New Hurdles for Environmental Justice Plaintiffs

Erin Daly

In communities across the country, illness and health hazards seem to follow pollution-producing industry, which seem to follow, with non-random predictability, predominantly poor and non-white populations. The Waterfront South neighborhood of Camden, New Jersey, is typical. One court recently called it “a popular location” for the siting of industrial facilities. Waterfront South contains two Superfund sites, as well as the county utilities authority, a sewage treatment plant, a trash-to-steam plant, a resource recovery facility, a power plant, and a co-generation plant. In this small neighborhood alone, the New Jersey Department of Environmental Protection has identified fifteen known contaminated sites. Ninety-one percent of the 2,132 residents of this neighborhood are persons of color who suffer from a “disproportionately high” rate of asthma and other respiratory ailments. South Camden Citizens in Action v. New Jersey Department of Environmental Protection, 145 F. Supp. 2d 446 (D. N.J. Apr. 19, 2001).

For nearly forty years, studies have consistently demonstrated a confluence of these three societal problems: health hazards, environmental degradation, and disempowered populations. Most studies, in fact, have concluded that race is an even more significant factor than economics. According to Luke W. Cole and Sheila R. Foster in their groundbreaking book, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement, most often, the best predictor of exposure to environmental hazards (including everything from air and noise pollution to lead poisoning to rat bites) is non-white race. The disparities, with the concomitant health risks, have grown with time.

Despite demonstrated links between ill health and environmental degradation, legal activists have waged an uphill battle in obtaining relief on behalf of these disempowered communities. An important decision in the Third Circuit, on which the Supreme Court denied certiorari in the summer of 2002, has made the hill substantially steeper. South Camden Citizens in Action v. New Jersey Dept. of Environmental Protection, 274 F.3d 771 (3d Cir. 2001), cert. denied, 122 S. Ct. 2621 (2002).

Environmental justice claims always have been difficult because of the ill-fit between the strictures of federal civil rights and environmental laws on the one hand, and the harms sought to be vindicated—poorer health in predominantly minority communities caused by an agglomeration of private and public action—on the other. In most instances, there is no violation of an environmental law per se; rather it is compliance with existing law—the issuance of the permit, for instance, or a procedurally unassailable siting process—that forms the basis of the claim. Nor, as the South Camden case illustrates, do these claims fit neatly under the rubric of equal protection law. Furthermore, the cost and complexity of litigation can put it out of reach of many communities in need.

Norwithstanding the demonstrated connection between race and environmental hazards, these claims are most likely to be successful when they are characterized as environmental claims rather than civil rights claims. The problem with limiting lawsuits to the environmental laws or even to procedural challenges, however, is that the litigation then fails to tell half the story. The condition that prompted the litigation in the first place is not merely the environmental hazard; rather, it is the effect of the environmental hazard on racial minorities. Combining both types of claims, then, provides a fuller picture of the nature of the actual harm. As Cole and Foster explain in their book, using “civil rights claims, particularly those based on constitutional principles of equal protection... can be very useful in building morale, raising the profile of a community’s struggle, and educating the public about environmental racism.” Luke W. Cole & Sheila R. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement 126 (New York University Press, 2001). Unfortunately for the plaintiffs, however, the inclusion of civil rights claims has not increased the likelihood of prevailing in specific litigation or of “transforming environmental decisionmaking processes to take into account the social, political, and economic vulnerability of poor communities of color.” Id.

Most authorities believe that Title VI of the Civil Rights Act of 1964 offers the most support for environmental justice claims. Title VI prohibits discrimination on the basis of race, color, or national origin in federally funded programs. This track, however, virtually has been foreclosed in many jurisdictions by the Third Cir-
The next question is whether the statutory provisions of Title VI go further than the constitutional provision. Title VI establishes that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Notwithstanding its ambiguous language, the Supreme Court repeatedly has assumed that Title VI, like its constitutional counterpart, prohibits only intentional discrimination and is indifferent to racially disparate impact.

Paradoxically, however, the Supreme Court has distinguished the scope of Section 602 of Title VI, which delegates to agencies the power to promulgate regulations to effectuate the provisions of Section 601, from the narrow bounds of Section 601. Thus, while the statutory provisions of § 601 bar only intentional discrimination, regulations promulgated under Section 602 to effectuate the provisions of Section 601 are valid even if they prohibit disparate impact discrimination. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). As a consequence, EPA regulations that prohibit the use by recipients of federal financial assistance of "criteria or methods . . . which have the effect of subjecting individuals to discrimination because of their race" are presumed to be valid. 40 C.F.R. § 7.35(b) (emphasis added). Indeed, as the both the majority and the dissent in the South Camden case noted, at least forty federal agencies have promulgated disparate impact regulations pursuant to Title VI.

Once the scope of the relevant statutory provision is determined, it remains to be decided whether the statute contains a private right of action to enforce it. For the most part, environmental laws contain explicit provisions granting to private individuals the right to enforce in federal court the provisions of the particular environmental law. The Civil Rights Act, however, is not so explicit and therefore requires that a court determine whether the statute can be read to imply a private right to sue. This has been a thorny question for the Supreme Court for years. Although it would seem clear that a statute that creates a right (e.g., the right to not be discriminated against) is toothless unless an individual can sue an alleged violator in federal court to enforce the right, the Supreme Court has determined that unless Congress makes its intent to create a private right to sue absolutely clear, judicial implication of such a right threatens the separation between legislative and judicial power.

With respect to Section 601 of Title VI, at least, the Supreme Court has accepted that a private right of action exists. Thus, one avenue that remains open to plaintiffs making environmental racism claims is to alleges intentional discrimination in violation of Section 601 of Title VI. But because that private right is limited
to claims of intentional discrimination, that avenue, like the equal protection route, is rather narrow.

Originally, the plaintiffs in the South Camden case successfully combined these principles of statutory construction and interpretation. They argued that they were entitled to pursue their private cause of action to enforce the disparate impact regulations because (1) EPA regulations prohibit disparate impact discrimination, (2) such regulations are valid under Section 602, and (3) Title VI permits a private right of action. The district court agreed and issued a preliminary injunction in April 2001.

Less than a week later, the Supreme Court's opinion in Sandoval confirmed these basic principles, but added a critical and devastating caveat. Not only, the Supreme Court said, are Section 601 and Section 602 distinguishable in scope, they also are distinguishable in remedy. Section 601 permits a private cause of action. Section 602 does not. Therefore, a private individual can sue to enforce the intentional discrimination ban of Section 601, and an agency can prohibit disparate impact discrimination by grantees through regulations, but a private individual may not sue to enforce regulations that prohibit disparate impact discrimination.

The Sandoval opinion effectively vacated the district court's five-day-old opinion allowing the private cause of action under Section 602.

South Camden on Appeal

Civil rights groups covering a wide spectrum of interests avidly awaited the Sandoval decision, knowing that it would have a significant effect on the ability of plaintiffs to claim that the actions of recipients of all federal funds discriminated against them. Following the Sandoval decision, however, disappointed plaintiffs found some solace, as well as a clever idea, in Justice Stevens' dissent. Justice Stevens noted that the majority's decision was not only "unfounded in our precedent and hostile to decades of settled expectations," it also may be "something of a sport. Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference Section 1983 to obtain relief." Plaintiffs in the South Camden case quickly picked up on this suggestion. They sought and received leave to amend their complaint "to add a claim to enforce section 602 through section 1983." The district court essentially accepted the Section 1983 argument and continued the preliminary injunction, which prompted the appeal to the Third Circuit by NJDEP and St. Lawrence. Thus, the main question before the appellate court was the viability of a Section 1983 action to enforce an EPA regulation promulgated under the authority of Section 602.

Part of the Civil Rights Act of 1866, 42 U.S.C. § 1983, has been essential in permitting private individuals to enforce federal law against the states; it has become all the more important because the Supreme Court has blocked other approaches under its Eleventh Amendment jurisprudence and restrictions on the Ex parte Young doctrine. 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 any action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. Thus, an individual can use Section 1983 to compel state actors to comply with the U.S. Constitution and federal statutes.

The critical question before the Third Circuit in South Camden was whether Section 1983 can be used to enforce federal regulations against the states. Similar claims are currently pending in other courts. The Supreme Court and several circuit courts (including the Third Circuit several times) have addressed this question previously. But the results have been mixed and the circuit court found that not all the cases squarely considered the question on the precise facts at issue in the South Camden case.

One feature of the South Camden case that made the question more difficult than it is in other cases was the apparent disjunction between the substantive right created by Section 601 (prohibiting intentional discrimination) and the valid EPA regulations (prohibiting disparate impact discrimination). The regulation sought to be enforced did not implement the precise right created by the statute. The court, therefore, distinguished Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418 (1987), finding that "the regulation at issue in Wright merely defined the specific right that Congress already had conferred through the statute." Thus, as the Eleventh Circuit explained in Harris v. James, 127 F.3d 993 (11th Cir. 1997): "So long as the statute itself confers a specific right upon the plaintiff, and a valid regulation merely further defines or fleshes out the content of that right, then the statute— in conjunction with the regulation—may create a federal right as further defined by the regulation." In other words, where the regulations do no more than define or flesh out the content of a specific right conferred upon the plaintiffs by the statute, the plaintiffs may state a Section 1983 claim to enforce the regulations, because the source of their authority derives directly from the statute. However, where, as here, the "regulations . . . give the statute a scope beyond [what] Congress contemplated," they are not independently enforceable. Thus, the critical question is how closely the regulations hew to the statute.

(Continued on page 62)
New Hurdles
(Continued from page 20)

The second basic reason for the *South Camden* court's rejection, as a matter of law, of the plaintiffs' Section 1983 claim, is that it found no evidence that Congress intended for a Section 1983 right to exist under EPA regulations. It found that the Supreme Court's current focus was "directly on Congress' intent to create enforceable rights and to confine its holdings to the limits of that intent."

These two issues are interrelated: if the regulation is untethered to the statute, there is less reason to believe that Congress intended the regulation to be enforceable by Section 1983 actions, even if the regulations are valid under *Chevron* and have the force of law. As the court explained, its own precedent, *Alexander v. Polk*, 750 F.2d 250 (3d Cir. 1984), was distinguishable in part on the ground that the regulation in that case did not "attempt[] to create a federal right beyond any that Congress intended to create in enacting the statute." 274 F.3d at 784.

This emphasis on congressional intent in the Section 1983 context is troubling for several reasons. First, it conflates the question of remedies with the question of rights, notwithstanding the *South Camden* court's protestations to the contrary. The *South Camden* court tried to emphasize that the "remedies" question of whether a private right of action exists under Section 602 and the "rights" question of whether EPA regulations create a federal right that is enforceable through Section 1983 against the states are independent of one another. Thus, it cited the Eastern District Court of New York approvingly when it said, "it is conceptually possible for plaintiff who is the intended beneficiary of a statute to have a § 1983 action but not a private right, or vice versa..." *Santiago v. Hernandez*, 53 F.Supp. 2d 264, 268 (E.D.N.Y. 1999). However, the likelihood of reaching the same result is increased significantly if both analyses turn on congressional intent to permit a private individual to enforce a federal right.

Indeed, the Third Circuit's analysis in *South Camden* constituted the kind of "conflation" that it warned against. The court found, as it had to give *Sandoval*, that no private right of action existed to enforce Section 602. But throughout the court's analysis of the Section 1983 claim, it repeatedly relied on the *Sandoval* opinion, which was clearly a private right of action case and not a Section 1983 case. The court seems to glean from *Sandoval* that if the Supreme Court is inexecutable to one claim, it would be equally inhospitable to the other.

Second, it is not at all obvious why the touchstone in Section 1983 situations should be the congressional intent of the substantive right. Section 1983 has been available for almost 150 years to individuals who need federal courts to enforce federal policy under EPA regulations. Section 1983 seems indifferent to the specific federal right sought to be enforced. (To the extent that Congress' specific intent is relevant, one might expect Section 1983 to be most effective in enforcing civil rights claims, given its origins in Reconstruction.) For twenty years, moreover, courts have acknowledged that such federal policy may be found in statutes as well as in the Constitution, given the broad language of Section 1983 to prevent the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by state actors. See *Maine v. Thiboutot*, 448 U.S. 1 (1980). Moreover, under *Blessing v. Freestone*, 520 U.S. 329 (1997), the existence of a federal right creates the presumption that Section 1983 is available to enforce that right. Requiring the plaintiff to establish not just the existence of a federal right but the congressional intent for that right to be enforceable through Section 1983 eliminates the advantage that the presumption is meant to provide.

Third, Justice Stevens' dissent in *Sandoval* with respect to private rights of action is equally applicable in *South Camden*. The longstanding presumption in favor of private enforcement would be expected to conduct to congressional silence because Congress had been on notice that the Court was permitting private enforcement even absent its explicit instructions. This silence, then, should not now redound to the plaintiff's disadvantage.

The Third Circuit's analysis invalidating the district court's preliminary injunction is broad and emphatic, drawing together various strands from otherwise disparate principles and rules. In this manner the court comes to rely on the following justifications for its holding: (1) Section 601 of Title VI prohibits only intentional discrimination; (2) regulations promulgated under Section 602 of Title VI may prohibit disparate impact discrimination as well as intentional discrimination; (3) Section 602 regulations that go beyond Section 1983 claims; (4) evidence of congressional intent to allow private enforcement of the regulations is necessary for both implied private rights and Section 1983 claims; and (5), in this case, there is no such evidence with regard either to private claims or to Section 1983 actions. Some of these rules are well-settled. With respect to others, however, the court had to cobble together bits of cases, distinguish contrary bits, and, as the dissent in *South Camden* said, "overread" some of the Supreme Court's cases in anticipation of the Supreme Court's eventual treatment of the issues.

Not without some trepidation, the plaintiffs petitioned the Supreme Court for review. Although the Third Circuit's opinion noted that there is significant split in the circuits on the Section 1983 issue, which would tend to increase the likelihood of review, the Supreme Court denied *certiorari* on June 24, 2002. *South Camden Citizens in Action v. New Jersey De-
Ultimately, environmental justice activists may have to return to their roots. The former made at least three contributions to the current efforts to promote environmental justice. First, it brought to light the range of inequities experienced by racial minorities throughout the country but often ignored by nonminorities or treated by nonminorities as natural, neutral, or acceptable. Second, it demonstrated the possibilities of grass-roots activism, and the potential energy that poor and working class people can exert in order to protect and improve their living conditions and the health of their children. And, third, it resulted in landmark legislation, including the comprehensive Civil Rights Act of 1964. Like the civil rights movement, the environmental movements recognized that harms to the environment, like harms to racial minorities, are rarely neutral and inevitable but rather often are the product of decisions made for political and economic reasons. This revelation entails the possibility of eradicating those harms through political and legal action, and through social awareness and grass roots campaigns.

The environmental justice movement has therefore proceeded simultaneously along multiple tracks, including public protests, lobbying, participation in administrative processes, and litigation. In some sense, litigation is a particularly inappropriate tool to use to effectuate broad-based social and economic changes, such as sensitizing industry permit-seekers and government permit-issuers to the plight of economically depressed neighborhoods. This is especially true where, as in most cases, the environmental damage comes not from a single source but from the cumulative or synergistic impact of multiple pollution-emitting factors and where factors other than the challenged pollution-emitting source may contribute to the health hazards. Where systemic change is needed, political activism may be more effective than judicial intervention.

Nevertheless, litigation may be the only available tool if community action, whether formal or informal, proves ineffective. And it can, if successful, be the only means of ensuring that industry and government will keep their word. Even after South Camden, the effectiveness of litigation depends, to a large extent, on the nature of the particular legal doctrines available to litigants and on the receptivity of courts to the complaints of the residents. It depends, too, on the creativity of the lawyers.

Ultimately, what many environmental justice advocates have said all along may have more salience now in the wake of the South Camden case: environmental justice battles should be waged at the policy level in legislative and administrative arenas, rather than before the federal courts.