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Title VI or Bust? A Practical Evaluation of Title VI of the 1964 Civil Rights Act as an Environmental Justice Remedy

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NOTE

TITLE VI OR BUST? A PRACTICAL EVALUATION OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT AS AN ENVIRONMENTAL JUSTICE REMEDY

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I. INTRODUCTION

The Waterfront South neighborhood of South Camden, New Jersey has become a critical battleground for the environmental justice movement. Activists and commentators within the movement are intently watching a citizens' group's fight against a corporation that is attempting to open an industrial facility in Waterfront South, a poor and predominately minority community.[1] The citizens' group,

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1. *See generally* Sara Hoffman Jurand, *"Environmental Justice" Movement Looks to Pivotal New Jersey Cases*, 39 TRIAL 12 (July 2003) (discussing the Waterfront South saga and its importance to the environmental justice movement); *see also* Keith E. Eastland, Note, *Environmental Justice and the Spending Power: Limits on Using Title VI and § 1983*, 77 NOTRE DAME L. REV. 1601, 1603 (2002) ("Proponents of environmental justice are well pleased with

South Camden Citizens in Action ("SCCIA"), is claiming, in part, that the New Jersey Department of Environmental Protection's ("NJDEP") decision to issue environmental permits for the industrial facility constitutes intentional discrimination in violation of Title VI of the 1964 Civil Rights Act,[2] which prohibits discrimination in federally-funded programs. Environmental justice commentators, activists, and attorneys are watching closely as these events unfold, waiting to see what the saga will reveal about Title VI's effectiveness as a legal remedy for fighting similar permitting decisions in other parts of the country.[3]

This Note assesses the effectiveness of Title VI, in its present state, in helping environmental justice advocates fight the siting of locally undesirably land uses ("LULU"s) in poor and/or minority communities. In making this assessment, this Note focuses on litigation strategy and accordingly does not question the ends sought by the litigation; leaving empirical and normative debate for other fora. This Note also assumes the existence of an "environmental justice crisis." That there is a colorable claim of such a crisis suffices for the purposes of this Note.

Part II of this Note describes the environmental justice crisis and the movement which has developed in response. Part II.A uses Waterfront South's plight as an anecdotal illustration of the environmental justice problem. Part II.B looks at the environmental justice movement on a larger scale and attempts to develop a working definition of both environmental justice and the specific goal sought by those who pursue it, particularly with respect to LULU sitings.

In Part III, this Note examines Title VI, its pertinent regulations, and its relevant case law. Part III.A outlines Title VI's statutory scheme, as well as, the regulations promulgated by the United States Environmental Protection Agency ("EPA") to implement Title VI.

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the South Camden residents' initial success and have been touting their new legal strategy as 'a road map for environmental justice advocates.'").

2. 42 U.S.C. §§ 2000d-2000d-7 (2000).

3. *See generally* Jurand, *supra* note 1 (discussing the Waterfront South saga and its importance to the environmental justice movement); *see also* Eastland, *supra* note 1, at 1603 ("Proponents of environmental justice are well pleased with the South Camden residents' initial success and have been touting their new legal strategy as 'a road map for environmental justice advocates.'").

Part III.B explores the Supreme Court's most recent decision on point, *Alexander v. Sandoval*,[4] in which the Court held that Title VI does not provide a private right of action to enforce disparate impact regulations promulgated under its provisions. Part III.C details the *South Camden*[5] proceedings to date and discusses what they reveal about the rights of action available under Title VI.

Part IV takes the law developed in Part III and uses it to examine the effectiveness of Title VI remedies for achieving the goals of the environmental justice movement, pointing out aspects that environmental justice activists and attorneys should consider in deciding whether Title VI action is appropriate. Part IV.A looks at Title VI remedies on their own terms while Part IV.B looks at Title VI remedies in relation to other remedies and strategies available to environmental justice attorneys and advocates.

In Part V, this Note concludes that as Title VI case law develops, environmental justice attorneys should neither rely exclusively on Title VI remedies nor ignore them completely. Instead, this Note argues, they should practically weigh the effectiveness of remedies offered by Title VI on an *ad hoc* basis in light of other options and develop strategies that best serve the specific needs and interests of the communities that they represent.

II. "ENVIRONMENTAL INJUSTICE"

A. *Waterfront South*

The story of Waterfront South typifies the problem identified by environmental justice advocates.[6] According to the 1990 census, the

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4. 532 U.S. 275 (2001).

5. South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 254 F. Supp. 2d 486 (D.N.J 2003) (hereinafter *South Camden IV*); South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771 (3d Cir. 2001) (hereinafter *South Camden III*); South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 505 (D.N.J. 2001) (hereinafter *South Camden II*); South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446 (D.N.J. 2001) (hereinafter *South Camden I*).

6. This description is based on Judge Orlofsky's account in *South Camden I*, 145 F. Supp. 2d. at 458-68, where the plaintiffs,

South Camden community was 91 percent minority, had an average annual per *household* income of $15,082, and had greater than 50 percent of its residents living at or below the federally defined poverty line.[7] By contrast, in 1990 Camden County, where Waterfront South is located, was 75.1 percent non-Hispanic white and had an average per household income of $40,027; more than 2.5 times that of Waterfront South.[8]

But neither poverty nor its majority-minority demographics are Waterfront South's most distinctive attributes. The neighborhood is most notable for its overabundance of LULUs; many of which are among the most objectionable uses of property. Waterfront South's 2,132 residents,[9] 40 percent of whom are children,[10] share their little community with Camden County's sewage treatment plant,[11] the Camden County Resource Recovery facility, a trash-to-steam incinerator, and a cogeneration power plant.[12] Additionally, Waterfront South has several industrial facilities, including an oil refinery.[13] By 2001, fifteen sites within Waterfront South had been identified by NJDEP as contaminated, and two sites within the neighborhood had been designated as Federal Superfund sites.[14]

SCCIA and private individuals, were granted a preliminary injunction.

7. *South Camden I*, 145 F. Supp. 2d at 459.

8. *See id.* (listing the per household incomes for Waterfront South and Camden County).

9. *Id.* at 458.

10. *Id.*

11. *Id.* The sewage treatment plant, operated by the Camden Country Municipal Utilities Authority, treats sewage for approximately 35 Camden County municipalities.

12. *Id.* A cogeneration power plant is "an industrial facility that converts waste energy to produce heat and electricity" through combustion.

13. *Id.*

14. *Id.* Superfund sites are those designated by the federal government for the cleanup of hazardous materials pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-28 (2000). One of Waterfront South's two sites was discovered to be contaminated with radioactive thorium in 1981. *South Camden I,* 145 F. Supp. 2d. at 459.

In spite of, or perhaps partly because of, Waterfront South's concentration of LULUs, the St. Lawrence Cement Company ("SLC"), decided that the neighborhood was the best location for the new GrandChem[15] factory it wanted to build on the U.S. eastern seaboard.[16] Once opened, the GrandChem facility would release particulate matter, mercury, lead, manganese, nitrogen, oxides, carbon monoxide, sulfur oxides and volatile organic compounds into the air.[17] Additionally, SLC's plans called for approximately 77,000 trucks per year to pass through the streets of Waterfront South, delivering the raw granulated blast furnace slag to the facility and removing finished GrandChem from the facility.[18]

In response to SLC's siting decision and NJDEP's decision to issue environmental permits to that facility, residents of Waterfront South formed SCCIA, an unincorporated community organization, and began fighting the permitting of the facility.[19] On October 4, 2000, SCCIA filed administrative complaints with the United States EPA's Office of Civil Rights ("OCR") and with NJDEP.[20] On February 13, 2001, SCCIA filed a complaint in the United States District Court for the District of New Jersey against NJDEP and its commissioner seeking declaratory and injunctive relief for violations of Title VI of the Civil Rights Act of 1964.[21]

B. *The Big Picture: National "Environmental Justice"*

Waterfront South's saga is not unique. One need not dig deeply into environmental justice literature to discover similar tales of dis-

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15. GrandChem is an additive used to strengthen portland cement and is made from grinding granulated blast furnace slag ("GBFS"), a byproduct of the steel-making industry. *Id.* at 453.

16. *Id.* SLC decided on Waterfront South after considering other locations in Delaware, Pennsylvania, and New Jersey. *Id.* SLC's chosen location was within one-half mile of four sites that the EPA had or would soon investigate for the release, or threatened release, of hazardous substances. *Id.* at 459.

17. *Id.* at 454.

18. *Id.*

19. *Id.* at 452.

20. *Id.*

21. *Id.* at 450. For a discussion of the legal issues raised in the complaint, see *infra* Part III.C.

advantaged communities, besieged by LULUs, battling the nearby siting and opening of more waste transfer stations, sewage treatment plants, or mercury-releasing factories.[22] Collectively, this grassroots activity combines to form the national "environmental justice movement."[23]

While it is difficult to determine the precise moment the contemporary environmental justice movement began,[24] many scholars point to protests in 1982 that took place in the predominately African-American, rural Warren County, North Carolina. The Warren County protests sought, unsuccessfully, to prevent the siting of a polychlorinated biphenyl ("PCB") landfill.[25] Following the Warren

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22. *See, e.g.,* LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP; ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 80-102 (2001) (describing environmental justice activism in Buttonwillow, California); *see also, e.g.,* Robert D. Bullard, *Anatomy of Environmental Racism, in* TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE 25, 30-32 (Richard Hofricter, ed. 2002) (recounting briefly environmental justice activism in Los Angeles since the early 1980s); Winona LaDuke, *A Society Based on Conquest Cannot be Sustained: Native Peoples and the Environmental Crisis, in* TOXIC STRUGGLES, *supra,* at 98 (detailing the disparate impact of undesirable land use on native peoples across North America).

23. *See generally, e.g.,* COLE & FOSTER, *supra* note 22; Bullard, *supra* note 22; LaDuke, *supra* note 22.

24. *See* COLE & FOSTER, *supra* note 22, at 19 ("Pointing to a particular date or event that launched the Environmental Justice Movement is impossible, as the movement grew organically out of dozens, even hundreds, of local struggles and events and out of a variety of social movements.").

25. *See, e.g.,* Robert D. Bullard, *Environmental Justice For All,* in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 3, 3-5 (Robert D. Bullard ed., 1994) (discussing environmental justice struggles as early as 1967 and asserting that "it was not until the early 1980s that a national movement for environmental justice took root . . ."). Bullard, in his discussion of pre-1982 environmental justice actions, argues that Rev. Dr. Martin Luther King, Jr. was engaged in an environmental justice mission when he was shot and killed in Memphis in 1968 while attempting to

County protests, which were led by the head of the United Church of Christ's Commission for Racial Justice ("CRJ"), the CRJ conducted and released a landmark study documenting the disproportionate impact of environmental hazards on racial minorities.[26] Over the past two decades, the environmental justice movement, largely characterized by grassroots activism, has sought to remedy the disparate impact of land use on unempowered communities.

The grassroots nature of the environmental justice movement has been both its biggest asset and its most significant shortcoming. On the one hand, unempowered communities faced with the siting of LULUs can engage people by relying on the personal connection felt between citizens and the movement; this connection has fostered empowerment and has been instrumental in helping to crystallize local support.[27] On the other hand, the decentralized nature of the movement makes coalition-building and coordination of strategies difficult, if not impossible.

One detrimental result of the environmental justice movement's piecemeal nature has been a persistent definitional ambiguity. Environmental justice is a term often used but seldom defined in a meaningful manner. For example, Professor Robert Bullard of the Environmental Justice Resource Center at Clark Atlanta University, one of the movement's leading activists and scholars, has defined the movement as seeking to eliminate "unequal enforcement of environmental, civil rights, and public health laws."[28] While this aspiration encapsulates the spirit of the movement, it translates poorly into strategy. Bullard's description fails to give activists any real point of reference against which gains and losses (both potential and actual) can be measured. In the absence of a concrete and discrete goal,

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improve working conditions and pay for striking African-American garbage workers. *Id.* at 3-4.

26. *See* COLE & FOSTER, *supra* note 22, at 20-21 (citing the CRJ study in discussing the foundations of the environmental justice movement following the Warren County protests).

27. For an example of local community activism defeating the decision to site a LULU, see Bullard, *supra* note 22, at 30-31 (discussing how community activism in South Central Los Angeles led the city to "kill" a project which would have placed three waste-to-energy incinerators in its neighborhood).

28. *See* Jurand, *supra* note 1, at 12 (discussing the Waterfront South saga and quoting Professor Bullard).

potential means of attaining that goal can hardly be effectively evaluated.

At its core, the "environmental justice" sought by activists is the equitable distribution of environmental hazards across society, regardless of imbalances in political, social, or economic power. With this in mind, environmental justice activists are essentially seeking to prevent and mitigate the disproportionate impact of LULUs on politically, socially, or economically marginalized populations.

While this characterization might exclude some of the goals Professor Bullard and his colleagues pursue (such as eliminating the disparate impact of environmental hazards not related to LULUs, including squalid working conditions and lead-based paint) or deemphasize the racial component of the "environmental justice crisis" (which some activists may consider *the* critical aspect), it captures the crux of what the residents of Waterford South and similar communities are trying to accomplish. Thus it provides a concrete point from which the effectiveness of remedies, including those available under Title VI, can be assessed and will therefore serve as a helpful reference for developing this Note. Ultimately, this attempt to define both "environmental justice" and the goals of its advocates could prove helpful in developing environmental justice strategies in the future.

III. THE TITLE VI CLAIM

A. *Title VI and the EPA's Regulations*

In 1964, Congress passed, and President Lyndon Johnson signed, historic legislation which became known as the Civil Rights Act of 1964.[29] Title VI of the Civil Rights Act prohibits discrimination in federally-funded programs. Section 601 of Title VI,[30] its general provision, provides that "[n]o person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving Federal financial assistance."[31]

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29. Act of July 2, 1964, Pub. L. No. 88-352 (78 Stat.) 252.

30. 42 U.S.C. § 2000d (2000); Act of July 2, 1964, Pub. L. No. 88-352, Title VI, § 601 (78 Stat.) 252.

31. *Id.*

To implement section 601's general discrimination prohibition, section 602[32] authorizes and directs federal agencies to promulgate rules preventing recipients of agency funding from engaging in discrimination.[33] Under section 602, federal agencies are empowered to force the compliance of their funding recipients (such as NJDEP, which receives EPA funding[34]) with section 602 regulations by ei-

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32. 42 U.S.C. § 2000d-1; Act of July 2, 1964 Pub. L. No. 88-352, Title VI, § 602 (78 Stat.) 252.

33. *See id.* ("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 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."). The exact relationship between sections 601 and 602 was a subject of contention between the majority and dissent in *Alexander v. Sandoval*, 532 U.S. 275 (2001). For a discussion of *Alexander v. Sandoval,* see *infra* Part III.B. Ultimately, Justice Scalia, writing for the majority, concluded that section 602 was created to implement section 601, not to define it, and that it therefore creates no private right of action to enforce its regulations. *See id.* at 293 ("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.").

34. EPA's website has a searchable database of recipients of EPA funding. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *Grants Information and Control System (GICS) Query Form, available at* http://www.epa.gov/enviro/html/gics/gics_query.html (last visited Aug. 10, 2004). Other recipients of EPA funding include the states of Arizona and Alaska, state environmental regulatory agencies, such as the Alabama Department of Environmental Management and the Florida Department of Environmental Protection, cities, such as Buffalo, NY and Kansas City, MO, universities, such as the University of North Carolina at Chapel Hill and the Presidents and Fellows of Harvard University as well as countless other public and private institutions. *See id.* (providing a searchable data base of EPA grant recipients).

ther denying funding or employing "any other means authorized by law."[35]

Pursuant to section 602, the EPA has promulgated regulations which prevent discrimination by recipients of EPA funding.[36] These regulations apply to "all applicants for and recipients of, EPA assistance [including state environmental protection agencies, such as NJDEP] in the operation of programs or activities receiving such assistance beginning February 13, 1984."[37] To effectuate this, the regulations charge OCR with the responsibility of administering and developing EPA's compliance under Title VI and other applicable civil rights legislation.[38]

Subpart B of these regulations, codified at 40 C.F.R. sections 7.30-7.35, prohibit discrimination in EPA-funded programs on the basis of race, color, national origin, or sex. Section 7.30, the general prohibition, commands that "[n]o person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program receiving EPA assistance on the basis of race,

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35. *See 42 U.S.C* § 2000d-1 ("Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. . . .") (emphasis added).

36. *See generally* 40 C.F.R. §§ 7.10-7.135 (2003) (implementing Title VI of the Civil Rights Act of 1964 and other antidiscrimination legislation).

37. 40 C.F.R. § 7.15 (2003).

38. *See* 40 C.F.R. § 7.20(a) (2003) ("The EPA Office of Civil Rights (OCR) is responsible for developing and administering EPA's compliance programs under the [relevant civil rights] Acts.").

color, national origin, or sex . . . ."[39] Section 7.35 catalogues the specific types of discrimination which are prohibited.[40] In section 7.35(b), recipients are prohibited from using "criteria or methods of administering its program which have the *effect* of subjecting individuals to discrimination on the basis of race, color, national origin, or sex . . . ,"[41] thereby prohibiting conduct by recipients which disproportionately impacts racial or ethnic minorities, regardless of the motivation behind that conduct.

Section 7.35(c), directly addresses the siting of LULUs by recipients of EPA funding, providing:

> 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 with the purpose *or effect* of defeating or substantially impairing the accomplishment of the objectives of this subpart [prohibiting discrimination based on race, color, national origin, or sex].[42]

It is noteworthy, however, that the text of section 7.35(c) only discusses the "choosing" of a site with a prohibited purpose or effect, *not* the granting of permits for the site.[43] Thus, one could argue this provision does not apply where a recipient agency merely grants permits to a private entity (as NJDEP does), as long as the private entity that chose the site does not receive EPA funding.[44] Still, such

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39. 40 C.F.R. § 7.30 (2003). Note that this provision is written in the passive form and neither says who the contemplated discriminating party would be nor the mode of discrimination. *See id.*

40. Section 7.35(d), however, implies that section 7.30's scope is broader than the provisions of section 7.35. *See* 40 C.F.R. § 7.35(d) (2003) ("The specific prohibitions of discrimination enumerated above do not limit the general prohibition of § 7.30."). Thus, one could claim a violation of the overarching goal of section 7.30, even where no specific provision of section 7.35 had been violated. *See id.*

41. 40 C.F.R. § 7.35(b) (2003) (emphasis added).

42. 40 C.F.R. § 7.35(c) (2003) (emphasis added).

43. *See id.*

44. In *South Camden I*, discussed *infra* Part III.C., the district court rejected the defendants' argument that EPA regulations do not

permitting decisions would have to comply with other disparate impact regulations, such as section 7.35(b) (which prohibits the use of criteria or methods with the effect of subjecting individuals to discrimination) and section 7.35(d) (which prohibits subjecting persons to discrimination contained in section 7.30). Thus, even a narrow interpretation of section 7.35(c) would not allow recipients of EPA funds to make permitting decisions without considering the potential discriminatory effect of the proposed site. The penumbral prohibitions in section 7.35 seem to require a disparate impact analysis in all decisions made by recipients of EPA funding.

Other EPA regulations in Part 7 implement prohibitions and provide remedies for the violations of those prohibitions. Section 7.90(a) requires each recipient to "adopt grievance procedures that assure prompt and fair resolution of complaints which allege violations of [Part 7's provisions]."[45] It should be noted, however, that this provision does not require that any specific procedures be adopted, other than those needed to "assure a prompt resolution of complaints."[46] Thus, though section 7.90(a) ensures aggrieved parties some procedure for bringing complaints to the attention of a recipient, the recipient is largely left to its own devices in deciding what remedy, if any, is appropriate in a given case.[47]

Subpart E of Part 7 creates EPA compliance methods. The general policy for these procedures is set out in section 7.105, which directs EPA officials to "seek the cooperation of applicants and recipients in securing compliance with [Part 7] . . . ."[48] The ensuing regulations

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require recipients to consider the Title VI issues when issuing permits. *See South Camden I*, 145 F. Supp. 2d 446, 475-76 (D.N.J. 2001) (rejecting the defendants' argument that EPA regulations only required recipient state agencies to comply with emission standards before issuing permits and citing, *inter alia*, section 7.35(c)).

45. 40 C.F.R. § 7.90(a) (2003).

46. *Id.*

47. *See id.* Section 7.90(b) merely provides an exception to section 7.90(a)'s requirement for recipients with fewer than fifteen full-time employees unless the OCR finds a violation of Part 7 or "determines that creating a grievance procedure will not significantly impair the recipient's ability to provide benefits or services." 40 C.F.R. § 7.90(b) (2003).

48. 40 C.F.R. § 7.105 (2003).

provide the procedures for remedial action to force compliance,[49] complaint investigations,[50] the coordination of efforts with other agencies,[51] the remedies available to EPA for obtaining compliance[52] and the process to regain eligibility which recipients and applicants have lost.[53]

Among these provisions, section 7.130 is of particular import to aggrieved parties as it discusses how EPA can obtain the compliance of a defiant recipient. Subsection (a) provides, where informal means cannot assure compliance, "EPA may terminate or refuse to award or to continue assistance."[54] Further, section 7.130(a) authorizes EPA to use any other means allowed by law, including referring the matter to the Department of Justice ("DOJ").[55]

Section 7.130(b) sets out the procedures by which EPA can institute the remedial measures authorized in section 7.130(a). Under section 7.130(b)(1), when OCR determines that a recipient is in violation of Part 7, proceedings are instituted against that recipient, and where voluntary compliance cannot be achieved, OCR is directed to make a finding of noncompliance and notify the recipient of this finding and of its procedural rights.[56] The remainder of section 7.130(b) lays out the appropriate procedures for a hearing to contest the initial OCR finding,[57] the process by which an applicant or recipient's disposition becomes finalized,[58] and for the scope of any

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49. *See* 40 C.F.R. § 7.110 (2003) (providing pre-award compliance regulations); 40 C.F.R. § 7.115 (2003), (providing post-award compliance regulations).

50. 40 C.F.R. § 7.120 (2003).

51. *Id.* § 7.125 (2003).

52. *Id.* § 7.130 (2003).

53. *Id.* § 7.135 (2003).

54. *Id.* § 7.130(a) (2003).

55. *Id.*

56. *See id.* § 7.130(b)(1) (2003) (discussing the procedures for an initial finding by OCR that an applicant or recipient has been noncompliant with Part 7).

57. *See id.* § 7.130(b)(2) (2003) (discussing the procedure for an applicant or recipient to contest and initial OCR finding of noncompliance).

58. *See id.* § 7.130(b)(3) (2003) (providing for default judgments, the opportunity for all parties to be heard in any hearing before an Administrative Law Judge, and for the decision to deny an applica-

decisions to terminate, annul, suspend or deny funding based on a violation of Part 7.[59] The final provision of Part 7 provides for the procedures by which a recipient or applicant who has had its EPA funding denied, annulled, terminated, or suspended can regain eligibility for funding.[60]

Noticeably absent from section 7.130 is a mechanism by which an outside party can institute proceedings against a recipient. With no formal procedures for bringing a claim through EPA, outside parties, such as environmental justice attorneys, who seek to enforce these regulations, must persuade the OCR to make an initial finding of noncompliance. If OCR and EPA refuse to institute section 7.130 proceedings against the recipient or applicant, no remedy is available through EPA to outside parties who claim harm due to violations of Part 7's provisions. Thus, any formal Title VI remedies available to environmental justice attorneys must come from a private right of action.

B. *Alexander v. Sandoval: The Supreme Court Taketh Away*

In 2001, the Supreme Court considered the scope of private rights of action provided by Title VI.[61] The specific question presented to the Court was "whether private individuals may sue to enforce disparate-impact regulations under [section 602 of] Title VI of the Civil Rights Act of 1964."[62] On its way to answering the question in the negative, the Court shed some light on potential rights of action available under Title VI. A deeper understanding of *Sandoval* is

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tion or annul, suspend, or terminate assistance to become effective thirty days after the a report is sent to the Congressional committees with legislative jurisdiction over the program or activity affected).

59. *See id.* § 7.130(b)(4) (2003) (providing that a decision which results in the denial, suspension, annulment, or termination of funding to an applicant or recipient is limited to that applicant or recipient and that its affects should be similarly limited).

60. *See id.* § 7.135 (2003) (providing procedures for regaining eligibility).

61. *See* Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that no private right of action exists to enforce disparate impact regulations promulgated pursuant to section 602 of Title VI).

62. *Id.* at 278.

helpful, if not necessary, for assessing the effectiveness of Title VI action to achieve "environmental justice."

Sandoval decided this much: no private right of action exists to enforce disparate impact regulations (or, for that matter, any other regulations) promulgated under section 602.[63] In addition, given the Court's analysis, it is practically certain that section 601 provides a private right of action for injunctive relief and damages[64] but only for intentional discrimination.[65] However, *Sandoval* was less clear on other points, calling into question the validity of section 602 disparate impact regulations but leaving the issue unresolved[66] and similarly leaving open whether, if valid, such regulation can be enforced through 42 U.S.C. § 1983.[67]

In 1990, the State of Alabama amended its constitution and declared English as the state's official language.[68] To implement this

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63. *Id.* at 293 ("Neither 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.").

64. *See id.* at 279 ("First, private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages.").

65. *See id.* at 280 ("Second, it is similarly beyond dispute–and no party disagrees–that § 601 prohibits only intentional discrimination.").

66. *See id.* at 281 ("Third, we must assume for the purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601."); *id.* at 282 ("These statements [in prior concurring and dissenting opinions which indicate that disparate impact regulations under § 602 are valid] are in considerable tension with [holdings in other cases] that § 601 forbids only intentional discrimination . . . but petitioners have not challenged the regulations here.").

67. *See id.* at 300 (Stevens, J., dissenting) ("Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief; indeed, the plaintiffs in this case (or other similarly situated individuals) presumably retain the option of rechallenging [the policy challenged in *Sandoval*] in a complaint that invokes § 1983 even after today's decision.").

68. *Id.* at 278-79.

provision, and to promote public safety, the Alabama Department of Transportation began administering its driving tests exclusively in English.[69] In 1998, a class action was filed against the Department of Transportation in the United States District Court for the Middle District of Alabama, claiming that the English-only policy violated DOJ Title VI section 602 disparate impact regulations because the policy had the effect of discriminating against non-English speakers on the basis of their national origin.[70]

The district court granted the class a preliminary injunction and ordered the Department of Transportation to accommodate non-English speakers.[71] The Department of Transportation appealed and United States Court of Appeals for the Eleventh Circuit affirmed the injunction.[72] The Supreme Court granted a writ of certiorari to determine if Title VI provides a private right of action to enforce the section 602 disparate impact regulations under which the plaintiffs had filed suit.[73]

Writing for the Court, Justice Scalia held that there was no private right of action under Title VI to enforce section 602 disparate impact regulations, and therefore, the Plaintiffs' claim was to be dismissed.[74] In reaching this conclusion, Justice Scalia took three aspects of Title VI "as given."[75] First, Scalia took for granted that a

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69. *Id.* at 279.

70. *See id.*

71. *Id.* (citing *Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998)).

72. *Id.* (citing *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999)).

73. *Id.* (citing *Alexander v. Sandoval*, 530 U.S. 1305 (2000) for the grant of certiorari and the question presented).

74. *Id.* at 293 ("Neither 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. . . . The judgment of the Court of Appeals [affirming the plaintiffs' preliminary injunction and ordering the defendants to accommodate non-english-speakers] is reversed.").

75. *Id.* at 279 ("Although Title VI has often come to this Court, it is fair to say (indeed, perhaps an understatement) that our opinions have not eliminated all uncertainty regarding its commands. For purposes of the present case, however, it is clear from our decisions,

private right of action exists under section 601 of Title VI for both injunctive relief and damages.[76] Second, Scalia understood section 601 to prohibit only intentional discrimination.[77] Finally, Scalia assumed that section 602 regulations can proscribe activities that cause a disparate impact on protected classes, even if section 601 only prohibits intentional discrimination.[78]

Scalia accepted that private individuals may sue for damages and injunctive relief to enforce section 601.[79] Though not necessary to *Sandoval*'s holding, and never directly reached by the Court previously,[80] the existence of such a right appears beyond question following *Sandoval*. Both the majority and the dissent treated the right of action under section 601 as well established,[81] leaving little doubt that the Court would find a private right of action under section 601 if the question were ever directly presented to it.[82]

Still the existence of a private right of action has no meaning without an understanding of the scope of that right. Justice Scalia's sec-

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from Congress's amendments of Title VI, and from the parties' concessions that three aspects of Title VI must be taken as given.").

76. *Id.*

77. *Id.* at 280.

78. *Id.* at 281.

79. *Id.* at 280.

80. *See id.* at 279-80 (relying on *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979), and stating that the Court has never directly addressed whether section 601 provides a private right of action). The majority cited *Cannon* as finding a private right of action under Title IX of the Education Amendments of 1964 by analogizing to and relying on the existence of a right of action under Title VI, citing no other case for the private right of action under Title VI. *See id.*

81. *See id.* at 280 ("It is thus beyond dispute that private individuals may sue to enforce § 601."); *id.* at 294 (Stevens, J., dissenting) ("[T]his Court has repeatedly and consistently affirmed the right of private individuals to bring civil suits to enforce rights guaranteed by Title VI.").

82. *Id.* at 280 (bolstering its conclusion that Congress intended a private right of action under section 601, the majority noted that a 1986 Amendment to Title VI, 42 U.S.C. § 2000d-7 (2000), abrogated state sovereign immunity against suits brought in federal court to enforce Title VI and provided that remedies at law and at equity would be available).

ond "given," that section 601 only prohibits intentional discrimination, foreclosed a section 601 remedy to plaintiffs who cannot show that a discriminatory intent motivated the actions of defendant recipients.[83] After briefly piecing together the convoluted web of pluralities and concurrences which constitutes the Court's Title VI jurisprudence,[84] Justice Scalia found emphatically that "Title VI itself directly reach[es] only instances of intentional discrimination."[85] This language, and the Court's holding that the plaintiffs had no private right of action under Title VI for disparate impact discrimination, appears to establish that section 601 only proscribes conduct taken because of, not simply in spite of, a racially discriminatory impact.

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83. *See id.* ("Second, it is similarly beyond dispute–and no party disagrees–that § 601 prohibits only intentional discrimination.").

84. *Id.* (citing precedent from a line of cases including *Alexander v. Choate*, 469 U.S. 287 (1985) and *Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

85. *Sandoval,* 532 U.S. at 281 (quoting *Alexander v. Choate*, 469 U.S. 287 (1985)) (internal quotations omitted). In Justice Scalia's attempt to drive home the point that section 601 reaches only intentionally discriminatory conduct, however, he left the door slightly cracked to the possibility of litigation on the issue in the future. Justice Scalia noted that the parties did not dispute that section 601 only reached intentional discrimination. *Id.* at 281 n.1 ("Since the parties do not dispute this point, it is puzzling to see why Justice STEVENS go out of his way to disparage the decisions . . . ."). As this indicated that the issue was never properly presented to the Court, there is some room for the issue to be litigated in the future if one believes Justice Stevens's statement that "[o]ur conclusion that [Title VI] only encompasses intentional discrimination was never the subject of thorough consideration by a court focused on that question." *See id.* at 307 (Stevens, J., dissenting). *But see* Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 642 (1983) (Stevens, J., dissenting) (discussing the Court's Title VI precedent and concluding that, pursuant to it, "proof of invidious purpose is a necessary component of a valid Title VI claim."). It should be noted, however, that limiting Title VI to intentional discrimination was necessary to the Court's holding that no private right of action exists under Title VI disparate impact regulations.

After determining that section 601 of Title VI only prohibits intentional discrimination, the Court made the final assumption that section 602 disparate impact regulations are valid despite section 601's limited scope.[86] Unlike the Court's previous two "givens," however, the majority had no intention of indicating that this assumption was well established or reliable. Immediately after assuming the validity of the regulations, Justice Scalia noted that "no opinion of this Court has held that."[87] Though Scalia did mention that four Justices in *Guardians Association v. Civil Service Commission of the City of New York*[88] had voiced their belief in the validity of section 602 disparate impact regulations, "at least on alternative grounds,"[89] he quickly cautioned that "[t]hese statements are in considerable tension with the rule of *Bakke* and *Guardians* that § 601 forbids only intentional discrimination."[90] In the end, Justice Scalia grounded the assumed validity of the regulations in a stipulation by the Alabama Department of Transportation, not on legal grounds,[91] leaving the issue largely unresolved.[92]

A source of considerable disagreement between the majority and the dissenters in *Sandoval* was the interrelationship between sections 601 and 602. An understanding of this relationship was crucial to

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86. *See Sandoval*, 532 U.S. at 281 ("[W]e must assume for the purposes of deciding this case that regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.").

87. *Id.*

88. 463 U.S. 582, 610-12, 642 (1983).

89. *Sandoval*, 532 U.S. at 281-82.

90. *Id.* at 282.

91. *See id.* (". . . but petitioners have not challenged the regulations here. We therefore assume . . . that
the . . . regulations proscribing activities that have a disparate impact on the basis of race are valid.").

92. Indeed, this assumption can be read simply as a manifestation of judicial restraint. Had the Court ruled on the validity of the regulations, it could have potentially affected any regulations which went beyond the scope of the statute under which they were promulgated. Since the Court held that there was no private right of action, it did not need to determine the validity of the regulations and was able to avoid a weighty issue.

the Court's holding as, under the Court's implied-private-right-of-action jurisprudence, the text and structure of the statute alone determines whether a right of action is to be implied.[93] Justice Stevens's dissent argued that section 602 authorizes federal agencies to give concrete meaning to section 601's "antidiscrimination ideals"[94] and, therefore, the regulations promulgated under section 602 provide enforceable rights as they help to define the singular Title VI right of action.[95] The majority, however, found that section 602 merely implements section 601; relying on a lack of legislative intent to create a right of action under the statute, the majority held that section 602 does not create an independent right of action.[96] Thus, following *Sandoval*, section 602 merely authorizes federal agencies to promulgate regulations implementing section 601.

In his dissent, Justice Stevens suggested a separate avenue which could provide a private right of action to enforce section 602 disparate impact regulations: a claim for deprivation of rights under 42 U.S.C. § 1983.[97] Section 1983 is the general federal statute that pro-

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93. *Sandoval,* 532 U.S. at 286-88 (discussing the Court's implied-right-of-action jurisprudence and concluding "[w]e therefore begin (and find we can end) our search for Congress's intent with the text and structure of Title VI.").

94. *See id.* at 304 (Stevens, J., dissenting) ("Section 601 does not stand in isolation, but rather as part of an integrated remedial scheme. Section 602 exists for the sole purpose of forwarding the antidiscrimination ideals laid out in § 601.").

95. *See id.* at 310 ("If the regulations promulgated pursuant to § 602 are either an authoritative construction of § 601's meaning or prophylactic rules necessary to actualize the goals enunciated in § 601, then it makes no sense to differentiate between private actions to enforce § 601 and private actions to enforce § 602. There is but one private action to enforce Title VI, and we already know such an action exists.").

96. *See id.* at 289 ("Far from displaying congressional intent to create new rights, § 602 limits agencies to "effectuat[ing] rights already created by § 601.").

97. *See id.* at 300 (Stevens, J., dissenting) ("Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief; indeed, the plaintiffs in this case (or other similarly situated individuals) presumably retain the option of rechallenging Alabama's English-only

vides a private right of action against anyone acting "under color of" state authority that deprives any person of "any rights, privileges, or immunities secured by the Constitution or laws."[98] For plaintiffs to enforce section 602 disparate impact regulations under § 1983, those regulations would first, have to be valid and second, create a federal right which § 1983 could enforce. With no guidance from the *Sandoval* majority on either of these issues, the extent to which section 602 disparate impact regulations can be enforced under § 1983 remains an open issue in *Sandoval*'s wake.[99]

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policy in a complaint that invokes § 1983 even after today's decision.").

98. Section 1983 provides in relevant part:

> 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 . . . .

42 U.S.C.A. § 1983 (2003). Though the body of law and commentary surrounding § 1983 is voluminous (its notes take up about two-and-one-half volumes in the United States Code Annotated, *see* 42 U.S.C.A. § 1983), a basic understanding of its text is sufficient for understanding the possible cause of action identified in Justice Stevens's dissent.

99. *See generally* Joseph Ursic, Note, *Finding a Remedy for Environmental Justice: Using 42 U.S.C. § 1983 to Fill in a Title VI Gap*, 52 CASE W. RES. L. REV. 497 (2002) (concluding "[i]t is difficult to definitively say whether the Supreme Court would hold that a private litigant may bring a section 1983 claim on the basis of disparate impact discrimination against a recipient of federal funds under the EPA's implementing regulations promulgated pursuant to section 602."); *but see South Camden III*, 274 F.3d 771 (3d Cir. 2001) (holding that EPA's section 602 disparate impact regulations are not enforceable through § 1983); Save Our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003) (holding that § 1983 prohibits the violation of rights not laws and therefore the plaintiffs could not maintain a private right of action for violation of the United States Department

C. *South Camden*

Perhaps Judge Orlofsky should have waited a week. On April 19, 2001, just five days before the Supreme Court released its opinion in *Sandoval*, he issued a preliminary injunction against NJDEP[100] and SLC, vacated permits issued by the NJDEP to SLC for the GrandChem facility, and remanded the case to NJDEP to make appropriate findings—all in favor of SCCIA, which sued to enforce section 602 disparate impact regulations.[101] The afternoon that *Sandoval* was released, Judge Orlofsky held a telephone conference during which the parties agreed to brief two issues in light of *Sandoval*: (1) whether SCCIA was entitled to a preliminary injunction under section 601 of Title VI based on intentional discrimination and, (2) whether SCCIA's preliminary injunction based on disparate impact could be justified through a 42 U.S.C. § 1983 claim.[102] On May 10, Judge Orlofsky released an opinion holding that SCCIA could maintain its cause of action under § 1983 and issued an order that both maintained the original injunction and denied an SLC motion to stay the injunction pending appeal.[103]

To bring a claim under § 1983, SCCIA had to show, as a preliminary matter, that it has sued a "person" for § 1983 purposes and that,

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of Transportation's Title VI disparate impact regulations as such regulations create laws to be complied with by recipients, not rights protecting people affected by those recipients).

100. NJDEP receives EPA funding and, thus, must comply with the regulations. ENVIRONMENTAL PROTECTION AGENCY, *Grants Information and Control System*, *supra* note 34 (listing NJDEP as a recipient of EPA grant money); *see also South Camden I.*, 145 F. Supp. 2d 446, 450 (D.N.J. 2001) ("The NJDEP receives federal funding and is thus obliged to conform its operations to the restrictions imposed by Title VI and the regulations which have been promulgated to implement Title VI.").

101. *South Camden I,* 145 F. Supp. at 446. For the facts, as alleged, in *South Camden I*, see *supra* Part II.A.

102. *South Camden II*, 145 F. Supp. 2d 505, 509 (D.N.J. 2001).

103. *Id.* at 509. Because Judge Orlofsky concluded that SCCIA was entitled to preliminary injunctive relief for the § 1983 disparate impact claim, he withheld judgment on the issue of whether SCCIA was entitled to that relief based on their alternative section 601 intentional discrimination claim. *Id.* at 509 n.2.

"under color of state law," that person deprived SCCIA of "rights, privileges, or immunities secured by the Constitution and laws."[104] Though states are not "persons" under § 1983,[105] state officials sued for injunctive relief in their official capacity qualify.[106] Accordingly, Judge Orlofsky determined that the NJDEP commissioner, whom SCCIA had sued for injunctive relief, was a "person" for § 1983 purposes; SCCIA's claim passed the initial hurdle.[107]

SCCIA next had to show that Title VI, section 602 disparate impact regulations provide a "right," the deprivation of which would open the commissioner to § 1983 liability.[108] Judge Orlofsky explored whether the EPA section 602 disparate impact regulations under which SCCIA had sued in fact created such a right by applying the *Blessing v. Freestone*[109] three-step analysis.[110]

Under the *Blessing* test, a rebuttable presumption is created in favor of the right asserted where the plaintiff shows that (1) Congress intended the provision in question to benefit the plaintiff, (2) the right asserted is not "so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) the "statute unambigu-

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104. *Id.* at 525 ("Section 1983 limits liability to any person who, under the color of state law, subjects any citizen of the United States to a deprivation of any rights, privileges, or immunities, secured by the Constitution and laws.").

105. Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989); *accord South Camden II*, 145 F. Supp. 2d at 525 (quoting *Will*).

106. *Will*, 491 U.S. at 71 n.10 (noting that state officials sued for injunctive relief are "persons" under § 1983 because "official-capacity actions for injunctive relief are not treated as actions against the state."); *accord South Camden II*, 145 F. Supp. 2d at 525 (quoting *Will*).

107. *See South Camden II*, 145 F. Supp. 2d at 525 ("Under the Supreme Court's holding in *Will*, it is clear that the Plaintiffs' claim against Commissioner Shinn, for prospective injunctive relief, falls within the ambit of § 1983.").

108. *See Id.* at 526.

109. 520 U.S. 329 (1997).

110. *See South Camden II*, 145 F. Supp. 2d. at 529 ("The inquiry I must now under take is whether the EPA's Title VI implementing regulations, codified at 40 C.F.R. § 7.1 *et seq.*, create rights enforceable under § 1983").

ously impos[es] a binding obligation on the States."[111] If the plaintiff satisfies these steps, the presumption of the existence of an enforceable right can be rebutted only by a showing that "Congress specifically foreclosed a remedy under § 1983."[112] In finding that EPA's section 602 disparate impact regulations create an enforceable right, Judge Orlofsky first determined that this analysis applies to regulations as well as statutes[113] and then that the EPA's section 602 disparate impact regulations passed the *Blessing* test.[114]

On appeal, the Third Circuit reversed.[115] In holding that the regulations did not create a federal right, the Third Circuit greatly limited the availability of § 1983 claims to enforce regulations which are not enforceable through the statute pursuant to which they were promulgated:

> The Supreme Court's primary concern in considering enforceability of federal claims under section 1983 has been to ensure that Congress intended to create the federal right being advanced. Accordingly, we hold that *a federal regulation alone may not create a right enforceable through section 1983* not already found in the enforcing statute. Similarly, we reject the argument that enforceable rights may be found in any valid administrative implementation of a statute that in itself creates some enforceable rights.[116]

Thus, in the Third Circuit,[117] § 1983 cannot be used by plaintiffs, as Justice Steven's dissent in *Sandoval* had argued,[118] and SCCIA

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111. *Blessing*, 520 U.S. at 340-41 (internal quotations omitted); *accord South Camden II*, 145 F. Supp. 2d at 519 (quoting *Blessing*).

112. *Id.* at 341; *accord South Camden II*, 145 F. Supp. 2d at 519 (quoting *Blessing*).

113. *South Camden II*, 145 F. Supp. 2d at 526-29 (concluding "that valid federal regulations which have the 'force and effect of law,' may create rights under § 1983.").

114. *See id.* at 529-46 (examining the history of section 602 disparate impact regulations, applying the *Blessing* test to the EPA's section 602 disparate impact regulations and concluding that the regulations create a right enforceable under § 1983).

115. *South Camden III*, 274 F.3d 771 (3d Cir. 2001).

116. *Id.* at 790 (emphasis added; citations omitted).

117. The Supreme Court subsequently denied a writ of certiorari, *see* South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.,

was left without any cause of action to enforce the disparate impact regulations.[119]

Unwilling to concede its claim, SCCIA amended its complaint again. SCCIA now claimed: (1) NJDEP issued the permits to SLC with a discriminatory intent in violation of section 601 of Title VI; (2) the discriminatory impact of the proposed plant violated the Fair Housing Act;[120] and, (3) SLC's proposed site constituted both a public and a private nuisance.[121] In addition, SCCIA claimed a violation of the Equal Protection Clause of the Fourteenth Amendment[122] and based on the Equal Protection claim, a violation of § 1983.[123]

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536 U.S. 939 (2002), and the Ninth Circuit has come to the same conclusion, *see* Save Our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003) (holding that § 1983 provides no private right of action for a violation of the United States Department of Transportation's Title VI section 602 disparate impact regulations).

118. *See* Alexander v. Sandoval, 532 U.S. 275 at 300 (2001) (Stevens, J., dissenting) ("Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief . . . .").

119. Indeed, the Third Circuit recognized the importance of its decision to both the plaintiffs and to other activists. *See South Camden III*, 274 F.3d at 790 ("We emphasize that the implications of this case are enormous and obviously, as the appearance of the many amici curiae attests, have not been lost on interested parties.").

120. 42 U.S.C. §§ 3601-19 (2000). The Federal Fair Housing Act was passed as Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81.

121. *South Camden IV*, 254 F. Supp. 2d 486, 489 (D.N.J. 2003). The nuisance claims were only directed against SLC. *Id.*

122. U.S. CONST. amend. XIV, § 1, cl. 3 ("No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

123. *South Camden IV*, 254 F. Supp. 2d at 494-95. For a discussion of § 1983, see *supra* Part III.B. SCCIA's second amended complaint also included claims based on the EPA's disparate impact regulations through both section 602 of Title VI and § 1983 but, pursuant to *Sandoval* and *South Camden III*, SCCIA conceded that they should be dismissed. *Id.* at 492.

To support the section 601 discriminatory intent claim, SCCIA made thirteen specific allegations.[124] Among these allegations, SCCIA asserted: (1) the NJDEP relied exclusively on environmental emission standards in making its permit decision to avoid the known racial disparate impact of the site; (2) NJDEP knew that it was in violation of EPA's Title VI disparate impact regulations when it approved the site;[125] and, (3) NJDEP "engaged in a statewide pattern and practice of granting permits to polluting facilities" in locations where those facilities disparately impacted minorities.[126] SCCIA essentially claimed that NJDEP's knowledge of the site's discriminatory impact on racial minorities, combined with its history of permitting sites with a discriminatory impact on minorities, was probative of a discriminatory intent.

The defendants filed motions to dismiss all claims pursuant to Federal Rule of Civil Procedure 12(b)(6).[127] Under Rule 12(b)(6), a claim should be dismissed where "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[128] Relying on this "beyond a doubt" standard, Judge Orlofsky allowed the plaintiffs to proceed on their section 601 intentional discrimination, Equal Protection, § 1983, and

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124. *Id.* at 493 n.4.

125. SCCIA did not indicate whether they were alleging that NJDEP knowingly violated intentional discrimination or disparate impact regulations. It should be noted that, in spite of the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), NJDEP would still have had to comply with the disparate impact regulations, as well as the intentional discrimination regulations. In holding that private individuals could not sue to enforce Title VI disparate impact regulations, the Supreme Court expressly assumed that such regulations were valid and, thus, would have applied to NJDEP. *See* 532 U.S. at 282 (assuming that Title VI section 602 disparate impact regulations are valid even if Title VI section 601 only proscribes actions taken with a discriminatory intent). For a discussion of *Sandoval*, see *supra* Part III.B.

126. *South Camden IV*, 254 F. Supp. 2d at 493 n.4.

127. *Id.* at 492.

128. *Id* at 493 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957) and Mruz v. Caring, Inc., 39 F. Supp. 2d 495 (D.N.J. 1999) (Orlofsky, J.)).

private nuisance claims.[129] The Fair Housing Act and public nuisance claims, however, were dismissed.[130]

In allowing the intentional discrimination claims to go forward, Judge Orlofsky made clear that his decision was not based on the merits of the case, and that whether the plaintiffs could bring forth enough evidence to both survive a motion for summary judgment and prevail at trial remained to be seen.[131] At the time of this writing, it still does.

IV. ASSESSING TITLE VI AS A REMEDY FOR ENVIRONMENTAL JUSTICE

What does all of this mean to the environmental justice movement? A close examination of Title VI remedies post-*Sandoval* reveals that under the right circumstances, Title VI can provide environmental justice advocates with an effective remedy. In other circumstances, however, Title VI remedies may not be available to achieve "environmental justice" or the costs of pursuing Title VI remedies may be greater than the expected rewards. As such, environmental justice attorneys should examine the appropriateness of

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129. *Id.* at 508; *see also id.* at 499 (relying on the "beyond a doubt" standard in denying the defendants' motions to dismiss the section 601 intentional discrimination, Equal Protection, and § 1983 claims).

130. *Id.* at 508. Judge Orlofsky also dismissed two claims based directly on the section 602 disparate impact regulations: one that sought to enforce the regulations though section 602 and another that sought to enforce them through § 1983. *Id.* As the Supreme Court and the Third circuit, respectively, had held that these rights of action do not exist, the plaintiffs conceded that the court should properly dismiss those claims. *Id.* at 492 ("In light of the Supreme Court's holding in *Sandoval* and the Third Circuit's recent holding in this case the SCCIA Plaintiffs concede that their claims of disparate impact in violation of the EPA's implementing regulations under § 602 of Title VI and § 1983 should be dismissed.").

131. *See id.* at 499 ("[I]t is inappropriate at this stage of these proceedings to argue the merits of the case . . . . If the NJDEP Defendants acted within the parameters of the law in issuing the air permits to SLC . . . they will have the opportunity to present supporting evidence to this Court in a motion for summary judgment, or ultimately at trial.").

bringing a Title VI claim on an *ad hoc* basis with reference to the desires and needs of the community in question.

What follows is an attempt to facilitate this decision-making process by outlining the factors which affect the appropriateness of a Title VI claim in a given circumstance, both on its own terms and in relation to other possible courses of action. This discussion is not intended to recommend what action is appropriate in a given circumstance, but rather to point out some aspects of Title VI action that environmental justice attorneys may want to consider in deciding whether to pursue remedies under the statute.

A. *Title VI on its Own Terms*

Judge Orlofsky's ruling that SCCIA could proceed with its section 601 intentional discrimination claim is certainly a victory for the environmental justice movement. Though post-*Sandoval* there is no real question that section 601 provides a private right of action for intentional discrimination claims,[132] SCCIA's ability to state that claim without alleging any overt manifestation of racial discrimination demonstrates that the evidentiary bar for such a claim may not be unattainably high.[133] Thus, extreme circumstances alone, such as those in Waterfront South, may have enough probative value to prove the discriminatory intent necessary to win a section 601 claim and attorneys representing similarly-situated communities may be able to use an such a claim to stop LULU sitings.

Still, environmental justice attorneys should be cautious in their enthusiasm as SCCIA's survival of the motion to dismiss may yet prove a Pyrrhic victory Given the high evidentiary burden of showing a discriminatory intent and the lack of allegations of overt racism, Judge Orlofsky's denial of the motion to dismiss the section 601 claim may have simply postponed an inevitable victory by NJDEP and SLC. A district court considering a Rule 12(b)(6) mo-

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132. *See* Alexander v. Sandoval, 532 U.S. 275, 279-80 (2001) (taking "as given" that Title VI section 601 provides a private right of action and briefly explaining the basis for this conclusion). For a discussion of the Court's treatment of this right in *Sandoval*, see *supra* Part III.B.

133. *See South Camden IV*, 254 F. Supp. 2d at 493 n.4 (listing the thirteen specific allegations in SCCIA's second amended complaint).

tion to dismiss accepts all allegations in the complaint as true.[134] SCCIA must now produce enough evidence both to survive a motion for summary judgment by the defendants and to prevail at trial.

The Supreme Court has foreclosed any direct remedy under Title VI for unintentional discrimination[135] and the Third and Ninth Circuits have found that § 1983 creates no remedy to enforce disparate impact regulations.[136] Therefore, Environmental justice advocates should be somewhat cautious about relying on Title VI for a cause of action without a "smoking gun" showing intentional racism on the part of a recipient of EPA funds. *Alleging* that the issuing of permits shows a discriminatory intent is one thing, *proving* it is quite another and the inability to do so could prove fatal to many Title VI plaintiffs.

The potential costs of bringing a losing legal claim, under Title VI or otherwise, could be great. First, the opportunity costs of litigation can be enormous. Unempowered communities, by definition, lack the financial, legal, and political resources of their more affluent counterparts. Time and money "wasted" on a losing legal claim is time and money which cannot be devoted to other activities calculated to oppose the siting of a LULU, such as social and political activism.

Moreover, losing a legal battle could be devastating to a community's morale. Lawyers are taught in law school to realistically assess the effectiveness of legal claims and quickly learn that there are very few sure answers in law. Lay persons, on the other hand, may be more inclined to place all of their hopes on a legal claim, perhaps

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134. *Id.* at 493.

135. *See Sandoval*, 532 U.S. at 280 ("it is . . . beyond dispute that § 601 prohibits only intentional discrimination."); *id.* at 293 ("Neither 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.").

136. *See South Camden III*, 274 F.3d 771, 790-91 (3rd Cir. 2001) (holding that section 602 disparate impact regulations cannot be enforced though 42 U.S.C. § 1983 (2000)); Save Our Valley v. Sound Transit, 335 F.3d 932 (9th Cir. 2003) (holding that § 1983 provides no private right of action for a violation of the United States Department of Transportation's Title VI section 602 disparate impact regulations).

because lay persons are more likely to focus on the equitable merits of their claims rather than the legal merits.[137] A loss in court could then destroy community morale and undermine other efforts to fight the siting of the present LULU, or even future LULUs. As one environmental justice attorney noted: in communities, "[t]here is a reliance on legal action, and no matter how much the lawyer says 'don't count on it,' they count on it."[138] Thus, environmental justice attorneys should seriously assess the facts surrounding the siting and permitting of the LULU they intend to fight and whether they give rise to a winnable claim of intentional discrimination before settling on a Title VI cause of action.

Of course, the potential costs of bringing a claim under section 601, or those associated with pursuing any other legal course of action, do not necessarily make bringing such a claim a bad idea. In fact, any course of action will have its uncertainty and its costs, and choosing no action is not normally a satisfactory answer. The key for environmental justice attorneys in deciding whether to bring a section 601 claim is making informed decisions and appropriate recommendations that take into account a wide variety of factors and information.

When environmental justice attorneys decide to bring a Title VI claim, they should not forget the side effects of legal action. A Title VI claim can give environmental justice groups bargaining power, even where the outcome of a section 601 claim may be uncertain. The existence of a viable claim can create opportunities for settlement where such settlements might achieve a mutually beneficial result. Moral, ethical,[139] and legal[140] concerns counsel against bring-

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137. Indeed, by thinking more in terms of "justice" than in terms of law, community groups may fail to understand how a court could possibly deny them relief, and should their claim fail in court, lose faith in the legal system as a whole.

138. *See* COLE & FOSTER, *supra* note 22, at 47 (quoting Philadelphia public interest lawyer Jerome Balter).

139. *See* MODEL RULES OF PROF'L CONDUCT Preamble: A Lawyer's Responsibility [5] ("A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others.").

140. *See, e.g.,* Fed.R.Civ.P. 11(b) (providing that "by presenting to the court . . . a pleading, written motion, or other paper, an attorney . . . is certifying that . . . (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless

ing a claim solely for the purpose of achieving a bargaining position, but this does not preclude the use of that power when legitimately gained.[141] While developers may never agree to scrap a proposed LULU, bargaining can create opportunities for community groups to gain rights of access and inspection, stricter emissions standards, the construction of alternative routes (so that in the case of Waterfront South, the additional truck traffic could be diverted around the community), or even an agreement from the company to "buy out" owners of adversely affected property.

Additionally, by providing access to a judicial forum, section 601 remedies may prove extremely effective at giving members of poor or minority communities something they may covet greatly: a medium for expression. The ability to be heard and understood can be extremely valuable, especially to people who feel they have been ignored by the system. A section 601 claim may allow a poor or minority community its "day in court.".[142]

Determining that Title VI may be useful in achieving "environmental justice" in some communities cannot end the analysis. The statute's effectiveness for the national movement, must be examined for inherent weaknesses which limit its ability to achieve "environmental justice" for all marginalized communities in the United

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increase in the costs of litigation . . .); Fed.R.Civ.P. 11(c) ("If . . . the court determines that subdivision (b) has been violated the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b).").

141. *See generally* Janet V. Siegel, *Negotiating for Environmental Justice: Turning Polluters into "Good Neighbors" Through Collaborative Bargaining*, 10 N.Y.U. ENVTL. L.J. 147, 171-72 (2002) (suggesting that environmental justice groups use bargaining power to force polluters to enter into legally binding "good neighbor" agreements).

142. *See* RICHARD L. MARCUS & EDWARD F. SHERMAN, COMPLEX LITIGATION 17 (3rd. ed. 1998) ("[I]t appears that being able to exercise control over the handling of the proceeding has substantial value to litigants even when the outcome is unsatisfactory to them. In short, people value having their own day in court."). In addition, litigation may give rise to an opportunity for alternative dispute resolution, such as mediation, which focuses on interests rather than rights and allows community members to express their views and concerns.

States. A careful examination reveals that two aspects of Title VI render its remedies ultimately insufficient (though not necessarily ineffective) for fully achieving the goals of the environmental justice movement.[143] First, because Title VI only addresses discrimination based on "race, color, or national origin,"[144] the statute offers no remedy to communities which cannot make a *prima facia* showing of a disproportionate demographic make-up, as compared to other communities. Second, since section 601 only prohibits *intentional* discrimination,[145] and post-*Sandoval*, it appears unlikely that section 602 regulations are privately enforceable,[146] Title VI remedies are

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143. This Note defines the goal of the environmental justice movement as preventing the disproportionate impact of locally undesirable land uses on communities which are under-represented and therefore marginalized, either politically, socially, or financially. For an explanation of the appropriateness of this definition, as well as its utility and limits, see *supra* Part II.B.

144. 42 U.S.C. § 2000d (2000).

145. Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (taking "as given" that section 601 of Title VI only addresses intentional discrimination). It should be remembered that, though the EPA's disparate impact regulations are technically valid at this time, *id.* at 281, private actors cannot enforce them, *id.* at 293.

146. Although Justice Stevens's dissent in *Sandoval* indicated that § 1983 could provide a vehicle to enforce section 602 disparate impact regulations, *Sandoval*, 532 U.S. at 300 (Stevens, J., dissenting), the Third and Ninth circuits have held that the regulations create no private rights which § 1983 can protect, *see Save Our Valley v. Sound Transit*, 335 F.3d 932, 939 (9th Cir. 2003) (holding that § 1983 prohibits the violation of rights not laws and therefore the plaintiffs could not maintain a private right of action for violation of the United States Department of Transportation's Title VI disparate impact regulations as such regulations create laws to be complied with by recipients, not rights protecting people affected by those recipients); *South Camden III*, 274 F.3d 771, 790 (3d Cir. 2001) (holding that the regulations did not create a federal right which § 1983 could enforce). In any event, the Supreme Court's analysis in *Sandoval*, discussed in Part III.B, *supra*, casts doubt on whether Title VI disparate impact regulations are even valid, *see Sandoval*, 532 U.S. at 281 (assuming that Title VI disparate impact regulations are valid even if Title VI only prohibits intentional discrimination but

apparently unavailable to marginal communities which cannot show that racial or ethnic discrimination drove the actions of a Title VI recipient in choosing or approving the site.

Title VI prohibits racial and ethnic discrimination and its remedies, by definition, are unavailable to communities which cannot show a disproportionate demographic make-up based on either "race, color, or national origin."[147] This *prima facia* requirement limits Title VI's effectiveness in achieving "environmental justice" nationally for essentially three reasons.

First, the remedy is essentially foreclosed to poor white communities that do not have a national origin identity, meaning that, relying solely on Title VI, the movement could never protect all unempowered communities. In fact, if transaction costs, not a racially discriminatory motive, have led to the problem identified by the environmental justice movement, focusing exclusively on Title VI remedies could have the undesirable effect of making poor, white communities even *more* attractive sites for LULUs.[148] In any event, the very language of section 601, Title VI's general provision, renders the statute an insufficient remedy to achieve "environmental justice" for all.

Second, changes in state law may make it difficult to show that a community is, in fact, disproportionately minority as compared to the surrounding area. The same day that California voters elected Arnold Schwarzenegger in the well-publicized recall election, they defeated a ballot initiative which would have, unless federally pre-

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cautioning that "considerable tension" exists between that assumption and the Court's precedent), indicating that the § 1983 discussion may be a moot point anyhow.

147. *See, e.g., South Camden IV*, 254 F. Supp. 2d 486, 493 n.4 (D.N.J. 2003) (listing among the specific allegations made by SCCIA: "a. The [NJ]DEP and Commissioner Shinn [now Campbell] knew that the residents of Waterfront South and the surrounding neighborhoods were predominately African-American and Hispanic.").

148. This is because the increased use of Title VI remedies by environmental justice advocates would likely increase the transaction costs associated with siting and permitting a LULU in a minority community while not affecting the transaction costs in poor, white communities, thus making sites in those communities more attractive to developers.

empted, severely undercut any Title VI claims.[149] Termed the "Racial Privacy Initiative," the measure sought to amend the California Constitution[150] to prohibit the State from classifying "any individual by race, ethnicity, color, or national origin in the operation of public education, public contracting, or public employment."[151]

To be sure, the Initiative contained a provision that allowed for Federal preemption.[152] Still, its existence would surely hamper the ability of community groups to bring Title VI claims, unless and until a court determined that the Initiative conflicted with Title VI and that such data must be kept. Though the Initiative was defeated and is not a barrier to Title VI claims at present, its sponsor, Ward Connerly, has indicated he will attempt to reintroduce the Initiative in the future.[153] As such, environmental justice attorneys and organizers considering Title VI action should pay attention to how this issue plays out in California, as well as whether "racial privacy" is proposed elsewhere.

Third, the destructiveness and divisiveness of race, especially in the United States, should give environmental justice attorneys some

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149. *See Commentary: Losing Proposition Series: Seiler*, ORANGE CO. REGISTER, Oct. 9, 2003, *available at* 2003 WL 7012055 (discussing the defeat of Proposition 54, the Racial Privacy Initiative).

150. The Initiative was proposed to be added as section 32 of Article I of the California Constitution and is available at http://www.racialprivacy.org/content/language.php (last visited Feb. 24, 2004).

151. Racial Privacy Initiative § 32(a).

152. Racial Privacy Initiative § 32(m) ("This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.").

153. Tanya Schevitz, *Prop. 54 Defeated Soundly: State Initiative on Racial Privacy Raised Issues about Health, Education*, S.F. CHRON., Oct. 8, 2003, at A.12 *available at* 2003 WL 3764977 ("[Ward] Connerly has said he will make another go at a racial privacy initiative. He plans to reintroduce it in a couple of years after reworking what he called 'flawed' and confusing language. He will turn to opponents in the medical community for help in crafting language to ensure it would protect health care.").

pause before employing Title VI, or any other race-based remedy, to achieve its goals. Focusing on race may limit the scope of discussion and planning and distort the goals of the environmental justice movement. White members of a community relying on Title VI may feel, or actually be, marginalized, undercutting support in an already fractured community.

Similarly, the emotional charge associated with claims of bigotry and discrimination may foreclose otherwise potentially fruitful negotiations between community leaders and corporate or government officials. Members of the community may be unwilling to seek agreement with those whom they see as racial oppressors, and corporate or government officials may be extremely offended by the allegations and become similarly intransigent. In sum, the racial component of Title VI claims, if too central to a citizens' group's activities, can actually *reduce* the group's effectiveness either by marginalizing support or by creating a combative environment that encourages competing factions to entrench themselves within their respective positions.

Additionally, Title VI is an insufficient remedy for achieving "environmental justice" nationally because the statute only prohibits intentional discrimination. Environmental injustice, as defined in this Note,[154] goes to the *effect* of a LULU on a marginalized community, not the mental state of those that chose to site it there. Because of this, relying solely on Title VI excludes (at least in theory) communities affected by LULUs not sited or permitted with a discriminatory purpose in mind and shifts the focus of the environmental justice movement from helping disadvantaged communities maintain a clean living environment to punishing "evildoers" who seek out minorities. Thus, Title VI remedies not only exclude marginalized communities which have been impacted by LULUs sited without discriminatory intent, but also transform the role of the environmental justice attorney from protector of the feeble to prosecutor of the malevolent, to the possible detriment of injured communities and the environmental justice movement as a whole.

B. *Title VI in a Broader Context*

Title VI does not exist in a vacuum; alternative courses of action must be examined to determine what role its remedies can effec-

154. *See supra* Part II.B.

tively play as part of a broader plan for "environmental justice." Events in *South Camden*[155] have been quite instructive on this point. Environmental justice attorneys and commentators watching the legal events unfold in *South Camden*[156] should be sure not to overlook the overall strategy employed by SCCIA's attorneys, who have been exemplary in their tenacity and ingenuity. In spite of a Supreme Court decision which nullified their first preliminary injunction and a Third Circuit decision which directly reversed their second, the attorneys continued to test the viability of Title VI remedies[157] while adding other legal theories of recovery. In its second amended complaint, SCCIA brought not only a claim of intentional discrimination under section 601, but also claims of private and public nuisance[158] and violations of the Federal Fair Housing Act.[159]

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155. *South Camden IV*, 254 F. Supp. 2d 486 (D.N.J 2003); *South Camden III*, 274 F.3d 771 (3d Cir. 2001); *South Camden II*, 145 F. Supp. 2d 505 (D.N.J. 2001); *South Camden I*, 145 F. Supp. 2d 446 (D.N.J. 2001).

156. *See* cases cited in note 155.

157. This time in the form of a section 601 intentional discrimination claim.

158. For Judge Orlofsky's decision concerning SCCIA's private nuisance claim, *see South Camden IV*, 254 F. Supp. 2d at 503-506 (denying SLC's motion to dismiss SCCIA's private nuisance claim because SCCIA (1) was not required under New Jersey law to show that SLC's facility was in violation of applicable regulations or laws concerning environmental emissions to state a claim of private nuisance and (2) had alleged the requisite private harm). For Judge Orlofsky's decision concerning SCCIA's public nuisance claim, *see id.* at 506-508 (granting the motion to dismiss SCCIA's public nuisance claim because SCCIA did not allege that the activities of SLC were not "fully regulated," a prerequisite to a public nuisance claim under New Jersey law unless the activity is in violation of regulations).

159. *Id.* at 508. The Federal Fair Housing Act was passed as Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81, and is codified at 42 U.S.C. §§ 3601-3619 (2000). For Judge Orlofsky's decision concerning SCCIA's Federal Fair Housing Act claim, *see South Camden IV*, 254 F. Supp. 2d at 499-503 (concluding that NJDEP does not provide housing services as contemplated by the Fair Housing Act and, therefore, cannot be sued under the Act's provisions).

Given the uncertainty surrounding Title VI remedies at present, as well as the general uncertainty associated with legal action, SCCIA's attorneys' example of buttressing a claim by employing multiple causes of action provides a helpful blueprint for other environmental justice attorneys. Of course, the causes of action listed in SCCIA's second amended complaint do not exhaust the legal remedies potentially available to environmental justice attorneys. At least one commentator has suggested using the Takings Clause of the Fifth Amendment[160] and similar state provisions to achieve "environmental justice."[161] There is always potential for innovative attorneys to adapt other legal doctrines to the needs and goals of the environmental justice movement or the particular communities they are trying to protect.[162] By considering several different claims, environmental justice activists can avoid having to rely upon Title VI remedies, especially in cases where a race-neutral remedy may be more appropriate.[163]

This does not mean, however, that environmental justice attorneys should simply bring any claim they can imagine. Strategic, moral,

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160. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

161. *See generally* Sandra L. Geiger, Note, *An Alternative Legal Tool for Pursuing Environmental Justice: The Takings Clause*, 31 COLUM. J.L. & SOC. PROBS. 201 (1998) (examining the Takings Clause of the Fifth Amendment as a remedy for environmental justice).

162. *See, e.g.*, Rachel Paras, Note, *Relief at the End of a Winding Road: Using the Third Party Beneficiary Rule and Alternative Avenues to Achieve Environmental Justice*, 77 ST. JOHN'S L. REV. 157 (2003) (suggesting that environmental justice attorneys may be able to bring claims as third party beneficiaries to spending contracts between the federal government and state regulatory agencies and, thereby, sue to enforce EPA's Title VI disparate impact regulations and mentioning other possible civil and criminal remedies available); Siegel, *supra* note 141 (suggesting that environmental justice groups use the bargaining power gained through litigation and administrative process to force polluters to enter into legally binding "good neighbor" agreements).

163. For a discussion of the potential dangers of relying on a race-based claim, see *supra* Part IV.A.

ethical,[164] legal,[165] and financial concerns all counsel against bringing frivolous or otherwise dubious claims. Rather than simply looking for colorable claims or testing new legal theories in an almost academic pursuit, environmental justice attorneys should assess all potential legal claims with respect to the costs associated with bringing them (financial, temporal, and opportunity), their likelihood of success, and the reward attained should they succeed (that is, whether the remedy allows for damages, equitable relief, or both).

Action under section 601 of Title VI offers the full range of remedies, both equitable and legal,[166] but winning a section 601 claim requires proof of intentional discrimination based on "race, color, or national origin." Thus, winning on the merits can be a difficult and expensive proposition and a section 601 claim is unavailable to non-minority communities. In deciding whether to bring a Title VI claim, these factors must be weighed against similar factors pertaining to other causes of action (especially where strategic or economic issues make bringing both claims mutually exclusive).

For example, the only remedy available under the Takings Clause is monetary relief in the form of "just compensation" for the property "taken" by government action.[167] As such, a Takings claim,

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164. *See* MODEL RULES OF PROF'L CONDUCT Preamble: A Lawyer's Responsibility [4] ("A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others.").

165. *See, e.g.,* Fed. R. Civ. P. 11(b) (providing that "by presenting to the court . . . a pleading, written motion, or other paper, an attorney . . . is certifying that . . . (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the costs of litigation; (2) the claims . . . are warranted by existing law or by nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (2) the allegations . . . have evidentiary support . . . ."); Fed. R. Civ. P. 11(c) ("If . . . the court determines that subdivision (b) has been violated the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b)").

166. *See* Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (concluding that section 601 provides both equitable and legal relief to be "beyond dispute").

167. The final clause of the Fifth Amendment provides "nor shall private property be taken for public use, without just compensation."

unlike a section 601 claim, cannot enjoin a LULU unless the government actor refuses to compensate the plaintiff. Still, a Takings claim only requires the plaintiff to prove that an injury was caused by a government `"taking," rendering irrelevant issues of race or motive. Because of this, a Takings claim will sometimes be more attractive than a section 601 claim, despite the limited relief available.

Focusing solely on legal remedies to accomplish the goals of the environmental justice movement may itself be a strategic mistake. Activists concerned with legal action may ignore the political and economic aspects of environmental justice struggles.[168] According to Professors Luke W. Cole and Sheila R. Foster, because "environmental justice struggles are at the heart of political economic strug-

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U.S. CONST. amend. V. Implicitly, then, the government (state or federal) is empowered to "take" private property "for public use." *See id.* All that the Takings Clause requires is that the government pays the injured party "just compensation" in return. *See id.* The government, however, can choose whether to compensate for a "permanent taking" or to desist whatever activity has effected a "taking" and avoid liability for a "permanent taking." *See Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1030 n.17 (1992) ("Of course, the state may rescind and thereby avoid having to pay compensation for a permanent deprivation."); *see also id.* ("But 'where the [regulation has] already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.'"); *First English Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987) ("Once a court determines that a taking has occurred, the government retains the whole range of options already available . . . ."); *id.* ("[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.").

168. *See* COLE & FOSTER, *supra* note 22, at 121-22 ("Litigation can be inappropriate for, or unavailable to, communities struggling for environmental justice. Because environmental justice struggles are political and economic struggles, legal responses have fallen woefully short of aiding communities and in some cases have hurt their struggles.").

gles, a legal response is often inappropriate or unavailable. In fact, bringing a lawsuit may ensure certain loss of the struggle at hand or cause significant disempowerment of community residents."[169] Thus, bringing a claim under Title VI may sometimes be inappropriate, not because Title VI is not the appropriate cause of action, but because legal action itself is inappropriate.

Cole and Foster state that for some environmental justice advocates the goal of "building viable community organizations and regional networks" predominates over "winning any particular environmental battle."[170] If coalition and network building is the proper goal for activists, environmental justice attorneys should turn their focus away from legal remedies, such as Title VI, and look for other ways to assist community activism. In addition to the analytical skills attorneys can bring to the coalition-building process, their legal expertise can be invaluable in protecting the political and free speech rights of activists, facilitating the community action process.

The key to the success of the environmental justice attorney, it would seem, is integrative "outside the box" thinking which can help determine which of the full range of available remedies, including those available under Title VI, are appropriate for assisting the individual communities they represent demand equal protection from environmental hazards.

V. CONCLUSION

Title VI of the Civil Rights Act of 1964 is presently an uncertain and shrinking remedy for achieving environmental justice. The only cause of action available under the statute is through section 601, which only prohibits intentional discrimination. Further, disparate impact regulations promulgated under section 602 may not even be valid, and even if they are valid, they are likely not enforceable through § 1983, despite Justice Stevens's optimism in his *Sandoval* dissent. Thus, a community group looking to enjoin an EPA recipient from siting or permitting a LULU must prove that the recipient's actions were motivated by the intent to discriminate against that community on the basis of "race, color, or national origin," hardly a delightful prospect for environmental justice attorneys.

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169. COLE & FOSTER, *supra* note 21, at 129.
170. *Id.* at 132.

In its present state, the law concerning the private right of action available under Title VI is uncertain and not encouraging for environmental justice activists and attorneys. Perhaps in time, proceedings in *South Camden*[171] or elsewhere will answer the questions surrounding Title VI and allow environmental justice attorneys to more easily evaluate whether they should bring a claim under section 601 (or, should the Supreme Court or other circuits disagree with the Third and Ninth Circuits, a claim to enforce section 602 disparate impact regulations under § 1983). In the interim, it is critical to the success of the environmental justice movement that its activists and attorneys recognize the potential benefits, costs, limitations, and uncertainty associated with Title VI claims and use Title VI and other remedies appropriately to fulfill the needs of a given community. Title VI is not now, nor will it ever be, a "magic bullet" for environmental justice attorneys, but if used properly, it can be an important part of their arsenal.

171. *South Camden IV*, 254 F. Supp. 2d 486 (D.N.J 2003); *South Camden III*, 274 F.3d 771 (3d Cir. 2001); *South Camden II*, 145 F. Supp. 2d 505 (D.N.J. 2001); *South Camden I*, 145 F. Supp. 2d 446 (D.N.J. 2001).