DISPARATE IMPACT REGULATIONS AND SECTION 1983 IN THE COURTS: THE WORDS ARE OF DEFERENCE, THE ACTIONS OF DISPARAGEMENT

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ABSTRACT

Who will protect minority residents suffering from disparate legal and environmental treatment? Minority citizens have historically been able to enforce their constitutional rights against discriminatory industrial placement through a private right of action under 42 U.S.C. §2000d-1. The Supreme Court decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), however, eliminated that private right of action as the Court determined that Congress never intended to create a privately enforceable remedy. Minority residents are now stuck with a class of regulation that is "authorized but not enforceable," and is relatively incapable of enforcing their constitutional rights.

In this article, Michael Churchill examines a cause of action alleging discriminatory industrial siting under Title VI and Title VIII in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 145 F. Supp. 2d 446, 491-2 (D.C.N.J. 2001). The claim finds itself trapped within the turmoil created by the Supreme Court's contemporaneous decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001). The unfavorable *Alexander* decision slammed shut the window of opportunity for the South Camden Citizens in Action. Has the subsequent Third Circuit Court of Appeals decision in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771, 775 (3d Cir. 2002), left New Jersey minority communities without any judicial remedy to prevent the environmental injustice of disproportionate placement of polluting facilities in minority communities?

DISPARATE IMPACT REGULATIONS AND SECTION 1983 IN THE COURTS: THE WORDS ARE OF DEFERENCE, THE ACTIONS OF DISPARAGEMENT

Delaware County, Pennsylvania, excluding the City of Chester, contained 460,349 white persons (91%) and 34,118 Black persons (6%) in the 1990 Census. The City of Chester, by contrast, consisted of 13,392 white persons (32%) and 27,276 Black persons (65%). During the decade 1987-1996 the Pennsylvania Department of Environmental Resources granted permits for 1,400 tons per year of waste disposal facilities in the County outside of the City and for in excess of 2,000,000 tons inside the City.[1] In granting these permits, DER made no attempt to determine if they had any adverse impact upon minorities. Several came after a 1995 EPA study which stated that the health of Chester residents was adversely affected by the cumulative environmental conditions. The EPA study urged no new air or water permits be issued.

On the other side of the Delaware River, the state of New Jersey granted twice as many air pollution permits in zip code areas which had greater than average minority populations than it did in zip codes with less than average. In Camden County the minority population in the City was inundated with permits compared to the predominately white areas in the rest of the county.[2] The New Jersey Department of Environmental Protection had no procedure for investigating the extent of the disparity or even for determining its existence.

Nationally, the facts were similar. Many reports documented that in many areas the burden of polluting facilities were not being shared equally but were concentrated in minority and low income communities.[3] These communities also have worse health conditions and are more susceptible to the medical stress created by pollution. Nevertheless, not a single state had a procedure for investigating whether permits were disproportionately being placed in minority communities.

The air permit process is a recognition that polluting industry is necessary, but that it needs to be regulated. Regulation implies that at some level it is safe enough, but many plants do not operate within the limits of the permits and even when they do, people almost uniformly prefer to live in places with less smoke, less particulate, less smog, less odors, less noise, less unknown risks. Can the burden of living with these

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[1] *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 927 (3rd Cir. 1997), vacated as moot, U.S. (1997). The Chester facilities included one of the largest waste incinerators in the United States and the largest infectious waste facility in the nation

[2] South Camden Citizens in Action v. New Jersey Department of Environmental Protection, 274 F.3d 771, 775 (3rd Cir. 2002) ; 145 F. Supp. 2d 446, 491-2 (D.C.N.J., 2001) (SCCIA I).

[3] The studies are cited in Terence J. Centner et al, Environmental Justice and Toxic Releases: Establishing Evidence of Discriminatory Effect Based on Race and Not Income, 3 Wisc. Envtl. L.J. 119 (1996); Vicki Been, What*s Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesireable Land Uses, 78 Cornell L. Rev. 1001 (1993); and Richard J. Lazarus, Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection, 87 Nw. U. L. Rev. 787 (1993).

polluting facilities be placed solely or disproportionately in minority communities which have relatively little political or economic power?[4]

Most environmental agencies take the position that if an applicant meets certain maximum and average emission levels the agency has done its job under the environmental statutes and leaves issues of location of facilities to be resolved by market forces. There are no specific EPA environmental policies addressing issues of concentration beyond the injunction to states which administer the permit programs not to exceed ambient air levels for the six criteria pollutants.[5]

Do the Constitution or civil rights laws provide any prescriptive direction to the problem of disproportionate burden in the location of polluting facilities licensed by state agencies? A generation ago, Judge Skelly Wright, condemning separate and unequal schools for white and black children in the District of Columbia, could write: " Orthodox equal protection doctrine can be encapsulated in a single rule: government action which without justification imposes unequal burdens or awards unequal benefits is unconstitutional."[6] And while the courts have continued to recognize that provision of differing services can form the basis of a Constitutional violation,[7] subsequent Supreme Court decisions, beginning with *Washington v. Davis*, 426 U.S. 229 (1976), have required Constitutional litigation to focus on proving intent, not just intent to accomplish the acts which created the unequal treatment, but intent to treat minorities differently.

With the demise of de jure segregation, it has become increasingly difficult to show that policies adopted by governmental bodies, operating through many people, each with a different motive, are intended to discriminate.[8] As a consequence, communities seeking a remedy to unequal environmental permitting have had to look beyond the Constitution.

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[4] The lack of such power is graphic in the Camden case where the project, built on Port Authority land, was exempt from the City*s zoning and planning process. The Port Authority is creature of the state, not of the City. Furthermore the state has recently taken control over many City functions

[5] Even when the criteria levels are exceeded, regulators have many options which allow new permits and EPA pressure on states is subject to political *realities.*

[6] *Hobsen v. Hansen*, F.2d D.D.C., F.Supp 1968). Judge Wright went on to say: "The complaint that analytically no violation of equal protection vests unless the inequalities stem from a deliberately discriminatory plan is simply false. Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." (Footnotes omitted). With the advent of the Burger and Rehnquist courts the law *matured* in a totally different direction.

[7] "The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)." *DeShaney v. Winnebago County Dep't of Social Servs*., 489 U.S. 189, 197 n.3 (1989).

[8] It might have been hoped that if disparate impact to a discrete and insular minority was shown, the burden would shift to the defendant to show a justification for the unequal distribution of benefits or the denial of protection. The justification, however, has been subject only to the rational basis test and not to the strict scrutiny which an explicit racial criteria is subjected to. On that basis, almost any justification will pass judicial muster.

The obvious place to look was the Civil Rights Act of 1964 and its implementing regulations. That Act was the culminating legislative response to southern style officially endorsed segregation by both public and private organizations. In addition to the provisions dealing with public accommodations and employment, it included Title VI, designed to end the discriminatory use of federal funds by recipients.[9] It was a recognition that minorities pay federal taxes and their money should not go to support programs not available to them and the obverse, that federally supported programs should be available to all.

The legislative history shows a pre-occupation with ending federal funds going to segregated programs *Blacks being denied services at federally funded hospitals, denied access to agricultural loan programs, denied access to white only areas in federally funded airports, etc. Congress and the Administration, however, were also concerned about federal funds going to schools which were no longer segregated de jure but which through various stratagems remained unbalanced racially. Secretary of HEW Celebrezze was examined closely on whether under the proposed bill federal funds could be withheld from districts merely because of racial imbalance, ie. because of the disparate impact of the district*s facially neutral assignment policies. He assured the Congress, as did Attorney General Kennedy, that the regulations they would write would deal with that situation. The act pased in July 1964 did not define discrimination and explicitly gave the administration the power to write regulations which would "carry out the objectives" of the Act. Section 602, 42 U.S.C.A * 2000d-1. But as part of a compromise the regulations had to be specifically approved by the President and any administrative action cutting off funding to a recipient had to be presented to Congress prior to becoming effective.[10]

On that basis Attorney General Kennedy*s Department of Justice wrote regulations prohibiting policies or activities which have the effect of subjecting individuals to discrimination because of race, color, national origin or sex. Pursuant to the regulations, any recipient of aid had to contractually promise to comply with Title VI and its regulations. [11]

Congress*s power for these measures was the Spending Power Clause[12] and Section 5 of the 14th Amendment granting Congress "power to enforce, by appropriate legislation, the provisions of this article."[13]

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[9] "No person in the Unites States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under ay program or activity receiving Federal financial assistance." 42 U.S.C. *2000d.

[10] Charles F. Abernathy, Title VI and the Constitution: A Regulatory Model for Defining *Discrimination*, 70 Geo.L.J. 1 (1972); *Civil Rights: Hearings on H.R. 7152 Before Subcomm. No. 5 of the House Comm. On the Judiciary*, 88th Cong., 1st Sess. 1514-23 (Sec. Celebrezze), 2652, 2740, 2765-66 (Attorney General Kennedy) (1963). The legislative history is reviewd by Justice Marshall in *Guardians Association v. Civil Service Comm*n of New York City*, 463 U.S. 582, 615 (1983) and by Judge Orlofsky in SCCIA II at 530-2.

[11] 29 Fed. Reg. 16274-16305 (1964); see Guardians, 463 U.S. at 618 (Marshall, J.)

[12] U.S. Constitution, Art. I, Sec. 8; see generally Dole v. South Dakota (cite);

[13] U.S. Constitution, Art.14, Sec. 5.

Two years later Southerners mounted an attempt to amend the Act to limit its prohibition to intentional discrimination. The effort failed.[14] In subsequent years Congress five times specifically acknowledged and endorsed these regulations by legislation directing agencies to adopt similar regulations.[15]

In 1972 when Chinese speaking students claimed they were discriminated against because a policy of teaching only in English had a disparate impact on them, the Court found a violation of Title VI, albeit three Justices based their concurrence on the regulations. *Lau v. Nichols*, 414 U.S. 424 (1974). The private right of action was assumed. Title IX, prohibiting discrimination on the basis of sex by recipients of federal funding was passed in 1972 and the statute and regulations were modeled directly on Title VI.

The holding in *Washington v. Davis* that violations of the Equal Protection clause required intent raised the question of the status of *Lau*. And that was heightened in the 1978 *Bakke* affirmative action reverse discrimination case where the Court found that it was badly split on the issue of whether Title VI prohibited non-intentional discriminatory conduct which was allowable under the Equal Protection clause, or whether Title VI was co-extensive with the 14th Amendment and merely extended the same prohibition on intentional discrimination to non state actors receiving federal money.[16]

In *Guardians Association v. Civil Service Comm*n of New York City*, 463 U.S. 582 (1983) a majority of the Court held that Title VI itself was co-extensive with the Equal Protection clause, prohibiting only intentional discrimination, but that the regulations prohibiting disparate impact discrimination were valid as a prophylactic protection authorized by Congress. As explained by Justice White, Congress prohibited discrimination in all cases in which it was intentional and authorized the agency to determine the circumstances in which to extend the prohibition to discrimination arising from disparate impact. That holding was confirmed two years later in *Alexander v. Choate*, 469 U.S. 287, 293 n.5 (1985), where the opinion for a unanimous court, as a predicate for its holding, declared that in *Guardians* the Court had "held" that "actions having an unjustified disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI."

The New Jersey Department of Environmental Protection took federal funds to run its air pollution permitting program and signed an assurance promising to abide by Title VI and its disparate impact regulations.[17] New Jersey, however, did nothing to determine whether it was in fact contributing to disparate impact.[18] Not only did it never

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[14] *See Guardians*, 463 U.S. at 620 (Marshall, J.)

[15] 49 U.S.C. *47123 (get p.l. cites); 43 U.S.C. *1863; 23 U.S.C. *324; 15 U.S.C. *775 ("This provision will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964.")

[16] *Regents of University California v. Bakke*, 438 U.S. 265 (1978).

[17] *Regents of University California v. Bakke*, 438 U.S. 265 (1978).

[18] *SCCIA I*_at 474-481. New Jersey*s failure to investigate is similar to the Federal Power Commission*s refusal to investigate the existence of alternative power sources which led the Second Circuit Court of Appeals to declare that an agency has an obligation to investigate and develop all relevant facts before issuing a

make any inquiry to determine that matter, one of the officials in NJDEP who was responsible for making the final determination on permit issuance testified in a deposition that she was not aware of the Title VI regulations or what they required done before a permit could be issued.

It was against that background that the South Camden community sought to challenge the decision of the New Jersey Department to grant a permit to St. Lawrence Cement Company to build a blast furnace slag grinding plant in a minority community which was already inundated with polluting facilities. The plant would take granulated slag from Italian steel mills shipped to Camden and trucked three miles from the port to the site. The company estimated there would be 35,000 trips a year. The slag would be deposited in uncovered piles, and then conveyed into the plant for a drying and grinding process. The finished product would be stored and then sent by 42,000 truck trips, although it is possible to ship it by barge. Emissions from the plant are principally particulate, and very fine grain particulate at that. Because particulate is one of the six criteria pollutants, federal standards have to be met. According to NJDEP, even with the plant in operation federal ambient air levels for PM-10 (particulate 10 microns or less) would be met. Federal levels which were proposed for the most dangerous forms of particulate PM-2.5 (two and one half microns or less) were not examined, because they were not in effect yet, although they unquestionably posed a considerable danger to the community and one of the St. Lawrence consultants had noted that the company estimated that levels would be very close to the proposed federal limits. Whether or not they exceeded the limits, the plaintiffs wanted to know why the Department, despite their protests during the public hearing and the filing of an administrative complaint prior to the issuance of the permit, had granted the permit without making any investigation whether the Camden community was being forced to carry a disproportionate share of the pollution permits issued by the Department.

The case brought in February 2001 by the South Camden Citizens in Action sought to suspend the permit granted by the NJDEP on the basis of violations of the Title VI regulations, of Title VI itself, and of Title VIII concerning non-discrimination in housing. The next day St. Lawrence Cement intervened. The case was assigned to Judge Stephen Orlofsky who had the parties submit affidavits on evidentiary matters and brief the disparate impact issues. In April he ruled, that he was bound by the Third Circuit*s decision in *Powell v. Ridge* to hold that there is a private right of action to enforce the regulations "until the Supreme Court renders it s decision in *Sandoval*." *SCCIA I* at 474.

On the merits Judge Orlofsky*s 55 page opinion found that NJDEP had violated the regulations by not undertaking any disparate impact investigation, *Id*. at 4474-81. It also, based on an extrodinarily careful and thorough review of the record, held that plaintiffs had a substantial likelihood of success on the merits because they had shown 1) adverse impact due to the emissions of PM-2.5 with its impact on the elderly, children and persons with respiratory problems and "the health consequences associated with the cumulative environmental burden this community already experiences", *Id*. at 484-491, and 2) disparate impact due to the statistically significant higher levels of air permits in areas with high minority populations compared to areas with below average

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permit, not just those brought to it by the parties. *Scenic Hudson Preservation Conference v. F.P.C.*, (2d Cir. 1965).

minority populations, *Id*. at 491-493. As a consequence, he directed NJDEP to conduct a disparate impact analysis consistent with the federal regulations and enjoined operation of the plant pending that report and a final hearing. Judge Orlofsky*s opinion was a complete refutation of the practices of the New Jersey Department, finding that they were entirely out of compliance with the Department*s obligations under the Title VI regulations.[19]

Five days later a five person majority on the U.S. Supreme Court swept the premise of the case away in *Alexander v. Sandoval*, 532 U.S. 275 (2001), holding that regulations adopted under Section 602 were not enforceable by a private right of action because there was no _expression of Congressional intent in Section 602 to create a privately enforceable remedy. In reaching that conclusion the majority chose not to read that intent from Section 601 which they conceded did provide for a private right of action and which the regulations in Section 602 are directed to "effectuate."

Based on the statement in Justice Steven*s dissent that the regulations remained enforceable under 42 USC * 1983, plaintiffs sought and received approval to amend their complaint to add a violation of Section 1983. Section 1983, created in 1871 to give recourse to persons facing the refusal of southern officials to enforce laws equally, opened federal courts to claims of deprivations of "rights" secured by the Constitution or laws of the United States.[20] Over the last twenty years the Supreme Court has worked out a line between laws which create personal rights and laws directed to government officials about how to execute and carry out a governmental program but which do not create personal rights. *Blessing v. Freestone*, 520 U.S. 329 (1997) and cases cited therein.

Under *Blessing* the first issue for a Court to resolve is whether Congress intended to create such a personal right. That, it appeared, was the only issue of Congressional intent, unlike when determining whether there is a private right of action where, many argued, the test was stricter, requiring Congressional intent both to create a right *and* to create a federal remedy. *Wilder v. Va. Hosp. Ass*n*, 496 U.S. 498, 508 n.9 (1990); Mank article.

It is difficult to know how to apply the Congressional intent test to regulations, for Congress doesn*t enact the regulations, it authorizes them. One approach would be to say Congress intends valid regulations to have same enforceability as the underlying statute, so that if it does not create a personal right the regulation does not, and if the statute creates a personal right then its regulations are also enforceable if they are directed to personal rights.

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[19] "The NJDEP has not cited a single source of statutory, regulatory, or case law which supports its position, and the Court found none." *SCCIA I* at 481. The Court of Appeals denied any stay to the portion of the District Court orders directing NJDEP to conduct a disparate impact analysis within 30 days, and the Department submitted a report. In light of the subsequent history of the case, no hearing was held on the adequacy of the report. The Department has issued no regulations or public guidance saying how it will conduct disparate impact analysis on future permit applications.

[20] "Every person, who, under color of any statute, ordinance, regulation, custom, orusage, 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 therof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party inured in an action at law, suit inequity, or other proper proceeding for redress." 42 U.S. C. *1983.

That is what the plaintiffs in the Camden case proposed: Section 601 creates enforceable rights, the regulations adopted to "effectuate" Section 601 protect personal rights ("a recipient shall not...subject....individuals to discrimination...."), the regulations have been properly adopted, therefore they are enforceable under Section 1983. In addition plaintiffs pointed to the specific history of subsequent congressional endorsement to argue that Congress intended them to create rights.

In response, defendants challenged the regulations were not enforceable under Section 1983 on the grounds they did not create a "right" secured by a law of the United States, essentially saying that the Congress only created a right to be free of intentional discrimination.

In a 41 page opinion Judge Orlofsky comprehensively reviewed the Supreme Court*s Section 1983 case law set forth in *Blessing* and earlier cases. *South Camden II*. He also reviewed the legislative history of the Title VI regulations and the Supreme Court*s subsequent case law. Based on that careful analysis he concluded that the regulations met all of the tests set forth in *Blessing* in order to evince a Congressional intent to create personal and enforceable rights. A panel of the Third Circuit Court of Appeals reversed (2 to 1). In doing so, the court in an opinion by Judge Greenberg assumed the regulations were valid[21] but left them uneforceable by injured citizens on the ground that the regulations were too distant from the statutory right. The Court set aside the previous holding in *Powell v. Ridge,* 189 F.3d 387 (3rd Cir. 1999) that a similar disparate impact regulation issued by the U.S. Department of Education was enforceable on the grounds that it was premised on the existence of a private right of action under the regulations and that *Sandoval* had undercut its authority. Following the 11th Circuit in *Harris v. James*, [127 F.3d 993 (1997) the court held that Section 1983 will only enforce regulations which "interpret" rights already created by the statute. Since the right to be free from disparate impact discrimination is not in the statute, it held it too distant to be a right that Congress intended to create. Judge McKee, in dissent, ably traced how *Powell* and several earlier Third Circuit cases[22] construing the enforcement of regulations under Section 1983 had found a federal right in the regulations based on the Blessing test independently of any private right of action. *Sandoval*, he noted, had been based on the *Court v. Ash* tests and not on *Blessing*.

Interestingly, the Court of Appeals panel reached the conclusion that Congress never intended to create a federal right to be free from disparate impact without any analysis of the congressional history surrounding the adoption of Title VI nor an acknowledgment of the subsequent endorsements. Nor is there any discussion in the opinion of the scope of the delegation intended by Congress when it authorizes regulations or of the extensive case law on that subject. Instead the conclusion is

[21] On appeal the defendants for the first time raised the issue of the invalidity of the regulations. The court held this untimely; however, it noted its agreement with Justice Scalia*s remark in *Sandoval* that the validity of the regulations (recognized in *Guardians*) was "in considerable tension" with the prior decision in *Bakke* that Section 601 reached only intentional discrimination. 274 F.3d at 780, n6. Indeed, it later says "the regulations, though assumedly valid, are not based on any federal right present in the statute." *Id.* At 790.

[22] *Alexander v. Polk*, 750 F.2d 250 (3rd Cir. 1984) and *West Virginia Univ. Hospitals v. Casey*, 885 F.2d 11 (3rd Cir. 1989).

reached on the basis of a formalistic comparison of the rights created by the statute on its face and the rights created by the regulations on their face.

Subsequent to the Court of Appeals opinion the Supreme Court decided *Gonzaga University v. Doe*, 122 S.Ct. 2268 (2003). While finding that the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 USC 1232g, did not create a right enforceable under Section 1983, Chief Justice Rehnquist wrote on behalf of four other justices that "our implied right of action cases should guide the determination of whether a statute confers rights enforceable under * 1983." 122 S.Ct. at 2275. If this were literally true, it would mean courts must look not only at whether Congress intended to create a personal substantive right, but also whether it intended to provide an enforceable remedy. This would be a substantial shift from the Blessing test, and under such a new test the Title VI disparate impact regulations would clearly fall given the *Sandoval* decision that there was no private right of action to enforce them. Restricting Section 1983 cases to the same test as private rights of action, requiring an intention to create a remedy, would overlook the fact that in dealing with state actors Congress by enacting Section 1983 expressly evidenced its intention to create a remedy. It seems likely, therefore, that the Court meant for the part of the *Blessing* test as to whether there is a personal right created the test is the same in both situations, but did not change that there is an additional test in the private right of action situation to show an intention to create a private remedy.[23] The only issue in the Section 1983 case, therefore, should be whether there is evidence of an intention to create a personal or individual right as distinguished from a measure "focused on *the aggregate services provided by the State*" *Gonzaga* at 2274, quoting *Blessing*.

The Court has not addressed the appropriate test for determining the enforceability of regulations under Section 1983 since its decision in *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987). In light of these developments, the Court has the following options available if it were to review the Title VI regulations: 1) Conclude that the disparate impact regulations effectuating Section 601 are directed to an individual right rather than a yardstick for measuring systemwide performance that *Blessing* found outside the coverage of Section 1983 and therefore are enforceable; 2) Conclude, as in *Sandoval*, that the regulations are authorized by Section 602 which does not create individual rights and therefore are not enforceable; 3) Overrule the *Guardians/Choate* decisions and hold the regulations are invalid and not authorized by Title VI; or 4) Follow the analysis of the Third and Eleventh Circuits and hold the regulations are valid but too far removed from the statute to be enforceable under Section 1983.

It seems very difficult to reconcile the approach of the Third and Eleventh Circuits in the *SCCIA*_and *Harris* cases with the Chief Justice*s opinion in *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) which stated that "a substantive rule*or a

[23] This conclusion is bolstered by the conclusion of the next paragraph where the Court states "But even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent *to create not just a private *right* but also a private *remedy*.*" *Id*. at 2275-6 (emphases in Court*s opinion). It is highly relevant that the Court in this sentence does not include when a plaintiff is suing under Section 1983 but limits it to implied rights of action. Furthermore, the Court also said: "Both inquiries simply require a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Id*. at 2276.

*legislative-type rule,**[is] one *affecting individual rights and obligations.* This characteristic is an important touchstone for distinguishing those rules that may be *binding* or have the *force of law.*" (citations omitted). That cased declared that a substantive rule becomes binding if it is within the grant of authority to the agency and if it is properly enacted procedurally. Similarly, in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) the Court held it is bound by an agency*s substantive regulations unless it determines that the agency*s regulatory policy choice is not a reasonable construction of the statutory provision. Needless to say, that was not the analysis undertaken by the Third Circuit nor the Eleventh.

Moreover, in numerous Supremacy Clause cases the Court has also enforced federal regulations which meet the *Chrysler* test. In *City of New York v.F.C.C.*, 486 U.S. 57, 63-4 (1988) a unanimous Court said "The phrase *Laws of the United States* [in the Supremacy Clause] encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization. For this reason . . . we have also recognized that *a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation*. . . ."

In none of the cases enforcing a federal right created by an agency pursuant to a delegated authority has the Supreme Court utilized a test that asked whether the regulation "explicate[s] the specific provision of the statute" or whether it is "too far removed." as Judge Greenberg did.[2427] The test for whether a regulation has the force of law is whether it is validly authorized, properly promulgated and "affect[s] individual rights and obligations." *Chrysler*, 410 U.S. at 302. In fact the Third Circuit*s opinion stands *Chrysler* on its head, making interpretative regulations enforceable when they deserve only modest deference under *Chrysler* while depriveing substantive regulations of the force of law which *Chrysler* says they are entitled to. It appears that the lower courts are now developing a new way to undo regulations that they do not approve of without going through the formal process required by *Chevron* and *Chrysler* of determining that the regulations exceed the Congressional delegation of power. For the contrasting approaches compare *Buckley v. City of Redding*, 66 F.3d 188 (9th Cir. 1995) enforcing the Secretary of Interior*s regulations requiring access for power boats to certain federally assisted facilities as within the authority of the statute to increase access to waterways for recreational users and *Kissimmee River Valley Sportsman Assoc. v. City of Lakeland*, 250 F.3d 1324 (11th Cir. 2001) refusing to enforce the same regulations on the grounds that the regulations were not sufficiently closely related to the statutory purpose to be enforceable under Section 1983.

This new standard will impose considerable hardship on Congress, for by giving an agency delegated authority to create substantive regulations it may nevertheless fail to create "rights . . . secured by . . . laws." If Congress wants to create a right enforceable

[24] Justice O*Conner, writing for three other Justices in dissent in *Wright*, 479 U.S. 437-38, did not adopt this test but said: "I am concerned, however, that lurking behind the Court*s analysis may be the view that, once it has been found that a statute creates some enforceable right, any regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agnecy ever contemplated such a result." The opinion does not explain how it is reasonable to say that a regulation "within the purview of the statute" is not contemplated by the Congress authorizing delegated regulatory rule making. Presumably Congress "contemplated" the agency as promulgating any allowable regulation and limited its delegation to foreclose those results it did not wish to contemplate.

under Section 1983, the Court of Appeals ruling would require it to engage in explicitly legislating many detailed provisions it may rather wish to leave to agency expertise to develop.

Another puzzle in the Third Circuit*s opinion is that it appears to be saying that Congress must go back and authorize the disparate impact regulation all over again, even though the Court assumes that the regulation was validly authorized to begin with. Moreover, Congress subsequently stated that it wanted five other regulations to follow these Title VI regulations. There can be no claim that those five regulations are unenforceable because beyond the intention of Congress. Is the Court of Appeals really saying that it will enforce one set of identical regulations but not the other? Does it really not understand that Congress was approving the Title VI regulations when it said to adopt other regulations which would be similar? Is it really the role of the Court to tell Congress that it can not delegate to an agency creation of rights which can be enforced by the courts? Is that deference or sabatoge?

In the last twenty years Congress has had to correct a string of interpretations by a Supreme Court hostile to citizen enforcement of federal laws. The decisions in *Grove City v. Bell*, *Smith v. Robinson*, *Ward Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) and *Suter v. Artist M.* have all been overruled by congressional action. Relying upon *Guardians* and its restatement in *Choate*, Congress concluded that it was not necessary to address and re-enact the disparate impact regulations. That reliance, evidently, was misplaced.

The Court of Appeals decision in Camden has opened up many questions which reach beyond the environmental justice issues which the case was brought to address. It threatens to create a whole new class of regulation *authorized but not enforceable* and to undercut the power of Section 1983 to protect citizens from unresponsive states by denying remedies for violations of federal law. At the same time the decision has left the issue of how to confront the environmental injustice of disproportionate siting of polluting facilities in minority communities without any judicial remedy.