 788.
71. Id. at 783-785. While the majority acknowledged that, in Alexander v. Polk, 750 F.2d 250 (3d Cir. 1984), the Third Circuit "held that federal regulations...created rights enforceable under 1983," it argued that the right created by the regulation "could be traced to and was consistent with the statute." South Camden III, 274 F.3d at 783. The majority concluded that Alexander was distinguishable because it "did not involve a circumstance in which the regulations attempted to create a federal right beyond any that Congress intended to create in enacting the statute," and was decided "well before the Supreme Court refined its analysis to focus directly on Congress' intent to create enforceable rights and to confine its holdings to the limits of intent." South Camden III, 274 F.3d at 784.

The majority described as "dicta" the Third Circuit's statement in W. Va. Univ. Hosp. v. Casey, 885 F.2d 11 (3d Cir. 1989) that "valid federal regulations as well as federal statutes may create rights enforceable under Section 1983." (citing Casey, 885 F.2d at 18). The majority concluded that the issue in Casey "was only whether a federal Medicaid statute, not its implementing regulations, created a federal right enforceable through section 1983." South Camden III, 274 F.3d at 784.

The majority also distinguished Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999), cert. denied, 528 U.S. 1046 (1999). The Powell court authorized a Section 1983 action brought under regulations that were, as in South Camden, enacted pursuant to
panel decisions from the Fourth Circuit and the Eleventh Circuit which held that regulations alone could not create rights enforceable through Section 1983—and rejected a Sixth Circuit case, *Loschiavo v. City of Dearborne*, that held to the contrary. The Third Circuit then adopted a rule set forth in the Eleventh Circuit decision, *Harris v. James*: 

[S]o long as the statute itself confers a specific right upon the plaintiff, and a valid regulation merely further defines or fleshes out the content of that right, then the statute—"in conjunction with the regulation"—may create a federal right as further defined by the regulation... 

[But], if the regulation defines the content of a statutory provision that creates no federal right under the three-prong [federal rights] test, or if the regulation goes beyond explicating the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provision, we think the regulation is too far removed from Congressional intent to constitute a "federal right" enforceable under § 1983.

section 602 of Title VI of the Civil Rights Act. *South Camden III*, 274 F.3d at 784. The Third Circuit concluded, however, that the *Powell* court had assumed that a regulation could create a right and did not "analyze" the issue of whether a regulation could create such a right. Therefore, *Powell* could not control the outcome of *South Camden*. Id. at 784-85.

Finally, the majority distinguished *Buckley v. City of Redding*, 66 F.3d 188 (9th Cir. 1995), on the grounds that the issue in *Buckley* was "whether the federal statute and its implementing regulations conferred a section 1983 right and not whether such a right arose under the implementing regulations alone." *South Camden III*, 274 F.3d at 785 (emphasis added).

72. *South Camden III*, 274 F.3d at 785-86 (citing *Smith v. Kirk*, 821 F.2d 980 (4th Cir. 1987) and *Harris v. James*, 127 F.3d 993 (11th Cir. 1997)). As the *Harris* dissent pointed out, the *Smith* case was decided before the Supreme Court's refinement of its federal rights analysis in *Wilder*—and, prior to *Harris*, was not cited by any other court of appeals over a period of ten years. *Harris*, 127 F.3d at 1016.

73. *South Camden III*, 274 F.3d at 787-788 (citing *Loschiavo v. City of Dearborne*, 33 F.3d 548 (6th Cir. 1994)). The majority made three arguments in support of its rejection of *Loschiavo*. First, *Sandoval* included a statement that "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." Id. at 788 (citing *Sandoval*, 121 S.Ct. at 1522). Second, the Supreme Court's "focus in *Wright* was on tying Congress' intent to create federal rights through the statute to the particular federal right claimed." Id. at 788 (citing *Wright*, 479 U.S. at 430). Finally, "in the Court's section 1983 jurisprudence after *Wright* dealing with whether a plaintiff is advancing an enforceable right, the primary consideration has been to determine if Congress intended to create the particular federal right sought to be enforced." Id. at 788.

74. *South Camden III*, 274 F.3d at 786-87 (citing *Harris v. James*, 127 F.3d at 1009).
Thus, the Third Circuit purported to follow Wright—"in accordance with its actual holding"—as well as the "teaching of Sandoval" and the holding in Harris, and held that the EPA's disparate impact regulations cannot create a federal right enforceable through Section 1983. In reaching its result, the Third Circuit emphasized that, because the Supreme Court had found previously that "the only right conferred by 601 was to be free of intentional discrimination" and that "there was no evidence of congressional intent to create new rights under 602," Title VI did not establish a right to be free of disparate impact discrimination. It followed that "the [EPA] regulations do more than define or flesh out the content of a specific right conferred upon the plaintiffs by Title VI"—rather, the Third Circuit concluded, the regulations "implement Title VI to give the statute a scope beyond that Congress contemplated."

B. Judge McKee’s Dissent

Accusing the majority of "analytical alchemy," Judge McKee attacked the court's treatment of Third Circuit precedent, its interpretation of Wright, and its adoption of the Eleventh Circuit's Harris rule. Judge McKee was especially disturbed by the fact that the majority "readily dismiss[ed] statements from our own jurisprudence as 'dicta' while relying upon dicta from cases that support its analysis and identifying the 'dicta' as 'teachings.'"

V
ANALYSIS

While the Third Circuit held that regulations cannot create "rights" enforceable under Section 1983, other Circuits have

75. Id. at 786-89.
76. Id. at 789.
77. Id. at 790.
78. Id. at 794.
79. Id. at 792-95, 798-99. Judge McKee observed:

The fact that we 'merely rejected' defendant's arguments that § 1983 does not allow a private cause of action to enforce regulations does not negate the fact that the result of refuting those arguments was that we found plaintiffs had a cause of action under § 1983, and that was part of our holding.

Id. at 794.
80. Id. at 797-99 ("Wright is consistent with, and supports, the plaintiff's position here that the regulations themselves may give birth to a federal right so long as the regulations are valid.").
81. Id. at 798.
82. Id. at 799.
reached a contrary conclusion. Accordingly, other courts may also apply the disparate impact analysis demanded by EPA's Title VI regulations and undertaken by the District Court in South Camden. I argue that this analysis enables a court to properly evaluate the environmental burden borne by communities of color. Moreover, the disparate impact analysis is based on the common sense proposition that there exist environmental harms for which individual environmental statutes do not adequately account—and that ignoring these harms further subordinates the very people EPA's Title VI regulations are intended to protect.

A. The District Court's Initial Decision

Because the District Court's disparate impact analysis did not have its source in the Clean Air Act—or any other environmental statute—such analysis is not limited by the standards of current environmental law. Thus, the district court's decision has three major implications: (1) any action by a state program that receives funds from a federal agency with disparate impact regulations is subject to an analysis of disparate environmental impact; (2) a pollutant-producing facility's compliance with a specific environmental statute is not sufficient, in itself, to support a finding of non-adversity; and (3) the scope of this disparate impact analysis is not limited to those environmental impacts generally regulated by EPA. Each of these implications is discussed, in turn, below.

1. Application to Federally-Funded State Programs

The disparate impact analysis performed by the District Court is widely applicable: any action taken by a state program that accepts federal funds from an agency with disparate impact

83. Samuels v. District of Columbia, 770 F.2d 184, 199 (D.C. Cir. 1985); Buckley v. City of Redding, 66 F.3d 188 (9th Cir. 1995); DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 724 n.19 (10th Cir. 1998).

84. The District Court drew its disparate impact analysis from Powell v. Ridge, 189 F.3d 387, 392 (3d Cir. 1999), stating: "I shall apply the disparate impact analysis articulated by the Third Circuit in Powell... Specifically, I shall consider whether Plaintiffs have demonstrated that a facially neutral policy is causally related to an adverse disparate impact on plaintiffs based on their race, color, or national origin." S. Camden Citizens In Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446, 484 (D.N.J. 2001) [South Camden I]. To guide its inquiry into "adversity," the District Court applied the analysis recommended and practiced by the EPA. Id. at 490-91. The Court considered the Draft Guidelines "only to the extent necessary to understand the EPA's developing interpretation of a recipient's duties under Title VI." Id. at 476.
regulations would be subject to a far-reaching examination of its potential disparate environmental impact. That such a disparate impact analysis can be applied in a wide range of contexts is a positive development. Any number of federally-funded state programs whose jurisdiction doesn't nominally involve traditional environmental concerns (e.g., departments of agriculture, transportation, corrections, etc.), make decisions that can contribute to the environmental degradation that inspires environmental justice claims. Although the siting decisions made by these programs cannot often be labeled "intentional discrimination"—as the current Supreme Court defines the term—the environmental burdens resulting from these decisions too frequently fall upon minority communities. By submitting a variety of state actions to an environmental analysis that does not focus on the intent of the state actors but, instead, on actual environmental effects, the District Court properly created congruence between the plaintiffs' experience of harm and the legal tools available to remedy that harm.

2. Compliance with Environmental Statutes

The District Court concluded that SLC's projected compliance with the relevant NAAQS did not mandate a finding of non-adversity. Nor should a court's review of a permit issuance be limited by such compliance. As the experience of the Waterfront South community evinces, compliance with national, ambient, health-based standards does not entail the absence of serious local adverse health effects. "Health-based" environmental standards fail to adequately ensure a

85. In South Camden, for example, this analysis was conducted not because EPA has jurisdiction over environmental concerns, but because plaintiffs had complained of disparate environmental impact and a federal agency (that had enacted disparate impact regulations) had provided the defendant state program with funds. Nor is NJDEP unique in this respect, as many state programs accept funds from such federal agencies. For a list of programs under which EPA itself provides grants to state authorities, see 40 C.F.R. Part 7 App. A (1994).

86. Plaintiffs suing under Section 601 of Title VI must prove that a defendant intentionally discriminated. See Guardians Assn. v. Civil Serv. Comm'n of New York City, 463 U.S. 582, 610-611 (Powell, J., joined by Burger, C. J., and Rehnquist, J., concurring in judgment); id. at 612 (O'Connor, J., concurring in judgment); id. at 642 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting). Courts have failed to find evidence of intentional discrimination because siting boards and developers can almost always offer at least some race-neutral justification for a site. See Mank, supra note 1 at 11.

87. For analysis of the empirical studies regarding the correlation between race and the distribution of pollution, see Robert R. Kuehn, A Taxonomy of Environmental Justice, 30 ENVT L. REP. 10681 (2000).
community's health partly because such standards invariably ignore some environmental impacts. 88 The delay in the enactment of PM-2.5 NAAQS caused by the American Trucking litigation exemplifies the failings of such standards, 89 as no one would suggest that the impact of PM-2.5 came into existence only after the PM-2.5 NAAQS had survived litigation. Similarly, health-based environmental standards are designed to protect healthy adults and fail to address "the cumulative effects of multiple facilities and existing health vulnerabilities." 90

The disparate impact analysis conducted by the District Court, however, enabled it to partially close these loopholes. Thus, while the American Trucking delay prevented NJDEP from

88. Many critics suggest that these failings derive partly from the political process. That process invariably involves compromise with regulated industries. Both the prevailing, expertise-oriented model of environmental enforcement and the racial make-up of the national environmental groups with the resources to participate in this process make it difficult to assume that the interests of minorities are being adequately represented. The difficulties inherent in such a process are illustrated, in the context of the Clean Air Act, by the inadequate number of existing NAAQS and—as in the case of lead—the continued need for new and more restrictive standards as it becomes obvious that the existing standards fail to protect human health. See Cole, supra note 15.

89. Businesses and business associations repeatedly challenged, on various grounds, final rules issued pursuant to the CAA by EPA that revised NAAQS for ozone and particulate matter. The litigation prevented the enactment of PM-2.5 NAAQS. In American Trucking Association, Inc. v. EPA, the District of Columbia Circuit Court of Appeals held that EPA's adoption of PM-2.5 NAAQS was not arbitrary or capricious. 283 F.3d 355 (D.C. Cir. 2002).

90. NAAQS may keep emissions at a level adequate to protect a healthy community—but do little to protect communities already suffering from disproportionate morbidity rates. See Guana, supra note 13, at *64 n. 111 (citing NATIONAL ADVISORY COUNCIL FOR ENVIRONMENTAL POLICY & TECHNOLOGY, REPORT OF THE TITLE VI IMPLEMENTATION ADVISORY COMMITTEE: NEXT STEPS FOR EPA, STATE, AND LOCAL ENVIRONMENTAL JUSTICE PROGRAMS (1999)).

Compliance with national, health-based environmental standards often fails to ensure the environmental health of a community for at least two additional reasons. First, significant adverse health effects may occur at levels of exposure below the limits set by NAAQS. See W. Lawrence Beeson et al., Long-Term Concentrations of Ambient Air Pollutants and Incident Lung Cancer in California Adults, 106 ENVT. HEALTH PERSP. 813-23 (1998); Ta-Liang Lin et. al., Chelation Therapy for Patients With Elevated Body Lead Burden and Progressive Renal Insufficiency, 130 ANNALS OF INTERNAL MED. 7-13 (1999).

Second, because NAAQS extend over a large region, "toxic hot spots" commonly develop. Local impacts can be missed when averaged across an entire air basin—particularly for some VOCs such as toxic air contaminants, which have their greatest effect where they are most concentrated, and for lead, which tends to "fall out" close to its source of emission. Id. This is especially relevant in the context of environmental justice, for monitor placement is often inadequate in minority communities. See Guana, supra note 13, at *71 n.183 (citing NEJAC Air and Water Subcommittee's Urban Air Toxics Working Group, Comments to the Office of Air and Radiation on the EPA's Draft Urban Air Toxics Strategy 9-13 (1999)).
considering the PM-2.5 NAAQS in the permit approval process, the disparate impact analysis enabled the District Court to consider the company's projected non-compliance with PM-2.5 NAAQS in its finding of adversity. In addition, the District Court could inquire into the pre-existing health vulnerabilities of the community, and its findings regarding disproportionate rates of asthma and cancer in the Waterfront South community also contributed to its conclusion regarding adversity. Finally, the disparate impact analysis enabled the court to conclude that NJDEP's distinction between stationary and mobile sources was irrelevant. Accordingly, the fact that Waterfront South was in "severe noncompliance" with NAAQS for ozone primarily as a result of emissions from mobile sources contributed to the court's conclusion regarding adversity. Moreover, by highlighting the fact that its analysis was demanded by EPA's own interpretation of its Title VI responsibilities, as evidenced by the decision of the Office of Civil Rights in Select Steel and EPA's Draft Guidances, the District Court rebutted potential arguments that its analysis improperly extended judicial authority.

3. Application to Impacts Beyond Those Regulated by EPA

The disparate impact analysis performed by the District Court is applicable to a range of adverse environmental impacts not generally regulated by EPA. The plaintiffs in South Camden requested a preliminary injunction based on adverse effects to the community's "quality of life." The court denied this request only because the record was insufficient to support such a claim. In principle, the future application of such a disparate impact analysis could include the assessment of "environmental" impacts such as cumulative physiological and psychological effects of pollution caused by proximity to a facility. Thus, disparate impact analysis has the potential to transform the legal meaning of "environment." The South Camden litigation is, obviously, a struggle over a specific siting decision, a cause of action, and the continued validity of one form of legal analysis. These contests, however, are only part of a larger struggle over

91. South Camden I, 145 F. Supp. 2d at 490.
92. Id.
93. Id.
95. South Camden I, 145 F. Supp. 2d at 485.
the meanings that we, as a culture, assign to concepts like “environment” and “land” and, ultimately, over how we understand human health.

A Title VI disparate impact analysis such as the one set forth by the District Court enables a court to challenge the meanings that national, ambient standards assign to concepts like “environment.” Accordingly, the District Court was free to describe the contested environment as the place where South Camden plaintiffs suffered adverse health effects—not, as would be assumed by such national, ambient standards, as the empty space into which a permitted facility releases an approved amount of pollutant. Similarly, the court analyzed the noise, dirt, and ozone produced by truck trips to and from the facility as environmental “impact”—and did not relegate these concerns to the domain of the market or other legal regimes. And the court could describe the contested land not as the site for a facility with newly-permitted emissions (i.e., “an available, appropriately priced and sized parcel located adjacent to a major road and rail transportation”) but, in context—as part of a minority, low-income community that already hosted, among other things, innumerable industrial facilities, a sewage treatment plant,

97. Because a disparate impact analysis enables a court to describe a land use as the cause of adverse health effects, this analysis also provides conceptual space in which to challenge Professor Vicki Been's highly influential account of "locally undesirable land uses" and the role of post-siting market dynamics in the distribution of environmental burdens. See Been, Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?, 103 YALE L.J. 1383, (1994). In Been's account, those who can afford to move from a neighborhood containing a locally undesirable land will purchase more desirable property. But, in light of a Title VI disparate impact analysis, such individuals can be said to purchase the right to be free from adverse health effects caused by the pollutant-producing facility. Because this right is reflected in the exchange value of the real estate, environmental quality is continually reproduced in the commodity form—i.e., a disparate impact analysis reveals that questions of human health are articulated in terms of market rates of exchange.

A utilitarian calculus is necessary to sanction this commodification of environmental quality—e.g., "disparity-causing decisions, unlike intentional discriminatory decisions, are sometimes 'good' on the whole and should not be deterred absolutely." See Thomas A. Lambert, The Case Against Private Disparate Impact Suits, 34 GA. L. REV. 1155 (2000). In light of the serious, adverse health effects experienced by communities like Waterfront South, such calculus seems, at best, ethically suspect. Moreover, this commodification of environmental quality would further subordinate racial minorities lacking market power. In any event, this utilitarian justification is precluded by EPA's Title VI regulations. These regulations prohibit discriminatory effects, notwithstanding any hypothetical benefit to the population as a "whole."

Superfund sites, and an incinerator.\textsuperscript{99} Thus, a disparate impact analysis enables a court to construct an alternative to the abstracted and market-friendly conception of "environment" espoused by national, ambient standards—and to bring the legal understanding of these terms in line with the daily experiences of people living alongside facilities that, for example, grind and process granulated blast furnace slag. In short, a disparate impact analysis enables a court to be more realistic.

B. The Third Circuit Decision

In a two-to-one decision whose implications were, by the majority’s admission, "enormous,"\textsuperscript{100} the Third Circuit held that EPA’s disparate impact regulations did not create rights enforceable under Section 1983. The majority reached this conclusion, however, by misconstruing the applicable Supreme Court precedent, \textit{Wright v. City of Roanoke}, and improperly utilizing dicta from \textit{Sandoval} to reach the novel conclusion that Section 602 of Title VI contains no right to be free of disparate impact discrimination.

1. Supreme Court Precedent

The Third Circuit’s decision depended upon a misreading of Supreme Court precedent regarding the relationship between regulations and federal rights. Rather than applying the test developed by the Supreme Court to identify those provisions that

\textsuperscript{99} Opponents of the use of disparate Impact analysis in the environmental justice context argue that this contextualizing process “essentially turns every permit application process into a federally-mandated zoning inquiry... [which] revisits siting decision that may have taken place decades ago.” Elizabeth Georges, \textit{If I had a Hammer: Why Permitting Challenges Do Not Fit in the Fight for Environmental Justice}, 10 FORDHAM ENVTL. L.J. 347, 356 (1999).

A disparate impact analysis does not “revisit” siting decisions. Instead, such analysis simply recognizes the fact that the cumulative impact of years of siting decisions (possibly made with a discriminatory intent) can affect a community’s health and, therefore, should be integrated into the court’s assessment of adversity. A dramatic illustration of the value of a disparate impact analysis occurred in the 98% African-American community of Alsen, Louisiana. In their Title VI complaint, the Alsen residents alleged that one reason there are so many facilities sited in their community is that their residential area was zoned for heavy industry by white politicians—at a time when residents were denied the opportunity to vote because of their race. See Kuehn, supra note 87, at n.235 and accompanying text. Thus, a disparate impact analysis prevents the siting entity from, in effect, purchasing the right to ignore the very real consequences of this country’s legacy of racial discrimination.

\textsuperscript{100} S. Camden Citizens in Action v. N.J. Dep’t of Envtl. Prot., 274 F.3d 771, 790 (3d Cir. 2001) [\textit{South Camden III}].
create rights enforceable under Section 1983, the "federal rights test," the Third Circuit re-interpreted the applicable precedent Wright. The Third Circuit concluded that the Wright Court "focused" on identifying congressional intent to create a federal right enforceable under Section 1983.101 Unfortunately, however, the Third Circuit's description of the Wright Court's focus is simply a mischaracterization of the Wright Court's application of the federal rights test.102

101. See supra notes 68-70 and accompanying text.
102. The Third Circuit viewed the rest of Supreme Court federal rights precedent as it did Wright, concluding that the Court’s federal rights jurisprudence “focus[es] directly on congress’ intent to create enforceable rights.” South Camden III, 274 F.3d at 784. A review of the contested precedent, however, reveals that the Third Circuit, as in its interpretation of Wright, has misconstrued the Supreme Court’s application of the three-part federal rights test. In the cases which the Third Circuit cites, the Court consistently inquires whether, pursuant to the federal rights test, the provision in question was intended to benefit the putative plaintiff—and does not, as the Third Circuit asserts, attempt to identify congressional intent to create a federal right enforceable under 1983.

In the most recent case cited by the majority, Blessing v. Freestone, 520 U.S. 329 (1997), a unanimous Court concluded that, when faced with the question of whether a particular statutory provision gives rise to a federal right, a court must perform the federal rights test. Id. at 340-41. The case turned on the plaintiff’s failure to articulate, with sufficient specificity, the rights it claimed were violated by the defendant: “[I]n prior cases, we have been able to determine whether or not a statute created a given right because the plaintiffs articulated, and lower courts evaluated, well-defined claims.” Id. at 342. Blessing, however, affirmed that the method of evaluating such a claim is the three-part federal rights test.

In Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990), the court stated the issue as follows: “[w]e must therefore determine whether the [statute] creates a ‘federal right’ that is enforceable under § 1983. Such an inquiry turns on whether “the provision in question was intended[ed] to benefit the putative plaintiff.” Id. at 509 (emphasis added). The Court concluded that “[w]here can be little doubt that health care providers are the intended beneficiaries of the [statute].” Id. at 510.

Similarly, in Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989), the Court also applied the federal rights test, asking “whether the provision in question was ‘intended[ed] to benefit’ the putative plaintiff.” Id. at 106. The Court allowed the plaintiff to proceed under Section 1983, concluding “[w]e agree with petitioner that it is the intended beneficiary of a statutory scheme that prevents governmental interference with the collective-bargaining process,” and holding “the NLRA gives it rights enforceable against governmental interference in an action under § 1983.” Id. at 109 (emphasis added).

Finally, the Third Circuit cites Suter v. Artist M., 503 U.S. 347 (1992). The Suter majority stated the issue as: “[d]id Congress, in enacting the Adoption Act, unambiguously confer upon the child beneficiaries of the act a right to enforce the requirement that the State make ‘reasonable efforts’ to prevent a child from being removed from his home, and once removed to reunify the child with his family?” Id. at 357. Although it did not apply the federal rights test, the Court arguably placed emphasis on the child beneficiaries of the act—i.e., the Court still inquired whether the provision in question was intended to benefit the putative plaintiff. Even if this were not the case, the Suter dissent correctly described the majority decision as an anomaly that demonstrated “disregard for established law.” Id. at 365 (Stevens, J., dissenting). "The Court does not explain why the settled three-part test for
The Wright Court began its analysis with the first element of the federal rights test—asking whether Congress intended that the provision in question benefit the plaintiff. Thus, in the language cited by the Third Circuit itself, the Court stated:

Although the Court of Appeals read the Brooke Amendment as extending to housing project tenants certain rights enforceable only by HUD, respondent asserts that neither the Brooke Amendment nor the interim regulations gave the tenants any specific or definable rights to utilities, that is, no enforceable rights within the meaning of § 1983. We perceive little substance in this claim. The Brooke Amendment could not be clearer: as further amended in 1981, tenants could be charged as rent no more and no less than 30 percent of their income. This was a mandatory limitation focusing on the individual family and its income. The intent to benefit tenants is undeniable.

By describing the statute as "focusing on the individual family," the Wright Court was not, as the Third Circuit argued, seeking to establish the existence of congressional intent to create a right enforceable under Section 1983. Instead, the Wright Court was simply performing the first element of the federal rights test, and identified the plaintiffs as the intended beneficiaries of the provision. The Wright Court's conclusion in this regard is clear: "the intent to benefit plaintiffs is undeniable."

determining the enforceability of an asserted right is not applied in this case." id. at 372. Regardless, Suter was decided five years before Blessing and does not, as the Third Circuit argued, reflect the "primary concerns" of the Court's 1983 jurisprudence. See Mank, supra note 17, at 333-34. ("subsequent Supreme Court and lower court decisions have explicitly endorsed the three-part [federal rights] test rather than the Suter approach.").

103. See supra note 27 and accompanying text.

104. 479 U.S. at 429-30.

105. South Camden II, 274 F.3d at 782-83. ("[t]he Wright Court looked first to the statutory provision creating the ceiling on tenants' rent, describing it as 'a mandatory limitation focusing on the individual family and its income. Further, it stated that Congress' intent with regard to the statute to benefit tenants was 'undeniable.'").

106. Not only does the Third Circuit fail to mention that the Wright Court applied the federal rights test, the passages which the Third Circuit quotes from Wright to support its argument regarding the Wright Court's "focus" are the same as those that the Supreme Court has cited as the source of the federal rights test. See Blessing v. Freestone, 520 U.S. at 340.

The first instance of this failure is the argument described supra at note 105 and accompanying text. There the Third Circuit—in an attempt to re-describe the Wright Court's focus—cites to a passage from Wright without mentioning that the Supreme Court had previously cited to that same passage as the source of the first element of the federal rights test. See Blessing v. Freestone, 520 U.S. at 340.

The second instance of this failure is the Third Circuit's argument regarding the following passage from Wright:

Respondent nevertheless asserts that the provision for a "reasonable" allowance for utilities is too vague and amorphous to confer on tenants an
2. The Third Circuit’s New Test

The result of the Third Circuit’s unwarranted inquiry into the Wright Court’s “focus” is a new, restrictive test for those Section 1983 plaintiffs that wish to vindicate federal rights created by regulations. The test announced by the Third Circuit attempts to distinguish between those regulations which may confer a federal right upon plaintiffs and those that do not. Immediately labeled a “new and undesirable framework for enforceable rights analysis” this test is clearly unworkable, relying on a distinction between “furthering” and “fleshing out” congressional enforceable “right” within the meaning of § 1983 and that the whole matter of utility allowances must be left to the discretion of the PHA, subject to supervision by HUD. The regulations, however, defining the statutory concept of “rent” as including utilities, have the force of law...they specifically set out guidelines that the PHAs were to follow in establishing utility allowances, and they require notice to tenants and an opportunity to comment on proposed allowances. In our view, the benefits Congress intended to confer on tenants are sufficiently specific and definite to qualify as enforceable rights under Pennhurst and § 1983, rights that are not, as respondent suggests, beyond the competence of the judiciary to enforce. Wright, 479 U.S. at 431. The Supreme Court has cited to the above passage from Wright as the source of the second element of the federal rights test ("the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence"). Blessing v. Freestone, 520 U.S. at 340.

Again, the Third Circuit fails to mention this important fact. And it is also clear that, in the above passage, the Wright Court was merely conducting the federal rights test—concluding that the benefits conferred on tenants were “specific and definite” and not “beyond the competence of the judiciary to enforce”—and was not “focused” on identifying congressional intent to create a right enforceable under Section 1983.

107. See supra, note 74 and accompanying text. The Third Circuit justifies the creation of this test by arguing that it was of “paramount” importance to the Wright Court that the regulation “defined” the right Congress had already conferred through the statute. South Camden III, 274 F.3d at 783. In support, the Third Circuit notes that the Wright Court, in a footnote, stated that it was rejecting “respondent’s argument that the [statute’s] rent ceiling applies only to the charge for shelter and that the HUD definition of rent as including a reasonable charge for utilities is not authorized by the statute”; in addition, the Third Circuit notes that Wright Court observed that the HUD regulation “defined the statutory concept of ‘rent.’” Id.

The Wright Court’s description of the regulations as “defining” particular statutory concepts was not, as the Third Circuit argues, of “paramount importance” to its disposition of the case. To the contrary, the Wright Court so describes the HUD regulation merely as means of distinguishing the contested regulation from other HUD regulations—nowhere in its opinion does the Court suggest that the range of regulations that may create rights is limited to those regulations that perform such a definitional function. Even accepting the Third Circuit’s interpretation of Wright and the validity of its test, disparate impact regulations would seem an appropriate “definition” of EPA’s Title VI anti-discrimination mandate. South Camden III, 274 F.3d at 798.

108. Harris, 127 F.3d at 1014.
will that is not readily apparent. Moreover, application of the Third Circuit's test will invariably lead to a finding of judicial unenforceability of agency regulations. Unambiguous evidence of Congressional intent to benefit individuals, as required under the Supreme Court's federal rights test, is often apparent in the text of the statute; evidence of Congressional intent to create a federal right enforceable under Section 1983, as required under the Third Circuit's approach, will almost always be nonexistent in a statute.

3. **Title VI**

Applying this new test, the Third Circuit concluded that that Section 602 of Title VI did not contain a right—to be free from disparate impact discrimination, and, therefore, that there was nothing for the EPA's regulations to "flesh out." In fact, the Supreme Court has never held that Section 602 of Title VI does not contain such a right. To reach this novel conclusion regarding Section 602, the Third Circuit engaged in a reading of *Sandoval* that the dissent aptly termed "analytical alchemy."

The Third Circuit reasoned that, because Section 601 of Title VI precludes only intentional discrimination—and because "the [Sandoval] Court found that there was no evidence of congressional intent to create new rights under Section 602"—Section 602, therefore, does not contain a right to be free of disparate impact discrimination. In a footnote, however, the Third Circuit acknowledged that its support for the second proposition—that *Sandoval* found no evidence of congressional intent to create new rights under Section 602—was dicta. The Third Circuit also admitted that this dicta was itself part of the *Sandoval* Court's application of the test formalized in *Cort v. Ash*—an inquiry into the existence of congressional intent to create a private right of action—and that the *Cort* analysis is

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110. Recent Case, supra note 109, at 2447.

111. *South Camden III*, 274 F.3d at 789-90.

112. See supra at note 11.

113. *South Camden III*, 274 F.3d at 788-90.

114. *Id.* at 789 n.12.

115. It is important to distinguish between the federal rights test articulated in *Blessing*, which is used to determine the existence of a right enforceable under Section 1983, and the *Cort* test, applied to determine whether Congress intended that
entirely different from its own inquiry into the existence of a federal right enforceable through Section 1983.\textsuperscript{116}

Though the Supreme Court's Title VI jurisprudence is fairly opaque, the Third Circuit's use of dicta to resolve a matter of such importance is inappropriate. Its conclusion regarding Section 602 of Title VI is contrary to many of the Supreme Court's previous evaluations of the legislative history of Title VI and its implementing regulations.\textsuperscript{117} Moreover, the Third Circuit's justification of its use of inapposite Sandoval dicta is internally inconsistent. The Third Circuit, again in a footnote, argued that it was entitled to use dicta from Sandoval's application of the Cort test, for doing so "respects the difference between the Cort implied-right-of-action analysis and the Blessing 'rights' analysis because it relies upon the factor common to both."\textsuperscript{118} The Third Circuit cannot, however, justify its use of Sandoval dicta by relying on a factor common to the Cort and Blessing tests—for the Third Circuit does not perform the Blessing test. The Third Circuit makes none of the three inquiries demanded by Blessing.\textsuperscript{119} Rather, the Third Circuit reads Wright to require plaintiffs seeking to vindicate rights created by regulations to

\begin{itemize}
  \item a statute create an implied private right of action. The Supreme Court has emphasized that these two tests are independent inquiries with different functions. Wilder, 496 U.S. at 509 n.9. The Cort test has four elements:

  \begin{quote}
  
  [In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?]
  \end{quote}

\end{itemize}

\textsuperscript{116} South Camden III, 274 F.3d at n.12.

\textsuperscript{117} See supra, note 8.

\textsuperscript{118} South Camden III, 274 F.3d at 789 n.12. In contrast, the District Court correctly rejected the defendants' argument that language from Sandoval could control the outcome of the court's inquiry into the existence of a federal right under the EPA disparate impact regulations. South Camden II, 145 F. Supp. 2d at 517. The District Court concluded that, because the Sandoval Court performed the Cort analysis—an inquiry into the existence of a private right of action, or remedy—using language from Sandoval to decide the South Camden case would represent a "conflation of rights with remedies." Id.

\textsuperscript{119} Thus, the Third Circuit rejected the Sixth Circuit's holding, in Loschiavo, that regulations could create rights: "[i]nasmuch as the Loschiavo court's approach first did not examine whether Congress intended to create the particular right at issue, we reject its holding that a federal right may be found in any federal regulation that, in its own right, meets the Blessing test." South Camden III, 274 F.3d at 788.
make a showing that Congress intended to create a right
enforceable through Section 1983—prior to any consideration of
the Blessing test.\footnote{120}

Thus, the Third Circuit is unable to justify its disposition of
the case with inapposite dicta from Sandoval without, at the
same time, asserting that it has applied the very Blessing
analysis that its opinion rejects. The Third Circuit’s opinion is
consistently disappointing from a jurisprudential perspective.
The majority wages a war in footnotes, relegating analysis of
crucial issues to footnotes in which it cites to footnotes from
other decisions, and grants dispositive weight to its analysis of
the Supreme Court’s “focus” and “primary considerations”—even
as it invokes Justice Scalia’s admonition in Sandoval that courts
are “bound by holdings, not language.”

4. \textit{South Camden and Environmental Justice Litigation}

Perhaps the most important ramification of the Third
Circuit’s decision in \textit{South Camden} is its potential to undermine
the manner in which federal agencies ensure that states comply
with federal funding conditions:

Federal agencies must often rely on private enforcement
mechanisms to implement their congressional mandates.
Individuals and public interest litigation groups frequently
promote agency regulatory goals by initiating private suits
against noncompliant state or local governments....

\footnote{120. Even if we assume, with the Third Circuit, that it has remained faithful to
binding Supreme Court precedent and applied the Blessing test, its justification of its
use of Sandoval dicta still fails. Although never stated explicitly, the structure of the
Third Circuit’s argument is as follows: (1) the Sandoval Court performed the first
element of the Cort test; (2) the Third Circuit is itself performing the first element of
the Blessing test; (3) and, because these two factors are identical, the Third Circuit
can use language from the Sandoval application of Cort in its Blessing analysis. The
Third Circuit’s argument fails because, as discussed above, the second proposition is
obviously false. The first, though less obviously so, is also false.

The Third Circuit argues, again in a footnote, that the Sandoval majority
performed the first element of the Cort test (“is the plaintiff one of the class for whose
especial benefit the statute was enacted?”). \textit{South Camden III}, 274 F.3d at 789 n.11.
Contrary to the Third Circuit’s assertion, however, the Sandoval majority performed
the second element of the Cort test (“is there any indication of legislative intent,
explicit or implicit, either to create such a remedy or to deny one?”). The Sandoval
Court’s analysis makes this clear: “[n]or does it follow straightaway from the three
points we have taken as given that Congress must have intended a private right of
action to enforce disparate-impact regulations; “[w]e therefore begin (and find we can
end) our search for Congress’s intent with the text and structure of Title VI itself”;
“[n]or do the methods that § 602 goes on to provide for enforcing its authorized
manifest an intent to create a private remedy.” 532 U.S. 275 at 276, 288, and 289
(emphasis added).}
agencies rely on private actions to identify and remedy the most egregious violations of federal funding conditions.\textsuperscript{121}

As discussed above, EPA simply does not enforce its own Title VI regulations. Even if the EPA were to find a state program in violation of these regulations it is unlikely to impose the sole available punishment, the discontinuation of funding to state and local programs.\textsuperscript{122} Accordingly, the elimination of private enforcement of regulations allows states to violate the prescriptions of valid regulations with impunity.

For opponents of environmental racism the \textit{South Camden} litigation effectively renders one of the signature laws to emerge from the Civil Rights Movement an historic anomaly—disparate impact regulations currently sit in the rulebooks of federal agencies, legally unenforceable by private parties.\textsuperscript{123} Justice Marshall’s observation that “a right without an effective remedy has little meaning”\textsuperscript{124} seems borne out by the fact that the St. Lawrence Cement Company continues, in violation of EPA’s Title VI regulations and to the detriment of the health of the residents of the surrounding community, to process granulated blast furnace slag at its Waterfront South facility.

In the context of the environmental justice movement as a movement, however, it is tempting to conclude that the loss of a cause of action will ultimately be of little consequence: it is consistently argued that a lawsuit, regardless of the legal theory under which plaintiffs proceed, is unable to “change the political and economic power relations in the community that led to the environmental threat in the first place.”\textsuperscript{125} This description of the relationship between law and social change—while important as a corrective to the over-emphasis on litigation in environmental advocacy—itself overstates the divisions between the political, economic, and legal aspects of environmental injustice.\textsuperscript{126}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{121} Recent Case, supra note 109, at 2447.
\item \textsuperscript{122} See Mank, supra note 1, at 23.
\item \textsuperscript{123} Such regulations, however, may not sit in those rulebooks for long. Given the extremely negative dicta in \textit{Sandoval}, five members of the Court are comfortable with the invalidation of disparate impact regulations altogether. \textit{See Sandoval}, 532 U.S. at 286 n.6.
\item \textsuperscript{124} Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582, 626 (1983) (Marshall, J., dissenting).
\item \textsuperscript{125} Luke W. Cole, Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law, 19 ECOLOGY L.Q. 619, 649 (1992).
\item \textsuperscript{126} Markets are not independent of legal rules and political institutions—i.e., they are not “the realm of private transactions, where goods, services, and information are exchanged in accordance with the ability to pay.” Instead, markets are social constructs “shaped at various levels by state and private control.” Sheila Foster, \textit{Justice from the Ground Up: Distributional Inequities, Grassroots Resistance},
\end{enumerate}
\end{footnotesize}
It may be more useful, in the context of the environmental justice movement, to understand a lawsuit as one of the processes by which material harms can be translated into a series of meanings—meanings that may, eventually, trigger some form of state action. A disparate impact analysis, as performed by the District Court in South Camden, enables a decision-maker to describe a community's experience of environmental injustice in a way that, rather than privileging market values, corresponds to the lived reality of those communities. Thus, to the extent that the South Camden litigation represents the elimination of disparate impact as a viable legal tool, it should be considered a real loss.


Nor does law seem simply an instrument of class domination. While the strategic value of a lawsuit very much depends upon the specific circumstances in which a plaintiff community finds itself, it is important, I think, to recognize that the relationship between legal and political/economic power seems of sufficient complexity that a lawsuit remains a viable alternative for a community faced with an inequitable share of environmental burdens and significant barriers to effective grassroots organizing.

127. Even if a lawsuit "fails" and such state action does not result, the lawsuit may ultimately be of great import in the larger movement for environmental justice. Cultural—or "discursive"—forms like law can be highly efficacious in social relations. Law itself is one of the primary sites for fixing cultural meanings—and one of the ideological/political practices in which dominant meanings are contested. This contest is of special importance if one is hesitant to draw a distinction between material and discursive struggle:

transformative human actions do not result automatically from material contradictions; they are mediated by subjective meanings and conscious intentions. Material changes, such as resource deprivation or environmental crisis, may create higher propensities for transformative action and limit the range of its possible outcomes, but ideological practices are relatively autonomous and are literally the decisive moments in the transformation of material conditions into political practices.


Thus, discursive forms can contribute to the formation of social relations: "[v]alues and beliefs mobilize action, shape social identities, and condition the understandings of collective interests." Donald Moore, Marxism, Culture, and Political Economy: Environmental Struggles in Zimbabwe's Eastern Highlands, in LIBERATION ECOLOGIES, supra, at 127. Accordingly, South Camden is as much a question of semiotics as it is of air, and the struggle over a siting decision—over the material concerns regarding the location of a facility and what level of pollutant it will emit—is, at the same time, a struggle on symbolic terrain: should the truck trips to and from a building be considered part of the "facility"? What counts as "pollution"? Why is "compliance" relevant?
CONCLUSION

In its initial opinion, the District Court concluded that the defendant state environmental program's facially neutral permitting practice caused the plaintiff community to suffer a disproportionate, adverse impact on the basis of race. The Supreme Court, however, then eliminated the legal mechanism underlying the plaintiffs' victory at the District Court level, namely the private right of action under Title VI disparate impact regulations. While the District Court issued a supplemental opinion allowing plaintiffs to proceed under Section 1983, the Third Circuit ultimately rejected the District Court's rationale. Other circuits should disregard the Third Circuit's holding and perform future disparate impact analyses in the manner set forth by the District Court in *South Camden*. Such an analysis prevents communities from suffering adverse health impacts for which existing environmental statutes do not adequately account.