

THE BALLENGER-GREEN DIVERSITY PAPER

The Ballenger-Green Memorial Diversity Paper was established in 2001 by the *Vermont Law Review* to commemorate the lives of the late Chandra Ballenger '02 and Orlando Green '01, students at Vermont Law School. The Ballenger-Green Paper gives students an opportunity to explore and address issues of human diversity in the law through legal scholarship. The *Law Review* then selects the paper that best reflects the same commitment to excellence that Orlando and Chandra demonstrated in their burgeoning legal careers. The *Vermont Law Review* is pleased to present the 2002 Ballenger-Green Paper.

ACHIEVING ENVIRONMENTAL JUSTICE THROUGH TITLE VI: IS IT A DEAD END?*

It's all about race. This is environmental racism in its purest form. We have a toxic overload and race played a major part in creating this environmental nightmare.

Phyllis Holmes¹

INTRODUCTION

During the summer of 1999, citizens of South Camden, New Jersey learned that the St. Lawrence Cement Company (SLC) was planning to build a new cement-grinding facility in their neighborhood. Many expected the new facility to provide economic stimulus and jobs to their community—a community in which over half of the citizens live at or below the federal poverty level. Yet, at least some of the Waterfront South citizens were not persuaded by promises of these “economic” benefits.² The citizens, represented by an unincorporated community organization named South Camden Citizens in Action (SCCIA), believed that the new facility looked more like the final milliliter of a lethal shot destined to bring them to a slow and painful death. SCCIA deemed the project a *prima facie* case of environmental racism. Refusing to accept the final shot with grace,

* In addition to Olga D. Pomar, the author would like to thank Professors Cheryl Hanna and Janet Milne for their guidance and comments. This paper also reflects the valuable insight of Spencer G. Hanes, Jr. on the function and role of Ombudsmen.

1. Interview by Dr. Robert D. Bullard with Phyllis Holmes, Citizen of Camden, New Jersey (June 19, 2001), available at <http://www.ejrc.cau.edu/camdeninterview.html> (last visited Apr. 20, 2002).

2. In fact, Professor Foster of Rutgers Law School at Camden notes that the SLC cement plant will probably only generate fifteen jobs, at most, and generate little tax revenue because the facility is built on land leased from the South Jersey Port Corporation. George Washington Center on Sustainability & Regional Growth, Forum, *Can Community Health & Environmental Justice Survive Sandoval?* (July 11, 2001), at <http://www.law.gwu.edu/csrg/fora.htm> [hereinafter *Community Health*].

SCCIA, with the help of its attorney,³ filed a claim in federal court under Title VI of the Civil Rights Act of 1964⁴ to stop the plant from operating. Several months later it succeeded in temporarily halting the plant. The victory was a first for environmental justice cases brought under Title VI that have gone to trial.⁵ It was an anomaly in the environmental justice movement that is not likely to recur.

This Paper considers the effectiveness, or lack thereof, of Title VI as a tool for communities trying to oppose the siting of polluting facilities that burden them with a disproportionate amount of environmental contaminants. Analysis is conducted through the lens of the experiences of SCCIA with particular attention to the persuasive facts of its story. This Paper begins in Part I by framing the issue. Part II provides a general discussion of the purpose of Title VI. Part III then summarizes the most recent Title VI environmental justice jurisprudence in three precedent-setting decisions—*South Camden I*, *South Camden II*, and *South Camden III*—arising from SCCIA's Title VI claim against the New Jersey Department of Environmental Protection (NJDEP).⁶ Part IV outlines potential solutions for more effective resolution of environmental justice claims in light of the *South Camden III* decision. This decision ultimately foreclosed private citizens from independently enforcing the Environmental Protection Agency's (EPA) Title VI regulations in the Third Circuit. The Paper concludes that Title VI is an inadequate remedy for environmental injustice. It is ineffective because success requires facts that are often difficult to quantify, resources and time that most adversely affected communities lack, and proof of intentional discrimination. Thus, Title VI is a dead end.

3. Olga D. Pomar of Camden Regional Legal Services, to whom I offer great appreciation for assisting me with my research and questions, represents SCCIA. Jerome Butler and Michael Churchill of the Public Interest Law Center of Philadelphia and Luke W. Cole from the Center on Race, Poverty & the Environment, San Francisco, CA, join Ms. Pomar in her representation.

4. 42 U.S.C. § 2000d to 2000d-7 (2000).

5. After the decision, legal experts commented that the ruling was "the first time an environmental agency that issues permits had been found in violation of [Title VI]." *Federal Judge Halts Opening of Slag Plant*, N.Y. TIMES, Apr. 21, 2001, at B4.

6. *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 145 F. Supp. 2d 446 (D.N.J. 2001) [hereinafter *South Camden I*], amended by 145 F. Supp. 2d 505 (D.N.J. 2001) [hereinafter *South Camden II*], rev'd and remanded by 274 F.3d 771 (3d Cir. 2001), cert. denied, 122 S.Ct. 2621 (Mem.) (2002) [hereinafter *South Camden III*]. The Third Circuit Court of Appeals lifted the injunction on June 15, 2001. *South Camden III*, 274 F.3d at 776; see discussion *infra* Part III.B.

I. FRAMING THE ISSUE

While there has been a great deal of discourse over the exact definition and meaning of the terms environmental racism⁷ and environmental justice,⁸ both generally refer to intentional or unintentional actions or decisions that disproportionately burden a community with hazardous pollutants.⁹ Typically, the affected communities are economically disadvantaged minority communities.¹⁰ Environmental racism most commonly finds its roots in unintentional actions, which are often the pervasive result of institutionalized racism that arises in part from the latent effects of laws and socialized sentiments that once legally segregated the United States.¹¹ Overall, studies tend to support this characterization, showing that “[e]nvironmental hazards are inequitably distributed in the United States, with poor people and people of color bearing a greater share of pollution than richer people and white people.”¹²

7. The coining of the term “environmental racism” is credited to Rev. Dr. Benjamin Chavis, former Executive Director of the National Association for the Advancement of Colored People (NAACP). Richard J. Lazarus, *Environmental Racism! That's What It Is*, 2000 U. ILL. L. REV. 255, 257 (discussing the influential impact of Chavis' use of the term “environmental racism” on environmental law and environmental justice).

8. Professor Robert Kuehn, Director of the Tulane Environmental Law Clinic, dedicated an entire law review article to distinguishing between the different meanings of environmental justice. See Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10681 (2000) (examining the term environmental justice within the contexts of distributive justice, procedural justice, corrective justice, and social justice).

9. See UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES ix (1987) (Dr. Benjamin F. Chavis, Jr., defining environmental racism). Comparatively, the Environmental Protection Agency defines environmental justice as the “fair treatment for people of all races, cultures, and incomes, regarding the development of environmental laws, regulations, and policies.” EPA, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ABOUT ENVIRONMENTAL JUSTICE, at <http://www.epa.gov/swerosps/ej/aboutej.htm> (last visited Feb. 29, 2000). Unfortunately, the EPA's definition more closely resembles a policy goal than an actual definition.

10. This Paper does not consider the impact that environmental laws and regulations have on Native Americans. Assumedly, they too, suffer from environmental injustice.

11. Tessa Meyer Santiago, *An Ounce of Preemption Is Worth a Pound of Cure: State Preemption of Local Siting Authority As Means for Achieving Environmental Equity*, 3 VT. J. ENV'T. 1, ¶ 5 (Oct. 15, 2001), at <http://www.vje.org> (last visited Apr. 25, 2002); see generally, Robert D. Bullard, *Environmental Justice For All: It's the Right Thing to Do*, 9 J. ENVTL. L. & LITIG. 281, 282–83 (1994) (discussing institutional racism). Professor Foster notes the “accumulation of [environmental] hazards in . . . [minority] communities is attributable to a complex interaction of historical, social, political and legal elements.” *Community Health*, *supra* note 2, at 7.

12. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 10 (2001); see Bullard, *supra* note 11, at 281 (citing studies indicating that minorities contend with a disproportionate impact of the siting of polluting facilities in the U.S.). Other studies have shown that environmental laws are not equally

Waterfront South is a prime example of one community subjected to environmental racism. Despite the fact that Waterfront South was already inundated with industrial polluters,¹³ SLC determined that this was the right community for its facility. SLC's new plant in the Waterfront South neighborhood is designed to import and grind 850,000 tons of granulated blast furnace slag and 16,500 tons of gypsum to create a product used to strengthen cement.¹⁴ A by-product of the grinding process is the emission of particulate matter, mercury, lead, manganese, nitrogen oxides, carbon monoxide, sulfur oxides, and volatile organic compounds.¹⁵ The plant is also expected to emit sixty tons of fine inhalable particulate annually.¹⁶ A separate and equally harmful impact on community health will result from the 77,000 annual truck trips that run through the Waterfront South community.¹⁷

After a futile attempt to derail the proposed cement plant through organizing and administrative processes, Waterfront South turned to the courts in search of more positive results. Unfortunately, its victory was only temporary.

II. TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Section 601 of Title VI provides that "[n]o 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."¹⁸ Section 602 of the Act authorizes and directs federal agencies to effectuate the provisions of section 601 by issuing rules, regulations, or orders, which will not become effective unless and until the President of the United States approves them.¹⁹ Accordingly, at least forty federal agencies "effectuated" regulations under section 602 that a President approved.²⁰ These agencies

enforced. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 12, 1992, at S1.

13. See discussion *infra* Part III.A.

14. *South Camden I*, 145 F. Supp. 2d at 453, ¶¶ 5-7.

15. *Id.* at 454, ¶ 9.

16. Shannon P. Duffy, *3rd Cir. Environmental Racism Ruling Could Have Broad-Ranging Impact*, THE LEGAL INTELLIGENCER, Sept. 26, 2001, at P1.

17. Brief for Amici Curiae of Natural Resource Defense Counsel at 7, 17-18, *South Camden II*, 145 F. Supp. 2d 505 (citing numerous scientific studies that show a firmly-established human health threat from diesel pollution not limited to increased potential for respiratory problems and lung cancer); *South Camden I*, 145 F. Supp. 2d at 450.

18. 42 U.S.C. § 2000d (2000).

19. *Id.* § 2000d-1.

20. *Powell v. Ridge*, 189 F.3d 387, 392-93 (3d Cir. 1999). The *Powell* court held that an implied right of private action exists under Title VI to enforce Department of Education Title VI

adhere to a disparate impact standard, which prohibits recipients of federal funding from using "criteria or methods . . . which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex."²¹ SCCIA filed a claim under Title VI in the U.S. District Court of New Jersey seeking a preliminary injunction against permits that NJDEP issued for the SLC cement facility. Specifically, SCCIA argued that NJDEP failed to meet its obligation "to ensure that [its] permitting criteria and methods do not create or contribute to an existing adverse, disparate impact on persons based on their race, color, or national origin."²²

III. THE SOUTH CAMDEN CASES

A. South Camden I

On April 19, 2001, the U.S. District Court of New Jersey issued a preliminary injunction vacating the air permits that the NJDEP issued pursuant to its authority under the Clean Air Act (CAA).²³ The court found that the NJDEP failed to consider regulations that the EPA promulgated

regulations and that the plaintiffs could maintain a claim under § 1983. *Id.* at 398–99. *See also* Appellees' Petition for En Banc Rehearing at 11, *South Camden III*, 274 F.3d 771. "In the regulations promulgated pursuant to § 602, federal agencies defined the term 'discrimination' as including disparate impact. Their definition, drafted by the Justice Department in 1964 . . . [was] subsequently approved by every President from Johnson through Reagan . . ." *Id.*

21. *See, e.g.*, 40 C.F.R. § 7.35(b) (2001) (EPA's regulations). Other federal agencies have similar regulations. *See, e.g.*, 28 C.F.R. § 42.104(b)(2) (2001) (Department of Justice disparate impact regulation); 49 C.F.R. § 21.5(b)(2) (2001) (Department of Transportation disparate impact regulation). In a memorandum to the heads of federal departments and agencies, Janet Reno stressed the importance of recognizing both intentional and effect-based discrimination. Reno stated:

The anniversary of this landmark legislation is a fitting time to remind agencies that administrative regulations implementing Title VI apply not only to intentional discrimination but also to policies and practices that have a discriminatory effect . . . Enforcement of the disparate impact provisions is an essential component of an effective civil rights compliance program.

Memorandum from Janet Reno, Attorney General of the United States, to Heads of Departments and Agencies That Provide Federal Assistance (July 14, 1994), available at <http://www.epa.gov/oct/docs/tab15.pdf> (last visited Apr. 20, 2002)

22. *South Camden I*, 145 F. Supp. 2d at 474, ¶ 138.

23. 42 U.S.C. §§ 7401–7671q (2000). The CAA authorizes the EPA to establish National Ambient Air Quality Standards (NAAQS) for air pollutants that may "endanger public health or welfare." *Id.* § 7408(a)(1)(A). Congress required states obtain EPA approval by submitting state implementation plans (SIPs) to implement, maintain, and enforce the NAAQS. *Id.* § 7410(a)(1). Accordingly, after the EPA approves a SIP, the state must determine whether the operation of a facility will "cause or significantly contribute to a violation of the NAAQS." *South Camden I*, 145 F. Supp. 2d at 457, ¶ 37.

under Title VI during the permitting process for SLC's facility.²⁴ As noted above, these regulations are intended to prohibit recipients of federal funding from discriminating on the basis of race, color, national origin, or sex.²⁵ According to the court's reasoning, in order to comply with the EPA's regulations, a recipient of federal funding must "consider racially discriminatory disparate impacts when determining whether to issue a permit, in addition to compliance with applicable environmental standards."²⁶ The court based its conclusion, in part, on the EPA's and the NJDEP's recognitions of such a standard and obligation.²⁷

The illuminating story of this case lies not in the legal rules and factors applied, but rather in the thought-provoking statistics and landscape that express the saddening realities of the Waterfront South community. Sections I and J of the *South Camden I* opinion state the almost wholly undisputed facts of the case—facts that paint a vivid picture of a community immersed in pollution and degradation. It is worthwhile to restate some of those facts here. The Waterfront South community has approximately 2132 residents of whom the 1990 Census Bureau statistics show 91% are persons of color, 41% are children, and over 50% live at or below the federal poverty level.²⁸ The median income is \$15,082.²⁹ In comparison, 23.4% of the county population consists of persons of color and the median income is \$40,027.³⁰ Interestingly, the county per capita income of \$15,773 exceeded the Waterfront South community's median income.³¹

24. *Id.* at 451–52.

25. 40 C.F.R. § 7.35(b) (2001). The EPA's disparate impact regulations were a contentious issue in this case. SCCIA argued that the regulations are valid and that the defendants accordingly had a duty to abide by them. *See* SCCIA Reply Brief at 2, 20–23, *South Camden II*, 145 F. Supp. 2d at 509. NJDEP supporters argued that the EPA's regulations are invalid because Title VI only prohibits intentional discrimination and the EPA's regulations operate as an extension of Title VI because they also focus on unintentional discrimination. The district court found in favor of the plaintiffs. *South Camden II*, 145 F. Supp. 2d at 509. Because the defendants failed to challenge the validity of the regulations, the court did not consider this question. *See id.*

26. *South Camden I*, 145 F. Supp. 2d at 474, ¶ 137.

27. *See id.* at 476–77, ¶ 151. (citing *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits*, 65 Fed. Reg. 39,650, 39,668 (June 27, 2000)). The court also identified three administrative orders that the NJDEP's Commissioner Shinn issued "acknowledging NJDEP's obligation under Title VI." *South Camden I*, 145 F. Supp. 2d at 480, ¶¶ 157–59.

28. *Id.* at 458–59, ¶¶ 47–51.

29. *Id.*

30. *Id.*

31. *Id.* These numbers come close to paralleling the national averages, except that minorities of Waterfront South have a household median income significantly lower than the national average. The national median household income for whites was \$44,366 in 1999, compared with \$27,910 for blacks. Richard Morin, *Misperceptions Cloud Whites' View of Blacks*, WASH. POST, July 11, 2001, at A1.

The landscape of the Waterfront South neighborhood is equally provocative. The place the Waterfront South residents call home is also home to a municipal sewage treatment plant that treats the waste for thirty-five municipalities in the county, the county waste recovery facility, and a power plant that converts and burns waste energy to produce heat or electricity.³² The community also contains several industrial facilities, including an oil refinery, two Superfund sites,³³ four sites being investigated for release or threatened release of hazardous substances, and fifteen known contaminated sites.³⁴ Additionally, the City of Camden undertook a study of Waterfront South in which the city found that the properties in the community are in an “[unsanitary, dilapidated or obsolete] condition” and as a result are “harmful to themselves, but also constitute a clear and present danger to the surrounding community.”³⁵ The cumulative effects of this commercially and industrially slain landscape are arguably linked to Camden County’s and the Waterfront South community’s unusual health statistics.

During SLC’s planning phase, an SLC consultant asked Dr. Berlin, the only physician on the NJDEP’s forty-member Environmental Equity Council, “to evaluate the overall SLC facility design and emission protections, with specific attention to particulate emissions.”³⁶ Dr. Berlin’s evaluation is based on a statewide study he is currently conducting. In his deposition, Dr. Berlin “identifies Camden County as a ‘Community of Concern.’”³⁷ The court’s opinion reflects Dr. Berlin’s initial results, which show:

- (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 . . . from asthma is over three times the rate of death for white females from asthma . . . and

32. *South Camden I*, 145 F. Supp. 2d at 458, ¶ 54.

33. Superfund sites are those sites that have been listed as the country’s most hazardous waste sites in accordance with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601–9675 (2000), and regulations promulgated thereunder at 40 C.F.R. 300–99 (2001).

34. *South Camden I*, 145 F. Supp. 2d at 458–59, ¶¶ 54–59.

35. *Id.* at 460, ¶ 60 (brackets in original).

36. *Id.* at 461, ¶ 63.

37. *Id.*

(5) the age-adjusted rate of death of black males . . . from asthma is over six times the rate of death for white males from asthma.³⁸

Additionally, it is “undisputed that as many as 61% of [South Camden’s] residents have problems coughing and catching their breath, compared to 36–39% of the residents in North Camden.”³⁹ Despite these demonstrative statistics, on October 31, 2001, the NJDEP issued the final permits for the SLC cement-grinding facility.⁴⁰ The NJDEP did so despite the fact that the area is inhabited by a predominantly poor minority population already disproportionately afflicted by poor health due to existing pollution.⁴¹

B. South Camden II

Five days after the District Court granted the preliminary injunction, the U.S. Supreme Court issued its opinion in *Alexander v. Sandoval* and effectively overruled the district court’s decision in *South Camden I*.⁴² At issue in *Sandoval* was whether private individuals had a right of action to enforce disparate impact regulations promulgated under section 602 of Title VI.⁴³ In a 5–4 decision, the Court reversed the Court of Appeals of the Eleventh Circuit and held that Title VI does not “create a freestanding private right of action to enforce regulations promulgated under § 602.”⁴⁴ The decision effectively overruled *South Camden I* because the plaintiffs

38. *Id.*

39. *South Camden I*, 145 F. Supp. 2d at 461, ¶ 64.

40. *Id.* at 452.

41. *Id.* at 451–52.

42. *Alexander v. Sandoval*, 523 U.S. 275, 277 (2001). In *Sandoval*, plaintiff, as representative of a class of Alabama citizens, brought an action against the Alabama Department of Public Safety under Title VI for allegedly violating Department of Justice (DOJ) disparate impact regulations when the state decided to issue driver’s license tests only in English. *Id.*

43. *Id.*

44. *Id.* at 293. *Sandoval* does not preclude the EPA from bringing an action under section 602 to enforce its regulations, although it is not likely that the EPA will. In fact, the EPA has apparently never brought an action, administrative or other, against a recipient of its funding to enforce Title VI regulations. Furthermore, under the Bush administration, it is even more questionable as to whether the EPA has the desire to bring an action. In a recent and telling decision, the EPA essentially eliminated its independent office dedicated to reviewing citizen complaints at contaminated waste sites. Edward Walsh, *EPA to Transfer Ombudsman; Whitman Proposes IG Oversee Superfund’s Sites Watchdog*, WASH. POST, Nov. 29, 2001, at A31. See also *infra* note 93 (discussing the events leading to the resignation of the EPA Ombudsman). The EPA’s move appears to be consistent with the administration’s withdrawal from Kyoto protocol negotiations and its support of new regulations limiting CO₂ emissions from coal burning power plants. For a recent article on the emissions topic, see, e.g., Shannon McCaffrey, *Bush Urged Not To Ease Emissions Rules*, ASSOCIATED PRESS, Jan. 8, 2002, available at 2002 WL 3701886. See also Katherine Q. Seelye, *Bush Team Is Reversing Environmental Policies*, N.Y. TIMES, Nov. 18, 2001, at A20.

brought their action directly under Title VI, which previously allowed a private right of action. In his dissent, Justice Stevens exposed the fact that regardless of the majority's opinion, a private right of action to enforce Title VI regulations was still available through 42 U.S.C. § 1983 (2001).⁴⁵ Shortly thereafter, Justice Stevens' comment proved useful for the *South Camden* plaintiffs.

Several hours after the Supreme Court handed down its decision in *Sandoval*, "the [district court] convened a . . . conference call with all counsel" to discuss *Sandoval's* impact on *South Camden I*.⁴⁶ After concluding that *Sandoval* overruled *South Camden I*, plaintiffs requested leave to amend their complaint to allege a cause of action for disparate impact discrimination stemming from the EPA's regulation under section 1983.⁴⁷ The court granted the leave "in the interest of justice."⁴⁸ In the forty-four page opinion issued on May 10, 2001, District Court Judge Stephen M. Orlofsky conducted an intricate analysis as to whether the plaintiffs could bring their action under section 1983. Judge Orlofsky ultimately held that "*Sandoval* [did] not preclude the Plaintiffs from pursuing their claim for disparate impact discrimination" under the EPA's Title VI regulations through section 1983, and that the plaintiffs were entitled to preliminary injunctive relief based on their revised claim.⁴⁹ The court then proceeded to reinstate its initial order to remand the case to the NJDEP so that it could properly evaluate whether the SLC plant would in fact have a disparate impact on the Waterfront South residents.⁵⁰

NJDEP and SLC immediately appealed the decision. Not long thereafter, on June 15, 2001, the three-judge panel of the U.S. Court of Appeals for the Third Circuit stayed the injunction. In its review of the defendants' motion to stay the preliminary injunction, the panel evaluated "(1) whether [SLC was] likely to succeed on appeal; (2) whether [SLC would] suffer irreparable injury absent relief; (3) whether granting relief [would] cause harm to other interested parties; and (4) whether granting or denying the motion would best serve the public interest."⁵¹ Without

45. *Sandoval*, 523 U.S. at 300-02 (Stevens, J., joined by Ginsburg, J. and Breyer, J., dissenting). Section 1983 prohibits every person operating under color of state law from depriving another citizen of any rights, privileges, or immunities secured by the Constitution and laws. 42 U.S.C. § 1983 (2000). In his dissent, Stevens clearly identifies and considers the fact that the plaintiffs could have validly brought their claim under § 1983. *Sandoval*, 523 U.S. at 300-02.

46. *South Camden II*, 145 F. Supp. 2d at 511.

47. *Id.* at 512.

48. *Id.*

49. *Id.* at 509.

50. *Id.*

51. *South Camden III*, No. 01-2224 (order staying injunction).

wasting many words, the panel systematically held for the defendants on every element of the four part test.⁵²

The Order made it clear that the Court of Appeals for the Third Circuit was leaning toward reversing the district court's decision. Perhaps what is most interesting about the panel's opinion is the sympathy it expresses for the economic losses that the SLC facility was suffering and the panel's failure to account for the proven adverse health effects that the SLC facility was causing.⁵³ While there is no doubt that the already-completed \$50 million facility⁵⁴ was losing money, the panel apparently disregarded the fact that SLC was allowed in 1999 to begin construction of the facility, pending final approval of the permits, "at its own risk."⁵⁵ When the final permits were issued on August 23, 2000, the plaintiffs promptly filed a complaint with the EPA's Office of Civil Rights (OCR). The panel's lifting of the injunction suggests that companies should hurry to build their facilities so that they can claim economic loss.⁵⁶ In considering the case, the Court of Appeals for the Third Circuit focused not on the reality of the situation, and the inevitable message being sent to industrial polluters, but on an entirely separate issue.

C. *South Camden III*

On December 17, the Court of Appeals for the Third Circuit in a 2-1 panel opinion reversed and remanded the district court's earlier decision to provide preliminary injunctive relief from permits that the NJDEP issued for the SLC's new facility.⁵⁷ In an opinion delivered by Judge Greenberg, the court of appeals reversed on the grounds that an "administrative

52. *Id.*

53. For example, a recent study by the University of California at Los Angeles found that "pregnant Los Angeles area women living in regions with higher levels of ozone and carbon monoxide pollution were as much as three times as likely to give birth to children who suffered from serious heart defects." *Urban Air Pollution Linked to Birth Defects*, ENVIRONMENTAL NEWS SERVICE, Jan. 2, 2002, at <http://ens-news.com/ens/jan2002/2002-01-02-09.asp>. Similarly, a Kaiser Daily Report on the same study noted several previous studies, one of which "found that pregnant women exposed to elevated levels of microscopic particles during the final six weeks of pregnancy were 20% more likely to deliver a baby prematurely than women whose pollutant exposure levels were lower." *Air Pollution Linked to Birth Defects, UCLA Study Says*, KAISER DAILY REPORTS, Dec. 17, 2001, at <http://www.kaisernet.org> (last visited Jan. 9, 2002). See also Brief for Amici Curiae of Natural Resource Defense Counsel at 13-20, *South Camden II*, 145 F. Supp. 2d 505 (discussing and citing many more specific medical studies on the effects of various types of air pollutants on human health).

54. Press Release, Washington Legal Foundation, Court Expresses Skepticism Regarding Use of "Disparate Impact" Standard (Aug. 15, 2001), available at <http://www.wlf.org/upload/8-15-01rs.pdf>.

55. *South Camden I*, 145 F. Supp. 2d at 452 (emphasis added).

56. See *South Camden III*, No. 01-2224 (order staying injunction).

57. *South Camden III*, 274 F.3d at 791.

regulation cannot create an interest enforceable under section 1983 unless the interest is implicit in the statute authorizing the regulation, and that inasmuch as Title VI proscribes only intentional discrimination, the plaintiffs do not have a right enforceable through a 1983 action under EPA's disparate impact discrimination regulations."⁵⁸ Its decision effectively forecloses private citizens from bringing actions under section 1983 to enforce EPA's Title VI disparate impact regulations in the Third Circuit.

The majority in *South Camden III* began and ended its analysis with the first part of a four-part test that the district court applied to determine whether SCCIA could obtain a preliminary injunction when the majority found that the plaintiff's claim was legally insufficient.⁵⁹ The first part of the four-part test requires the moving party to demonstrate a reasonable probability of eventual success in the litigation.⁶⁰ Its holding hinged on whether the EPA's regulations promulgated under section 602 created a federal right enforceable through section 1983. To make this determination, the majority ultimately applied the rule that the Court of Appeals for the Eleventh Circuit established in *Harris v. James*.⁶¹ In applying *Harris*, the court in *South Camden III* noted that for a regulation to create an enforceable federal right, the "statute itself [must] confer a specific right upon the plaintiff, and a valid regulation merely further defines or fleshes out the content of that right."⁶² In applying this rule, the majority in *South Camden III* found that the EPA's regulations "do more than define or flesh out the content of a specific right conferred upon the plaintiffs by Title VI. [T]hey are too far removed from Congressional intent to constitute a

58. *Id.* at 774.

59. *South Camden III*, 274 F.3d at 777.

60. To obtain a preliminary injunction a court must determine that the moving party has demonstrated: (1) a reasonable probability of eventual success in the litigation; and (2) that it will be irreparably injured if relief is not granted, balanced with: (3) the possibility of harm to other interested person from the grant or denial of the injunction; and (4) the public interest. *Id.* at 777 (citing *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143 (3d Cir. 1982)). Failure to satisfy both of the first two requirements results in the denial of a preliminary injunction. *Id.*

61. *Harris v. James*, 127 F.3d 993 (11th Cir. 1997) (holding that a Medicaid regulation requiring states to provide non-emergency transportation to and from providers did not create a right to such transportation enforceable via § 1983). The majority in *South Camden III* also positively cited the court in *Smith v. Kirk*, which dismissed a claim brought under § 1983 to enforce alleged violations of the Social Security Act and its regulations because mandatory language used in an implementing regulation cannot create a right enforceable under § 1983 not already contained in the statute. *South Camden III*, 274 F.3d at 785 (citing *Smith v. Kirk*, 821 F.2d 980, 984 (4th Cir. 1987)). *But cf.* *Loschiavo v. City of Dearborne*, 33 F.3d 548, 552 (6th Cir. 1994) (holding that regulations promulgated under the Cable Communications Policy Act of 1984 created a right which plaintiff could enforce under § 1983).

62. *South Camden III*, 274 F.3d at 786 (quoting *Harris*, 127 F.3d at 1009).

'federal right' enforceable under § 1983."⁶³ The court supports this holding by adding that Title VI only prohibits intentional discrimination, and that the EPA's regulations have a far broader meaning.⁶⁴

The irony of the majority's opinion is that while it assumes for purposes of its analysis that the EPA's Title VI regulations are valid,⁶⁵ it effectively invalidates them. While it does this under the guise of "rights" conferred, or as the majority finds, not conferred, it strikes at the heart of the regulations themselves. Judge McKee notes this contradiction in his dissent when he writes, "[w]e cannot invalidate EPA's Title VI regulatory definition without invalidating the regulation, and the majority claims that it is not doing that."⁶⁶ Adding further support to this contention is the fact that the majority states that if "Title VI is to go as far as to have the application that plaintiffs wish, Congress should take it there."⁶⁷ Again the focus is on rights, but it directly equates with the majority's sense that the EPA's regulations are beyond the scope of congressional intent, and thus invalid because federal agencies must operate within the confines set by statute.

At the end of the day, the ultimate issue has not been truly addressed. The residents of Waterfront South continue to be subjected to a disproportionate amount of hazardous air pollutants. On January 1, 2002, plaintiffs filed a petition with the court of appeals for an *en banc* rehearing, which was denied on January 16, 2002.⁶⁸ Plaintiffs still have pending claims for intentional discrimination under Title VI, and under the Fair

63. *Id.* at 790.

64. *Id.* See also *Sandoval*, 523 U.S. at 280 (noting "it is similarly beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination"); *Alexander v. Choate*, 469 U.S. 287, 293 (1985) (discussing *Guardians Assn. v. Civil Service Comm'n of New York City*, 463 U.S. 582 (1983), which held in part that Title VI itself directly reaches only instances of intentional discrimination).

65. *South Camden III*, 274 F.3d at 780 n.6. The court in *South Camden III* stated:
We assume without deciding that the regulations are valid, as neither NJDEP nor [SLC] timely challenged them in the district court and our analysis does not turn on their validity. That being said . . . we observe that there does seem to be considerable tension between the section 602 regulations proscribing activities that have a disparate impact and section 601's limitation to interdiction only of intentionally discriminatory activities.

Id. (citing *Sandoval*, 523 U.S. at 281).

66. *South Camden III*, 274 F.3d at 798 (McKee, J., dissenting).

67. *Id.* at 14. Interestingly, some members of Congress have drafted legislation to do just that. For one recent example, see the Community Environmental Equity Act, H.R. 1540, 107th Cong. (2001), that was referred to the Committee on Energy and Commerce. The Act states in part: "[a covered] entity . . . shall not, on the ground of race, color, national origin, or economic status, disproportionately expose any person or community to any covered substance." H.R. 1540, 107th Cong., § 2802(a) (2001).

68. *South Camden III*, No. 01-224, 01-2296 (order denying *en banc* rehearing).

Housing Act,⁶⁹ and may move to amend to include other claims based in tort. Thus, while the case is not over, it is clear that at least in the Third Circuit, communities that are being or may be disproportionately impacted by environmental pollutants may no longer look to the EPA's Title VI regulations for redress. But the decision goes further. *South Camden III* is a stark reminder of the difficulties communities like Waterfront South face. It compels us to rethink the legal mechanisms and social institutions designed to avoid perpetuating environmental injustices so that they work to protect citizens rather than polluters.

IV. WHAT SOUTH CAMDEN MEANS

One law professor appropriately identified this case as "battleground zero for the fight over environmental justice."⁷⁰ This case might very well determine whether those people who suffer from an unintentional disproportionate amount of environmental pollutants will have any federal protection under Title VI. The human reality of this case is that it is not a legal battle, but rather a battle waged by a group of citizens who want to live, walk, socialize, and sleep in their homes without wondering if the air they are breathing and the water they are drinking are slowly killing them. Unlike more affluent citizens and communities, the residents of Waterfront South lack the economic and political voice that might protect them from the systematic and continuous degradation of their environment and their health. The case also suggests a means of legal enforcement, and the need for other less burdensome mechanisms to review disparate impacts and the cumulative effects of multiple polluting facilities. To be effective, the mechanisms must allow for community involvement and discussion at the early planning phases so that economic losses can be minimized and community health can be protected.

The most successful tool in the environmental justice movement has been organizing and protesting, as it has been in all social movements. One recent and uplifting portrayal of successful community organization occurred in Los Angeles, California. Over 1000 residents appeared at a public meeting to oppose an attempt to site a new power plant in an area designated to become a much needed public park called the Baldwin Hills

69. 42 U.S.C. § 3601 (2000).

70. *Community Health*, *supra* note 2, at 3 (quoting Professor Weiss, Director, George Washington University Center on Sustainability & Community Health at George Washington Center on Sustainability & Regional Growth).

Conservancy.⁷¹ Unsurprisingly, the future public park and proposed power plant was slated for the center of a Los Angeles minority community.⁷²

The park was planned to begin rectifying a disproportionate allocation of greenspace in the Los Angeles metro area. In Los Angeles, there are approximately "six times more parks in white wealthy communities than in the [predominantly minority] inner city."⁷³ Robert Garcia, an attorney with the Center for Law in the Public Interest and also one of the organizers, posed the question: "Why is it that the only power plant in a state park in the state is proposed for Baldwin Hills?"⁷⁴ Garcia, local and state politicians, residents, and the state Energy Commission recognized that there was something sour about the siting of the proposed plant.⁷⁵ In a span of less than three weeks, the community came together and successfully ended plans to build the power plant.⁷⁶ The energy company declared that it would not pursue the development of the Baldwin Hills plant.⁷⁷

Concerned citizens are left to wonder whether a community needs to protest to be heard, and protest loud enough so that it is heard not only locally, but also nationally.⁷⁸ Ultimately, at least for now, the answer to this

71. Joe Mozingo, *Plan for Baldwin Hills Power Plant Attacked*, L.A. TIMES, June 19, 2001, at B4.

72. Joe Mozingo, *A Fight for Their Goal, Their Gains*, L.A. TIMES, June 23, 2001, at B1 (stating that the Baldwin Hills community is 76% African American, 9% Latino, and 6% White).

73. *Community Health*, *supra* note 2, at 15.

74. Mozingo, *supra* note 71, at B4. The L.A. Times answered this question, reporting that "a letter circulated at [the first public meeting by staff from the state Energy Commission] noted that six of nine of the so-called peaker plants approved under the governor's emergency order are in areas that are predominantly nonwhite." *Id.*

75. Joe Mozingo, *Energy Company Abandons Plans for Baldwin Hills Plant*, L.A. TIMES, June 22, 2001, at B1.

76. Another compelling story is the case of Kettleman City, California, where citizens came together to protest the development of a hazardous waste incinerator and eventually brought the company to withdraw its application to construct the facility in that location. For a complete discussion of the Kettleman City case, see COLE & FOSTER, *supra* note 12, at 1-9.

77. Mozingo, *supra* note 72, at B1.

78. Apparently, President Clinton thought the answer to this question was no. Thus, he responded by issuing Executive Order Number 12,898. Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994). This order required all federal agencies to "make achieving environmental justice a part of [their] mission" and created an Interagency Workgroup (Workgroup) on Environmental Justice. *Id.* §§ 1-101, 1-102. In addition to requiring federal agencies to make "achieving environmental justice a part of [their] mission," it requires agencies to take substantive actions to attain this goal. *Id.* § 1-101. Among other things, agencies are required to work with the Workgroup to develop "Agency Strategies." *Id.* § 1-103. In a subsequent section, one that bears a striking resemblance to 40 C.F.R. § 7.35 (disparate impact regulations), the order mandates:

Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons . . . the

question is yes for two reasons. First, social organizing and protesting have the important effect of raising the general public's awareness. This is especially important now, since many members of the public walk through life believing that racism no longer exists in the United States.⁷⁹ Second, strong community opposition has the effect of raising invaluable local, state, and federal support from political representatives who can sometimes wield leverage with local and state regulatory agencies. Still, other mechanisms need to be provided.⁸⁰

One potential mechanism that could aid in this endeavor is greater reliance on the EPA's Office of Civil Rights (OCR). Reliance on the OCR would create an environment in which citizens *might* not have to go to the

benefits of, or subjecting persons . . . to discrimination under, such programs, policies, and activities, because of their race, color or national origin.

Id. § 2.2 (emphasis added).

79. One author suggests that racism is dead, writing "'all the evidence shows that young people today are strongly committed to the principle of equality of rights,' and 'they are not disfigured by the racism that afflicted earlier generations of America.'" Lincoln L. Davies, *Lessons For An Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism Has to Teach Environmentalists Today*, 31 ENVTL. L. 229, 233 (2000) (quoting DINESH D'SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 552 (1995)). The facts tend to show that racism is still alive both in its intentional and unintentional forms. *Id.* at 233. Ironically, shortly after the publishing of D'Souza's book, thirty-four predominantly African American churches were bombed in the South. *Id.* at 233 (citing Sonya Walls, *Black Church Bombings in the South*, CHICAGO CITIZEN, June 20, 1996, at 2). Interestingly, at least one recent study, conducted by the Washington Post, the Henry Kaiser Family Foundation, and Harvard University, found that a majority of white Americans incorrectly agree, at some level, with D'Souza. One of the researchers noted, "[t]he results [of the study] suggest there is the overwhelming sense among most whites that this is 2001—we could not possibly be saddled with segregation and discrimination and therefore things can't possibly be as bad as black Americans say they are." Morin, *supra* note 31, at A1. Unfortunately, statistics tend to show that although African Americans have decreased the gap in terms of income, employment rates, health care, and schooling, there is still a significant difference in all of these areas. *Id.*

80. Other authors have advanced more intricate arguments on how to better protect communities suffering from a disproportionate amount of hazardous pollution. See, e.g., M. Patrice Benford, *Life, Liberty, & The Pursuit of Clean Air—Fight for Environmental Equality*, 20 T. MARSHALL L. REV. 269 (1995) (advancing the argument that environmental justice advocates might rely on the Fair Housing Act and Title VIII of the Civil Rights Act of 1968); Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice Into EPA Permitting Authority*, 26 ECOLOGY L.Q. 617 (1999) (examining ways in which the EPA can take environmental justice into account in permitting decisions); Alma Lowry & Tom Stephens, *The Environmental Justice Movement Is Working to Prevent Racial and Social Discrimination in an Environmental Context*, 80 MICH. B.J. 25, 26 (2001) (identifying the potential to successfully bring an environmental justice claim under the Michigan Constitution); Santiago, *supra* note 11, at 1, ¶ 59 (suggesting the creation of a state regulatory board that has final approval power over all sitings of new land uses that may significantly effect the human health); ENVTL. L. INST., OPPORTUNITIES FOR ADVANCING ENVIRONMENTAL JUSTICE: AN ANALYSIS OF U.S. EPA STATUTORY AUTHORITY (2001), at <http://www.eli.org> (last visited Apr. 25, 2002). For a broader review, see Karen Smith, *How the Legal System Has Failed the Environmental Justice Movement*, 12 J. NAT. RESOURCES & ENVTL. L. 325 (1997) (discussing claims brought under the Equal Protection Clause of the Fourteenth Amendment, under Title VI of the Civil Rights Act, and based on tort theories).

streets to fight for their safety and health. At this point in time, no court has held that the EPA cannot investigate and bring an action against an EPA funding recipient for failing to comply with its Title VI regulations. This avenue for potential redress, therefore, remains open.

Reliance on the OCR, however, cannot be justified until there is change to the existing office and framework within which the OCR operates. Unfortunately, the OCR as it is operating now, receives low marks with communities that have filed complaints.⁸¹ The OCR might be resurrected if it were given more resources, greater independence, and a stronger and more powerful legal framework within which to operate. Potential success of the office can only be achieved through the sum of these three parts.

Greater resources are needed to accomplish these goals.⁸² To initiate any reorganization and alteration of the OCR, the OCR will need an infusion of new resources that must come in the form of financial investment. Funding should be allocated to hire more staff to investigate citizen complaints in a timely fashion so that time and money are saved and community health is best protected. Failure to review complaints in a timely manner has plagued the OCR since the first complaint was filed in 1992.⁸³ Although over 100 complaints have been filed with EPA since that time,⁸⁴ only one, the *Select Steel* case, has ever been decided on the merits.⁸⁵ The others have either been dismissed or are still awaiting an

81. CENTER ON RACE, POVERTY, & THE ENV'T AND THE CAL. RURAL LEGAL ASSIST. FOUND., COMMENTS ON DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS AND DRAFT TITLE VI GUIDANCE FOR EPA ASSISTANCE RECIPIENTS ADMINISTERING ENVIRONMENTAL PERMITTING PROGRAMS, at 1-4 (Aug. 26, 2000), available at <http://www.epa.gov/ocr> (last visited Jan. 9, 2002) (quoting statements signed by sixty-three frustrated complainants in fifty-nine of the Title VI complaints filed with EPA since 1992) [hereinafter COMMENTS ON DRAFT GUIDANCE].

82. Interestingly, lack of resources was a fact the Court of Appeals for the Third Circuit previously relied upon in allowing a private right of action to enforce Title VI disparate impact regulations. "Therefore, we reasoned, 'a private right of action will increase enforcement,' and we concluded that such increased enforcement will further Title VI's purposes, compensating for the agency's lack of sufficient resources to adequately enforce the regulation itself." *Powell v. Ridge*, 189 F.3d 387, 398 (3d Cir. 1999) (quoting *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 936 (3d Cir. 1997), vacated as moot, *Chester Residents Concerned for Quality Living v. Seif*, 524 U.S. 974 (1998)). Unfortunately, after *South Camden III*, private parties may no longer be able to bring a private action to enforce the EPA's regulations in the Third Circuit. See *South Camden III*, 274 F.3d at 771. This will likely place a greater burden on the EPA in the future.

83. COMMENTS ON DRAFT GUIDANCE, *supra* note 81, at 1-4.

84. *Title VI Complaints Filed With EPA*, available at <http://www.epa.gov/civilrights/docs/t6csjan2002.pdf> (last updated Jan. 4, 2002) (listing all complaints since 1993).

85. See Letter from Ann E. Goode, Director, EPA's Office of Civil Rights, to St. Francis Prayer Center (Complainant) and the Michigan Department of Environmental Quality (Recipient) (Oct. 30, 1998), at http://www.epa.gov/ocrpage1/docs/ssdec_ir.pdf (last visited Apr. 25, 2002) (dismissing the Title VI complaint against the Michigan Department of Environmental Quality and finding that neither of the complainants' concerns rise to the level of discriminatory effect within the meaning of Title VI or

investigation.⁸⁶ Some communities have waited for over six years for an investigation.⁸⁷ This failure has disenfranchised the very citizens that it was created to protect—leaving them with little or no hope at all. One commentator has appropriately referred to these complainants as “EPA’s Civil Rights Orphans.”⁸⁸ While other factors, such as political influence, have contributed to the phenomenon of “Civil Rights Orphans,” lack of adequate funding is certainly one culprit. Thus, without additional funding, any action to make the OCR more independent or to strengthen its operating framework would yield few results because conducting a Title VI review requires time, staff, and money.⁸⁹

The OCR must operate as an independent office within, or outside of, the EPA. Today, more than ever, big money from the corporate world that fuels the American economy influences the federal government’s, as well as state governments’s, decision-making.⁹⁰ Perhaps most often discussed in the context of congressional elections⁹¹ and federal policy-making,

the EPA’s implementing regulations); see also Bradford C. Mank, *The Draft Title VI Recipient and Revised Investigation Guidances: Too Much Discretion For EPA and a More Difficult Standard For Complaints?*, 30 ENVTL. L. REP. 11,144, 11,150 (2000) (discussing the *Select Steel* decision). Just prior to the publication of this Paper, EPA issued two additional decisions in July 2002. See Hyde Park and Aragon Park Improvement Committee, Inc., EPA File No. 8R-94-R4 (July 2002) (dismissing complaint based on findings of no intentional or disparate impact discrimination in the Env’tl. Prot. Div. of the Georgia Dept. of Natural Res.’s regulatory oversight of industrial discharges and cleanup of groundwater and sediment contamination in neighborhoods); Miller and Thompson (Miller Swine Farm Complaint), EPA File No. 18R-98-R4 (July 2002) (dismissing a complaint of intentional discrimination based on findings that the Miss. Dept. of Environmental Quality had legitimate, race-neutral, and non-pretextual explanations for delaying the processing of Miller’s swine farm permit application).

86. *Title VI Complaints Filed With EPA*, *supra* note 84.

87. COMMENTS ON DRAFT GUIDANCE, *supra* note 81, at 2–4.

88. *Id.* at 2.

89. Apparently, in an effort to deal with its backlog of unanswered complaints, the EPA doubled its Title VI resources (staff and contract dollars) in 2000. EPA, DRAFT TITLE VI GUIDANCE DOCUMENTS QUESTIONS AND ANSWERS, *Question 20*, at 6 (June 16, 2000), available at <http://www.epa.gov/civilrights/t6guidefaq1.pdf> (last visited Jan. 11, 2002). Unfortunately, no progress (measured by answered complaints) has been made, which suggests at least two things: (1) potentially even more resources are needed and (2) other factors are at play.

90. See, e.g., WILLIAM GREIDER, WHO WILL TELL THE PEOPLE: THE BETRAYAL OF THE AMERICAN DEMOCRACY 35 (1992). Greider argues, that during the last generation our democratic system was overtaken by a growing industry of “business firms and outposts of sponsored scholars devoted to concocting facts and opinions and expert analysis, then aiming them at government.” *Id.* He refers to this as a “democracy for hire,” and explains, “[o]nly those who have accumulated lots of money are free to play in this version of democracy.” *Id.* Supporting his proposition, Greider states that “[in 1991] [m]ore than 70 percent of each major party’s contributions [came] from corporations.” *Id.* at 259 (citing Charles R. Babcock, *\$100,000 Political Donations on the Rise Again*, WASHINGTON POST, Sept. 30, 1991, at A1); see also DAVID C. KORTEN, WHEN CORPORATIONS RULE THE WORLD 141–48 (1996) (discussing the effects of corporate lobbying).

91. See, e.g., GARY JACOBSEN, THE POLITICS OF CONGRESSIONAL ELECTIONS (1997). Jacobsen notes, “[m]any interest groups contribute to campaigns not so much to influence the outcome

corporate and business interests have slowly inundated agency standard-setting and discretion.⁹² While commonly balanced with public interest organizations, corporate interests still subtly find their way into agency decisions. To root out any undue influence, the OCR must be given the independence that would allow it to function in an unbiased and uninfluenced manner. Obviously, an argument exists that there is no need to provide independence because agencies and their offices, as a part of a democratic government, are designed to act in the public interest. But, analyzed in the context of environmental justice, one realizes that the people most commonly affected are those most often left out of the process.

A model for such an independent official or office could find its roots in the EPA's National Ombudsmen Office, which was created to investigate citizen complaints regarding decisions that the EPA's Office of Solid Waste and Emergency Response (OSWER) made.⁹³ An ombudsman is an

as to gain influence with, or at least access to, people who are likely to be in a position to help or hurt them." *Id.* at 38. He goes on to note that while money affects challengers and incumbents differently, both have a greater likelihood of success with increased amounts of money, and the challenger probably cannot win without it. *Id.* at 42. Thus, (1) an interest group's desire to gain access to the political process and (2) a candidate's need for money, can lead to a propensity for increased candidate fundraising, and, as a result, the potential for greater interest group influence over the political process and decisions made therein.

92. This phenomenon is generally referred to as "agency capture." Thomas A. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155, 1196-97 (2000) (citing Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1684-85 (1975), for his proposition that within "broad legislative directives, agencies unduly favor organized interests, especially the interests of regulated or client business firms and other organized groups at the expense of diffuse, comparatively unorganized interests such as consumers, environmentalists, and the poor"). Lambert argues that agency capture is not a serious issue in the EPA's desire to enforce its Title VI regulations based on the cost/benefit distribution of a regulated entity versus an affected community. He argues that because costs and benefits are concentrated, "there is no need to worry about one side lacking a sufficient incentive to lobby the agency for its desired outcome, and no side is likely to dominate—or capture—the agency." Lambert, *supra*, at 1197. Unfortunately, while it is certainly true that both sides have a "sufficient incentive" to lobby the agency, Lambert's argument fails to recognize that lobbying efforts require money and other resources, which most communities afflicted by environmental injustices lack. Thus, there is an inherent imbalance that gives one group, business, more power and influence over an agency than another. See generally Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENVTL. L.J. 81 (2002).

93. The Hazardous and Solid Waste Amendments of 1984 § 103, Pub. L. No. 98-616, 98 Stat. 3225 (codified as amended at 42 U.S.C. § 6917 (2000)) (establishing an Office of the Ombudsman within the Office of Solid Waste and Emergency Response to terminate four years from Nov. 8, 1984). While the office officially expired in 1988, the EPA decided to maintain the office as a "matter of policy." GEN. ACCT. OFF., HAZARDOUS WASTE: EPA'S NATIONAL AND REGIONAL OMBUDSMEN DO NOT HAVE SUFFICIENT INDEPENDENCE, GAO-01-813, 1 (2001) [hereinafter GAO Report]. Furthermore, "[o]ver time, EPA expanded the ombudsman's jurisdiction to include Superfund and other hazardous waste programs managed by the Office of Solid Waste and Emergency Response." *Id.* Recently, however, the Bush Administration has threatened to eliminate this office altogether. The Administrator of the EPA, Christine Todd Whitman, has issued orders to relocate the National

“impartial official who receives complaints and questions, collects relevant information through an investigation or inquiry, and works toward the resolution of the particular issues.”⁹⁴ However, because independence is central to impartiality, even prior to recent moves by the Bush Administration, EPA’s Ombudsman Office probably serves better as an idea than as a model. This is demonstrated by the shortcomings made apparent in a July 2000 U.S. General Accounting Office (GAO) report.⁹⁵ Independence, impartiality, confidentiality, and credibility of the review process should be central tenets for future changes to the OCR.⁹⁶ Key to any changes should be the goal that the OCR be “free from initial bias and conflicts of interest”⁹⁷ that can arise from an administration’s affiliation with a specific political party, congressional influence, or agency capture.⁹⁸ These changes, in collaboration with action, might restore complainants’ confidence in the role of the OCR and make it a more effective decision-making body.

Finally, the legal framework of Title VI, the EPA’s Title VI regulations, and the Draft Guidance within which the OCR operates all need to be strengthened and made more proactive. At this time, the EPA will only review Title VI complaints filed after a state permitting agency

Ombudsman to the EPA Office of Inspector General. This move has outraged the National Ombudsman because, as one ombudsman clearly noted, “transferring the Ombudsmen to the Office of Inspector General would give the false appearance of independence because of the very different missions of these offices.” See Memorandum from Robert J. Martin, National Ombudsman, EPA, to Christine Todd Whitman, Administrator, EPA (Nov. 27, 2001) (on file with author). More recently, an EPA ombudsman has filed a suit in the U.S. District Court of the District of Columbia to prevent this “reorganization.” *EPA Ombudsman Sues to Prevent Move*, ASSOC. PRESS, Jan 10, 2002, available at 2002 WL 3702935. On January 13, 2002, U.S. District Court Judge Richard W. Roberts issued a temporary restraining order, but lifted it on April 12 after a hearing on the issue in which he held that Martin (the Ombudsman) had not “exhausted all administrative remedies before going to court.” Mike Soraghan, *Ruling paves way for EPA transfer Whitman wins round in ombudsman fight*, DENVER POST, April 14, 2002, at A15. On April 22, 2002, Martin sent his letter of resignation to EPA Administrator Christine Todd Whitman, writing, in part, “I hope you find it in yourself to recognize that by obliterating the independent Ombudsmen function, you have deprived the American people and the Congress of a valuable means with [sic] to keep the EPA true to its mission of protecting human health and the environment and to be accountable to American communities.” See Memorandum from Robert J. Martin, *supra*.

94. GAO Report, *supra* note 93, at 1.

95. *Id.* at 22. As the title makes clear, the GAO’s central finding was that the Ombudsman’s Office lacked sufficient independence. See *id.*

96. DEAN M. GOTTEHRER & MICHEL HOSTINA, U.S. OMBUDSMAN ASSOCIATION, *ESSENTIAL CHARACTERISTICS OF A CLASSICAL OMBUDSMAN* (1998), available at <http://www.usombudsman.org/References/references.htm> (last visited Jan. 11, 2002), cited in GAO Report, *supra* note 93, at 5 n.6.

97. GAO Report, *supra* note 93, at 3.

98. For a discussion of these factors, see *supra* notes 90, 91, and 92.

has issued final permits for a facility.⁹⁹ Unless it is later found that the state failed to satisfy a legally required administrative aspect of the permitting process or that the permitting agency wrongly issued permits because the facility was out of compliance, a facility that obtains permits will continue to operate despite any alleged violation of Title VI. An exception might exist if the aggrieved party could prove intentional discrimination was behind the action or decision. However, this is virtually impossible without finding the proverbial "smoking gun."

Developing a more proactive process is an important step because it reduces the opportunity for both economic and health-related harm. Even in the *South Camden* cases, where the facts clearly showed that the Waterfront South residents were being disproportionately affected by harmful pollutants, the court of appeals turned a blind eye before it issued its opinion and reversed *South Camden II*. During oral arguments, Judge Greenberg expressed his opinion of SLC's decision to build in South Camden by stating, "[t]his was highly justified in terms of economics. These people have got real competitors, they've got to be cheap."¹⁰⁰ Competitiveness comes with a price tag. This time, it is at the expense of the health of Waterfront South residents.

There is some evidence that the EPA's Draft Guidance reflects similar deference to economic factors. For example, some commentators are concerned about how the EPA will examine economic benefits in determining whether an agency action is justified. The general consensus is that nothing justifies discrimination, especially the type that can lead to serious adverse health effects and shortened life spans.¹⁰¹ In light of the deference to economic harm, the EPA should consider revising its Title VI regulations and Draft Guidance so that the economic burden is shifted to the companies that decide where they will site new facilities. This could effectively be done if complaints and decisions were proactive rather than reactive. For example, simply prohibiting companies from beginning to build until final permits have been issued and a formal public comment period has been conducted may benefit the process by reducing overall loss if it is later found that permits should not be issued.¹⁰² Because this would

99. Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigations Guidance), 65 Fed. Reg. 39,667, 39,673 (June 27, 2000).

100. Duffy, *supra* note 16, at P1.

101. COMMENTS ON DRAFT GUIDANCE, *supra* note 81, at 8. See also Mank, *supra* note 85, at 11,170 (expressing both business and environmental justice advocates' views of the "justification" standard).

102. For example, SLC began building its facility in South Camden as soon as the permit was administratively complete, and before final permits had been issued and a formal public comment period was held. *South Camden III*, 274 F.3d at 775. Admittedly, this delay will entail lost economic

apply to all potential new facilities, no one company would have a competitive edge. Shifting the burden will force companies to internalize the costs of their decisions and think more deeply about all the consequences of their actions, rather than just about the cheap labor, land, and citizens who often lack the leverage to object. Companies would also need to consider the backyard into which they wish to move. The fear of delay and potential denial of permits could act as an effective deterrent to unintentional discrimination.

CONCLUSION

While the EPA's Title VI regulations are not yet a complete dead end, they may be so for the communities situated within the jurisdiction of the Third Circuit. But even after *South Camden III* eliminated a private right of action to enforce the EPA's disparate impact regulations, citizens still have the ability to bring a claim for intentional discrimination under Title VI. Unfortunately, proving intentional discrimination in these cases is almost impossible. Therefore, it is more likely that citizens will file Title VI complaints with the EPA's OCR. In light of this development and increased burden on the OCR's already-limited resources, the OCR needs to be a more effective decision-making body. The OCR could be more effective if it were given additional resources, greater independence, and a more proactive framework within which to operate. Presumably this type of change would require amending provisions of the Clean Air Act, but without these adjustments the OCR will continue to be plagued with dismal results.¹⁰³

Perhaps a more worrisome issue that *South Camden III* raises is that the EPA's own ability to enforce its regulations is precariously balanced and

opportunity by pushing back a facility's beginning operation date, but in the end it will reduce the overwhelming economic interests that have prevailed over public health interests. Once a plant is completed and operating, the economic interests involved become much greater than before construction began. The weighing of these economic considerations takes place within the context of a rule that is well rooted in our legal system. See *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970). For a complete discussion, see Andrew Jackson Heimert, *Keeping Pigs Out of Parlors: Using Nuisance Law to Affect the Location of Pollution*, 27 ENVTL. L. 403 (1997). Heimert states that "two propositions emerge from *Boomer*: first, an injunction may be inappropriate when the economic value of the harmful activity sought to be enjoined greatly exceeds the one harmed; second, courts can award damages even though the social value of a business exceeds that of the activity it hampers." *Id.* at 411 (internal citations omitted).

103. The question still remains as to whether the EPA's enforcement of its Title VI regulations can even provide an effective remedy or deterrent for recipients who fail to comply. The EPA's remedies are limited to terminating the recipient's federal funding or using other means authorized by law. 42 U.S.C. § 2000d-1 (2000). While the second provision potentially provides for broader relief, it is ultimately left up to the EPA's discretion and remains untested.

ready to fall. This inability could eliminate any potential redress for environmental racism under Title VI.¹⁰⁴ Ultimately, it may require an act of Congress to remedy the problem.

While it is often necessary to weigh the costs and benefits of certain decisions, it is also important to properly weigh the realities of a particular action or situation. The reality of the legal situation is that the unclear nature of Title VI makes it a windy and uncertain route to redressing environmental racism. Revisions to the EPA's Title VI regulations and guidance could effectively balance the scales of justice by providing an impartial setting to review complaints and by shifting the economic burden onto those people and companies that are able to decide where they will or will not site their facilities.

The reality of the human situation is that the story of the Waterfront South residents' fight to protect their families' health is not an uncommon one. It is important not to lose sight of this human reality when navigating through the legal thicket searching for solutions. While the human answer lies in the facts, the legal answer remains shackled to the rules. Recognition of these facts might someday provide the political and social will to eliminate all discrimination. Until that time, residents like those of Waterfront South will continue to fight for their right to live in a clean and healthy environment.

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104. See *South Camden III*, 274 F.3d at 771 n.6 (identifying tension between Title VI regulations and section 601).