Toxic Injustice: Private Rights and Public Wrongs Post-*Sandoval*

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This Article examines how the Supreme Court's 2001 decision in Alexander v. Sandoval *has severely undermined environmental justice advocacy by eliminating private rights of action to enforce disparate impact regulations under Title VI of the Civil Rights Act. Drawing on four decades of empirical research, this Article demonstrates the persistent correlation between race, socioeconomic status, and disproportionate exposure to environmental hazards—patterns that have proven particularly difficult to challenge in the post-*Sandoval *legal landscape. While* Sandoval *left intact federal agencies' authority to promulgate disparate impact regulations, the elimination of private enforcement has forced advocates to pursue alternative legal strategies with significant limitations, including section 1983 claims, Equal Protection challenges, and administrative complaints. This Article analyzes these alternative pathways and their shortcomings, ultimately arguing that legislative action may be required to restore effective private enforcement mechanisms and ensure environmental justice for vulnerable communities. In examining potential solutions, this Article evaluates emerging frameworks under the Clean Air Act that may provide limited avenues for private enforcement of EPA's disparate impact regulations in the specific context of state implementation plans. However, this Article concludes that achieving meaningful environmental justice likely requires broader reforms to both civil rights and environmental law frameworks.*

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I. INTRODUCTION

The Supreme Court's 2001 decision in *Alexander v. Sandoval* marked a seismic shift in civil rights enforcement, eliminating a critical legal tool that had enabled private individuals to challenge policies with discriminatory effects. For decades prior, federal courts had recognized an implied private right of action allowing citizens to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964. In a 5-4 decision, the *Sandoval* Court closed this avenue of enforcement, holding that Title VI's prohibition on discrimination in federally funded programs extends only to intentional discrimination, not practices that merely have a discriminatory impact on protected groups.

This Article argues that *Sandoval* has proven particularly devastating for environmental justice advocacy, where proving discriminatory intent behind the siting of hazardous facilities and other environmental burdens is exceedingly difficult, if not impossible. The loss of private enforcement tools under Title VI has left vulnerable communities with limited recourse against policies and practices that, while facially neutral, result in the disproportionate exposure of racial minorities and low-income populations to environmental hazards.

These issues have only grown more urgent in the face of escalating environmental challenges. The intensifying impacts of climate change—such as extreme weather events, rising sea levels, and worsening air quality—have disproportionately harmed marginalized communities, exacerbating existing environmental inequalities. Meanwhile, the Biden administration has introduced significant new initiatives to address environmental justice, including the creation of the White House

Environmental Justice Advisory Council (WHEJAC)[1] and the Justice40 Initiative, which seeks to direct forty percent of the benefits of federal climate and clean energy investments to disadvantaged communities.[2] Yet, without robust private enforcement mechanisms, these initiatives risk being undermined by the same structural barriers that have hindered environmental justice for decades.

Drawing on empirical studies spanning four decades, this Article documents the persistent correlation between race, socioeconomic status, and proximity to polluting facilities—patterns that have proven stubbornly resistant to challenge in the post-*Sandoval* legal landscape. While alternative legal strategies have emerged, including Equal Protection claims, section 1983 actions, and administrative complaints, these approaches face significant limitations and have failed to fill the enforcement gap created by *Sandoval*. Moreover, the growing role of state-level environmental justice laws and policies—such as California's SB 535 requiring twenty-five percent of carbon trading revenues for disadvantaged communities[3] and New Jersey's landmark Environmental Justice Law of 2020—highlights the uneven patchwork of protections that exist across the United States. Among the twenty-four U.S. Climate Alliance states, only thirty-eight percent have clear definitions of environmental justice communities, and just half have developed environmental justice mapping tools.[4] This fragmented approach leaves many vulnerable communities without meaningful recourse, despite recent progress in states like New York with its cumulative impact legislation.[5]

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1. The White House, *President Biden Announces Key Appointments to the White House Environmental Justice Advisory Council*, (2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/05/23/president-biden-announces-key-appointments-to-the-white-house-environmental-justice-advisory-council/ (The White House Environmental Justice Advisory Council [WHEJAC] was established by President Biden through Executive Order 14008 on Tackling the Climate Crisis at Home and Abroad.).

2. The White House, *Justice40 Initiative*, https://bidenwhitehouse.archives.gov/environmentaljustice/justice40/ (last visited Jan. 14, 2025).

3. Laurie Monserrat, *SB 535 Disadvantaged Communities* (2015), https://oehha.ca.gov/calenviroscreen/sb535 ("At least 25 percent of funds must be allocated toward DACs").

4. Jonah Kurman Faber, *Report: An Assessment of Environmental Justice Policy in U.S. Climate Alliance States*, CLIMATE XCHANGE (Sept. 3, 2021), https://climate-xchange.org/2021/09/report-an-assessment-of-environmental-justice-policy-in-u-s-climate-alliance-states/ ("Less than half [38 percent] of Alliance states have developed an explicit, measurable definition of an EJ [environmental justice] community. Half of Alliance states have developed an EJ mapping data tool.").

5. State Action on Environmental Justice, RIVER NETWORK, https://www.rivernetwork.org/state-policy-hub/environmental-justice/ (last visited Jan 14, 2025) ("New York's cumulative

The Article proceeds in three parts. Part I examines the background, reasoning, and scope of the *Sandoval* decision. Part II analyzes the empirical evidence of environmental disparities and explores how Title VI's disparate impact regulations previously enabled challenges to discriminatory environmental policies. Part III evaluates potential alternative pathways for disparate impact litigation post-*Sandoval*, including section 1983 claims, Equal Protection challenges, and administrative enforcement through federal agencies. The Article concludes that legislative action may be required to restore effective private enforcement mechanisms and ensure environmental justice for vulnerable communities.

II. THE *SANDOVAL* DECISION AND ITS SCOPE

A. The Background and Facts of Sandoval

In the landmark 2001 *Alexander v. Sandoval* decision,[6] the U.S. Supreme Court held that private parties cannot file private lawsuits to enforce federal discriminatory effects (disparate impact) regulations issued under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (hereinafter Title VI), because Title VI only prohibits intentional discrimination, not unintentional discriminatory effects.

This ruling eliminated a presumed method for seeking compensation for civil rights violations within federal regulations, as private individuals no longer had a right to file lawsuits under, or to enforce, federal discriminatory effects regulations issued pursuant to Title VI.[7]

In *Sandoval*, an individual filed a class action lawsuit under Title VI against the Alabama Department of Public Safety, seeking to prevent the administration of the state driver's license exam solely in English, which was done in accordance with a 1990 state constitutional amendment that designated English as the official language of Alabama.[8] The state amendment also mandated state authorities to elevate its status, leading the Alabama Department of Public Safety to implement an "English-Only

impact law mirrors New Jersey's, and the state's efforts through the Climate Leadership and Community Protection Act [2019] include robust public participation, including around the development of disadvantaged communities criteria.").

6. Alexander v. Sandoval, 532 U.S. 275 (2001).

7. Michael D. Mattheisen, *The Effect of* Alexander v. Sandoval *on Federal Environmental Civil Rights (Environmental Justice) Policy*, 13 GEO. MASON U. C.R. L.J. 35, 37 (2003).

8. *Id.*

Policy" in 1991.[9] This policy stipulated that the written driver's license tests in the state be conducted exclusively in English.[10] However, Title VI prohibits discrimination based on race, color, and national origin in programs that receive federal financial assistance, including the Alabama Department of Public Safety, which received funding from both the U.S. Department of Justice (DOJ) and the U.S. Department of Transportation (DOT).[11]

The plaintiff, Martha Sandoval, contended that the English-only policy enforced by the state violated Title VI regulations of the DOJ, as it prevented federally assisted programs from employing discriminatory methods of administration.[12] Sandoval argued that the state's policy produced a discriminatory effect on individuals who were not fluent in English, based on their national origin.[13] Sandoval filed a lawsuit seeking both declaratory and injunctive relief, claiming that the English-only policy of the Alabama Department of Public Safety violated her right to be free from national origin discrimination. Sandoval argued that this right was protected by the Equal Protection Clause of the Fourteenth Amendment, as well as by Title VI of the Civil Rights Act of 1964 and its implementing regulations.[14]

Section 1 of the Fourteenth Amendment states that no state can deny equal protection of the laws to any person within its jurisdiction.[15] To prove a violation of this guarantee of equal protection, a plaintiff must demonstrate that the policy or program in question was motivated by an intent to discriminate.[16] Typically, evidence such as substantial disparate impact, a history of discriminatory actions by officials, deviations from normal decision-making procedures, and discriminatory statements in legislative or administrative history can establish discriminatory intent.[17] The requirement to show discriminatory intent sets a high standard of proof for plaintiffs.[18]

The U.S. District Court for the Middle District of Alabama ruled in favor of Sandoval and issued an injunction against the policy, ordering

9. John Arthur Laufer, Alexander v. Sandoval *and Its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613, 1615 (2002).

10. *See id.*

11. Mattheisen, *supra* note 7; 42 U.S.C.S. § 2000d (1964).

12. *Sandoval*, 532 U.S. at 278.

13. *Id.* at 279.

14. *See* Laufer, *supra* note 9.

15. *Id.* at 1616.

16. *Id.*

17. *Id.*

18. *Id.*

the Alabama Department of Public Safety to make arrangements for non-English speakers, and this decision was upheld by the U.S. Court of Appeals for the Eleventh Circuit.[19] In this case, *Sandoval v. Hagan,* the Eleventh Circuit ruled that such a cause of action existed, based on its own precedent, relevant Supreme Court statements, and decisions in other circuits.[20]

B. The Title VI Statutory Framework

Title VI of the Civil Rights Act of 1964, enacted under Congress's Spending Clause power, prohibits racial discrimination by institutions that choose to accept federal funding. The Alabama Department of Public Safety, having received grants from the DOJ and DOT, thereby "subjected itself to the restrictions" of Title VI.[21] These restrictions arise from two statutory clauses.[22] The primary prohibition is contained in section 601, which states that no person in the United States shall be excluded from participating in, denied the benefits of, or subjected to discrimination under any program or activity receiving federal financial assistance on the grounds of race, color, or national origin.[23] Section 602 complements section 601 of the Civil Rights Act of 1964 by granting federal agencies the authority to issue rules, regulations, or orders to promote compliance with section 601.[24] This provision applies to programs and activities that receive federal financial assistance, and although section 602 does not explicitly address private enforcement, it empowers federal agencies to enforce the regulations they adopt under this section.[25]

C. The Court's Analysis and Holdings

In 2000, the Supreme Court granted certiorari to hear *Sandoval v. Hagan*, to determine whether the disparate impact regulations can be enforced through a private cause of action.[26] Upon reviewing previous case law, the Court found that no such cause of action had been previously

19. *Sandoval*, 532 U.S. at 279.

20. Tanya Miller, *Alexander v. Sandoval and the Incredible Disappearing Cause of Action*, 51 CATH. U. L. REV. 1393, 1408 (2002).

21. Laufer, *supra* note 9, at 1616.

22. *Id.*

23. *Id.* at 1616-1617.

24. *Id.* at 1616.

25. *Id.*

26. Miller, *supra* note 20, at 1408.

recognized.[27] The Court overturned the ruling, acknowledging that while intentional discrimination under Title VI and its regulations can be the subject of a private lawsuit, discriminatory effects under Title VI regulations cannot.[28] Discriminatory effects under Title VI regulations cannot be the subject of private lawsuits because Title VI does not prohibit disparate impact.[29]

In coming to its decision, the Court stated, "three aspects of Title VI must be taken as given."[30] First, that "private individuals may sue to enforce . . . Title VI and obtain both injunctive relief and damages."[31] Second, that Title VI prohibits only intentional discrimination.[32] And, third, that Title VI regulations "may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under Title VI.[33] In regard to the third assumption, however, the Court noted that it had never actually held that Title VI disparate impact regulations were valid and that the premise was "in considerable tension" with the Court's opinions in *Regents of University of California v. Bakke*[34] and *Guardians Association v. Civil Service Commission of New York*[35] which determined that Title VI prohibited only intentional discrimination.[36]

The plaintiff in *Sandoval* did not contest the regulations themselves; therefore, the opinion of the Court solely considered whether a private lawsuit could be initiated to enforce the regulation, and did not address whether the regulation was permitted under Title VI or whether the lower courts were correct in their ruling that the English-only policy constituted discrimination on the basis of national origin.[37] The Court concluded that Congress intended the disparate impact regulations to be enforced directly by the Office for Civil Rights (OCR), a political body with limited resources, as opposed to a private right of action.[38] Prior to the *Sandoval* ruling, over the course of the thirty-seven years since the Civil Rights Act was passed, the Court had on several occasions indirectly approved of

27. *Id.*
28. Mattheisen, *supra* note 7, at 38.
29. 42 U.S.C.S. § 2000d (1964).
30. *Sandoval*, 532 U.S. at 279.
31. *Id.* at 279.
32. *Id.* at 280.
33. *Id.* at 281.
34. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
35. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983).
36. Mattheisen, *supra* note 7 at 39.
37. *Id.* at 38.
38. *Id.*

private actions.[39] Furthermore, the matter of private actions under the Title VI regulations had already been settled by nine out of the twelve U.S. Courts of Appeals; all had reached the consensus that such an action was legally permissible.[40]

The Court distinguished between sections 601 and 602 of the Civil Rights Act of 1964, ultimately determining that section 601 establishes individual rights with the language "no person . . . shall . . . be subjected to discrimination."[41] While this language creates the opportunity for a private right of action, the Court clarified that it exclusively prohibits intentional discrimination.[42] Section 602, on the other hand, authorizes federal agencies to develop regulations to advance the objectives of section 601 and ensure that recipients of federal funds do not discriminate.[43] However, the Court determined that section 602 does not center on the regulated or protected individuals but rather on the agencies.[44] Therefore, section 602 does not create new private rights beyond those outlined in section 601, nor can it establish an additional private cause of action.[45] Agencies may employ section 602 to promote the rights granted in section 601, but cannot create new private rights beyond that.[46]

Since section 601 prohibits only intentional discrimination and section 602 merely advances the rights established in section 601, an independent private cause of action for disparate impact cannot be created by section 602.[47] Therefore, if section 602 regulations prohibit conduct permitted by section 601, they cannot be enforced through an implicit private right of action.[48]

In regard to prohibiting activities that result in disparate impact, several federal agencies have implemented regulations.[49] The Court's decision in *Sandoval* did not discuss the legitimacy of such regulations, but rather assumed that the agencies had the authority to enact them.[50]

39. *Id.*
40. *Id.*
41. *Sandoval*, 532 U.S.at 288.
42. *Id.* at 289.
43. Derek Black, *Picking up the Pieces After* Alexander v. Sandoval*: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356, 359 (2002).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 359-360.
48. *Id.* at 360.
49. Black, *supra* note 43, at 356, 361.
50. *Id.*

However, the Court did acknowledge that certain regulations enacted under section 602 prohibit actions allowed under section 601, such as neutral policies with disparate effects.[51] As a result, the Court's interpretation suggests that "discrimination" pertains to intentional discrimination under section 601, but may encompass unintentional discrimination under section 602.[52] Despite this potential inconsistency, the Court's focus was solely on the presence of an implied private right of action to enforce the regulations created under section 602.[53]

D. The Court's Impact on Civil Rights Enforcement

The Court clarifies in *Sandoval* that the regulations under Title VI do not establish a cause of action for unintended discrimination.[54] In *Sandoval*, the complainants contended that the regulations had to be "privately enforceable" because they contained "rights-creating language."[55] However, the Court determined it was "incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress."[56] According to the Court, "the genesis of private causes of action, whether they are substantive federal law or private rights of action to enforce federal law, must be created by Congress and is determined by Congressional or statutory intent."[57] The Court observed that the "rights-creating language" in section 601 of Title VI "is completely absent from § 602," and that "far from displaying congressional intent to create new rights, § 602 limits agencies to effectuating rights already created by § 601.[58]

Further, the Court observed that, "Statutes [like Title VI] that focus on the person [or entity] regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons," and that "Section 602 is yet a step further removed: [It] focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating."[59] The Court accordingly concluded, "When this is true, 'there [is] far less reason

51. *Id.*
52. *Id.*
53. *Id.*
54. Mattheisen, *supra* note 7, at 72.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 7.
59. *Id.*

to infer a private remedy in favor of individual persons.'"[60] The decisions raise questions concerning the validity of regulations on discriminatory effects and whether Title VI actually grants a substantive right for environmental purposes.[61]

III. ENVIRONMENTAL JUSTICE UNDER TITLE VI

A. The Pattern of Environmental Disparities

While the outcome of the *Sandoval* case was anticipated by some, it still caused a great deal of shock among civil rights advocates, particularly for activists working in the area of environmental justice.[62] The environmental justice movement seeks to establish conceptual and legal links between the deeply interconnected issues of race/class discrimination and environmental protection.[63] The concept of environmental justice has garnered considerable attention due to the united efforts of poor and minority communities nationwide.[64] These groups have formed grassroots organizations to combat the unfair implementation of environmental policies and the unjust distribution of environmental hazards within their communities.[65]

Despite being viewed as progressive movements, civil rights and environmentalism have often been seen as incompatible with each other.[66] However, in recent decades, these ideological factions have acknowledged their shared goals and methodologies, leading to the emergence of a distinct, yet interdependent, environmental justice movement.[67] Both civil rights proponents and the more recently energized

60. *Id.*

61. *Id.*

62. *Id.* at 39.

63. *See* David J. Galalis, *Environmental Justice and Title VI in the Wake of* Alexander v. Sandoval*: Disparate-Impact Regulations Still Valid Under Chevron*, 31 B. C. ENV'T AFF. L. REV. 61-62 (2004), https://heinonline.org/HOL/P?h=hein.journals/bcenv31&i=69.

64. Joseph Ursic, *Finding a Remedy for Environmental Justice: Using 42 U.S.C. 1983 to Fill in a Title VI Gap*, 53 CASE W. RSRV. L. REV. 497, 498 (2002), https://heinonline.org/HOL/P?h=hein.journals/cwrlrv53&i=507.

65. *See generally* Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENV'T L. REV. 1 (2002), https://heinonline.org/HOL/P?h=hein.journals/helr26&i=7. (Environmental protection and civil rights law have been based on drastically different problem paradigms. Their differences can be traced to fundamentally divergent regulatory value premises: Civil rights law is intended to provide protections against majoritarian pressures, while environmental regulation is largely designed to enhance majoritarian preferences). Ursic, *supra* note 64 at 498.

66. Galalis, *supra* note 63, at 62.

67. *Id.*

environmental justice movement acknowledge that economically disadvantaged and minority communities bear a disproportionate burden of exposure to environmental risks, as compared to wealthier, predominantly Caucasian neighborhoods.[68] This is not necessarily due to deliberate acts of racism, but rather a consequence of the inherently biased decision-making processes within seemingly neutral structures.[69] These "disparate impacts" can be observed in three contexts: (1) disparate siting and permitting of hazardous facilities, (2) disparate enforcement of environmental laws, and (3) disparate cleanup of contaminated sites.[70] To address and prevent environmental harm in underprivileged communities, advocates of environmental justice rely heavily on private legal action, while also seeking to influence the decision-making processes of policymakers.[71] Furthermore, negotiation has emerged as an alternative means for citizen groups looking to reduce or prevent environmental damage in their localities.[72]

Prior environmental justice legal actions had concentrated on utilizing Title VI and specific regulations of the Environmental Protection Agency (EPA).[73] Title VI has two main components: (1) Section 601 establishes a broad ban on discrimination by preventing recipients of federal funds from subjecting recipients to discrimination on the basis of race and (2) section 602 mandates that all federal agencies in charge of disbursing federal funds must implement regulations that "realize the objectives of section 601."[74]

Disparate impact regulations had become the main means through which private plaintiffs sought to assert their right to be protected from racial discrimination by recipients of federal funds, due to the Court's narrow interpretation of section 601 prior to *Sandoval*.[75] In accordance with section 602 of the Civil Rights Act of 1964, the EPA issued regulations in 1973 that not only forbade intentional racial discrimination by those receiving EPA funding, but also prohibited the use of "criteria or methods" that would result in discrimination against individuals based on their race.[76]

68. *Id.*
69. *Id.* at 62-63.
70. *Id.* at 63.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *See* Laufer, *supra* note 9, at 1621.
76. Galalis, *supra* note 63, at 63-64.

B. The Failure of Title VI Environmental Protection

One premise underlying environmental justice Title VI strategy is that Title VI creates substantive rights: specifically, a substantive right to environmental justice (i.e., the even distribution of pollution by racial demographics).[77] For example, the EPA's Title VI guidance states that "Title VI is concerned with how the effects of the programs and activities of a recipient are distributed based on race, color, or national origin," and that the EPA "generally would expect the risk or measure of potential adverse impact for affected and comparison populations to be similar under properly implemented programs, unless justification can be provided."[78] The original 1998 interim Title VI Guidance was also based on the same substantive standards, which stated that the "EPA generally would expect the rates of impact for the affected population and comparison populations to be relatively comparable under properly implemented programs."[79] According to the EPA's Title VI guidance, this environmental right exists pursuant to civil rights law even though environmental law does not include such a right.[80]

However, the EPA's interim guidance was issued with the purpose of implementing Title VI of the Civil Rights Act of 1964, rather than environmental law.[81] Merely complying with environmental laws does not automatically equate to compliance with Title VI, as discrimination may arise from policies and practices that seem impartial but have a discriminatory impact.[82] For example, while most permits are designed to regulate pollution, they may still raise concerns under Title VI in certain cases, as environmental laws do not consider race, color, or national origin disparities.[83] Title VI is primarily concerned with how a recipient's programs and activities affect these protected groups.[84] No federal environmental laws address the issue of race, color, or national origin-based disparities resulting from environmental permits.[85] Therefore, the scope of a recipient's Title VI responsibility is not confined by the framework set up to implement their environmental regulatory program.[86]

77. Mattheisen, *supra* note 7, at 73.
78. *Id.* at 73-74.
79. *Id.* at 74.
80. *Id.*
81. *Id.* at 75.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*

The environmental justice movement's Title VI strategy is not aligned with existing laws.[87] Title VI does not allow for regulations that forbid unintentional discrimination or provide extensive power to regulate unintentional discriminatory effects.[88] Furthermore, Title VI does not establish substantive rights on its own, let alone a substantive right to the equal distribution of pollution among different races.[89] It also does not impose an obligation on recipients of federal financial assistance to ensure such a substantive right.[90] Title VI is proscriptive, not prescriptive: It proscribes, or prohibits, use of discriminatory standards and practices by recipients of federal financial assistance, but does not prescribe, authorize, or require recipients to provide any particular service or level of service, including interracially uniform environmental conditions.[91]

The authority of a federal agency is limited to the powers and authorities granted to it by its governing statutes.[92] Title VI does not grant state agencies immunity from federal anti-discrimination regulations, and it does not allow or require the utilization of racial criteria. Some commentators argue that providing environmental protection by race is "presumptively unlawful and can only be justified, if at all, by meeting the strict scrutiny standard, which requires that the governmental action serve a compelling, non-discriminatory governmental interest, be based on substantial evidence, and be narrowly tailored to serve that interest."[93]

Regardless, the effort to use Title VI as a means of achieving environmental justice was relatively short-lived.[94] At first, advocates attempted to enforce EPA's disparate impact regulations directly by asserting the existence of an implicit private right of action, but when the Court in *Sandoval* held that no implied private right of action existed to enforce these regulations, environmental activists found themselves significantly limited in their ability to further their goals.[95]

C. The Distribution of Hazardous Waste Sites

The environmental justice movement maintains that racism and classism in the placement of locally undesirable land uses (LULUs), the

87. *Id.* at 77.
88. *Id.*
89. *Id.*
90. *Id.* at 77-78.
91. *Id.* at 78.
92. *Id.*
93. *Id.*
94. Galalis, *supra* note 63, at 64.
95. *Id.*

creation and enforcement of environmental and land use regulations, and the allocation of resources for cleaning polluted areas contribute to increased exposure to environmental hazards for low-income and minority neighborhoods.[96] The movement advocates for a more just distribution of environmental resources, such as clean air, as well as a more equitable distribution of environmental burdens, such as waste facilities.[97] These arguments and demands are becoming increasingly prominent in discussions around environmental and land use policy in the United States.[98] Environmental justice considerations are now being included in environmental impact statements prepared under the National Environmental Policy Act of 1969 (NEPA).[99] Additionally, at least seven states have enacted laws specifically addressing environmental justice, and numerous other states are currently in the process of considering similar legislation.[100]

In 1982, protesters in predominantly African-American Warren County, North Carolina brought national attention to the correlation between pollution and minority communities.[101] The protesters were opposed to the decision by the state to construct a landfill for the disposal of soil contaminated by the highly toxic polychlorinated biphenyls (PCBs) in an area that was eighty-four percent African-American.[102] This community had the highest percentage of African-Americans in the state, accounting for sixty-four percent of the total population.[103] Despite their efforts, the campaign ultimately failed. However, it is noteworthy that 400 individuals were arrested, marking the first time that anyone in the United States had been imprisoned for attempting to prevent the establishment of a toxic waste landfill. Furthermore, the protests galvanized Walter E. Fauntroy, a prominent participant in the campaign and the District of Columbia's delegate to Congress. As a direct result of the protests, he took a pivotal step by calling upon the United States General Accounting Office (GAO) to conduct an inquiry into the racial composition of hazardous waste sites.[104]

96. Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios—A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 3 (1997), https://heinonline.org/HOL/P?h=hein.journals/eclawq24&i=13.

97. *Id.*

98. *Id.*

99. *Id.* at 4.

100. *Id.*

101. Ursic, *supra* note 64, at 498.

102. *Id.*

103. *Id.*

104. *Id.*

In 1983, the GAO conducted an examination of the correlation between race and the selection of sites for hazardous waste facilities in the Environmental Protection Agency's Region IV. Region IV consists of Alabama, Florida, Georgia, Mississippi, Kentucky, North Carolina, South Carolina, and Tennessee.[105] The report revealed that African-Americans constituted the majority population in three of the four communities where hazardous waste landfills were situated. Notably, despite African Americans accounting for just twelve percent of the nation's population at that time, they comprised a staggering forty-two to ninety-two percent of the populations in these three communities.[106] Moreover, even in the fourth landfill, which was established in a county where the overall population was thirty-eight percent African-American, the site was located just four miles away from a community that was comprised of sixty-nine to ninety-two percent African-American residents.[107]

Although the environmental justice movement encompasses the distributional consequences of all environmental and land use choices, a primary focus of the movement has been on the placement of undesirable land uses, such as waste facilities.[108] Studies have established clear patterns of racial and socioeconomic disparities in the distribution of a large variety of environmental hazards.[109] Environmental justice studies spanning decades have consistently shown that in the United States, hazardous waste is unevenly distributed, with non-white and low-income neighborhoods being disproportionately affected.[110] The location of commercial hazardous waste treatment, storage, and disposal facilities (TSDFs) has been a contentious issue, with concerns focused on the potential for discriminatory siting and resulting inequities.[111] Some environmental justice advocates argue that these facilities are intentionally located in minority neighborhoods, or at least sited in a manner that leads to a disproportionate number of them being situated in such neighborhoods.[112]

105. *Id.*

106. *Id.*

107. *Id.* at 498-499.

108. Been & Gupta, *supra* note 96, at 4.

109. *Id.* at 4-5.

110. Paul B Stretesky & Ruth McKie, *A Perspective on the Historical Analysis of Race and Treatment Storage and Disposal Facilities in the United States*, 11 ENV'T RSCH. LETTERS 031001 (2016), https://dx.doi.org/10.1088/1748-9326/11/3/031001.

111. Douglas L. Anderton et al., *Environmental Equity: The Demographics of Dumping*, 31 DEMOGRAPHY 229, 229-230 (1994), https://www.jstor.org/stable/2061884.

112. Been & Gupta, *supra* note 96, at 4.

One of the most well-known studies is a nationwide analysis conducted by the Commission for Racial Justice (CRJ) in 1987 that examined the demographic characteristics of areas surrounding commercial hazardous waste facilities.[113] The CRJ discovered a significant correlation between the number of these facilities in a given zip code and the percentage of minorities in the population of that zip code.[114] In areas with one hazardous waste facility, the percentage of minorities was nearly twice that of areas without any such facilities.[115] As the number or severity of these facilities in a given neighborhood increased, so did the percentage of minorities residing in that neighborhood.[116] The CRJ updated its research in 1994 using 1990 census data and found, once again, that zip codes with one facility had more than twice the percentage of minorities compared to zip codes with no such facilities.[117] There have been at least twenty additional studies that have arrived at similar conclusions based on case studies of specific cities, counties, or regions.[118]

Despite the CRJ study, the public discourse regarding environmental justice concerns did not begin to gain momentum until the early 1990s.[119] A pivotal moment in the history of the environmental justice movement occurred during the Michigan Conference on Race and Incidence of Environmental Hazards in January 1990.[120] This event brought together a diverse cohort of individuals, including scholars, social scientists, civil rights activists, and biological investigators, to deliberate upon the unfair allocation of environmental hazards within impoverished and minority communities.[121] The representatives at the conference formally voiced their apprehensions to the EPA.[122]

In response to these apprehensions, the EPA established the Environmental Equity Workgroup (EEW).[123] The EEW was tasked with assessing the risks that accompanied the unequal distribution of hazardous waste in minority communities.[124] Additionally, it examined the EPA's

113. *Id.* at 5.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. Ursic, *supra* note 64, at 499.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*

existing policies from the lens of environmental equity.[125] It is worth noting that the EEW was unable to draw a definitive correlation between health effects and exposure to environmental hazards, owing to the limited data available.[126] Nevertheless, in its May 1992 report, the EEW confirmed the apparent disparity in the potential for exposure to environmental pollution based on race and socioeconomic status.[127]

A prior study was done that utilized data from the 1986 baseline survey of the Americans' Changing Lives Study (ACL), a nationally representative panel study of the U.S. adult population.[128] The ACL sample was recently geocoded in order to identify the exact geographic locations of respondents and was connected to similar geocoding of point locations of sites in the EPA's 1987 Toxic Release Inventory (TRI), a national database consisting of 21,894 industrial facilities reporting on-site and off-site disposal of almost 650 toxic chemicals.[129] The ACL study offers new evidence and corroborates trends identified in a growing body of quantitative research into the uneven distribution of environmental hazards based on race and socioeconomic status.[130] The study found that racial disparities in the distribution of the ACL sample in the vicinity of polluting industrial facilities persisted even after adjusting for socioeconomic and other variables.[131] Moreover, the study also discovered that proximity to a polluting facility was significantly linked to socioeconomic and other demographic variables.[132]

The study found that people with lower incomes were significantly more likely to reside in the vicinity of a polluting industrial facility compared to those with higher incomes.[133] Similarly, individuals without a high school diploma were significantly more likely to live near such a facility than those with higher levels of education.[134] While the study did not uncover significant gender differences concerning proximity to a facility, the findings suggested that marital status was correlated with the

125. *Id.*
126. *Id.* at 500.
127. *Id.*
128. Paul Mohai et al., *Racial and Socioeconomic Disparities in Residential Proximity to Polluting Industrial Facilities: Evidence from the Americans' Changing Lives Study*, 99 AM. J. PUB. HEALTH S649, S650 (2009), https://pmc.ncbi.nlm.nih.gov/articles/PMC2774179/pdf/S649.pdf.
129. *Id.* at S650.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*

presence of polluting industrial facilities nearby.[135] The study also found that racial disparities in proximity to polluting industrial facilities were more significant in certain regions of the country than in others. Specifically, the disparities were most pronounced in the metropolitan areas of the Midwest and West, as well as suburban areas of the South.[136] However, no significant disparities were identified in rural areas or the metropolitan areas of the Northeast. [137]

However, it should be noted that while these studies demonstrate a link between race and site locations, an important consideration is whether hazardous waste sites are located in low-income or minority neighborhoods or whether poor and minority populations have moved into areas near these sites, as this can have significant implications for public policy.[138] This situation can arise when a hazardous waste facility is viewed as a nuisance or unwanted in a neighborhood and property values in the surrounding area are likely to decrease, which causes residents who can afford to leave to do so.[139] As a result of this "out-migration" and the decline in property values, the housing in the neighborhood becomes more affordable for lower-income households and individuals who have limited housing options due to racial discrimination in the housing market.[140] Over time, the community around the facility becomes poorer and more populated by a higher percentage of racial and ethnic minorities than it was prior to the facility's placement.[141]

Other studies have come to differing conclusions. One study found that hazardous waste TSDFs were typically located in areas where white residents were already moving out and being replaced by minority residents, a trend that had been occurring for a decade or two before the TSDFs were established.[142] Further studies are needed to help determine: "Which came first, the facilities or the disproportionate numbers of poor people and minorities?"[143] Additional research is necessary to examine

135. *Id.*

136. Mohai et al., *supra* note 128.

137. *Id.* at S654.

138. Been and Gupta, *supra* note 96, at 7.

139. *Id.*

140. *Id.*

141. Mohai et al., *supra* note 128.

142. Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, 10 ENV'T RSCH LETTERS 115008, 15 (2015), https://iopscience.iop.org/article/10.1088/1748-9326/10/11/115008/pdf.

143. *Id.*

the underlying causes of uneven facility siting and determine the separate influences of racial, socioeconomic, and political factors.[144]

Furthermore, it is important to explore how these factors may intersect and reinforce one another. The fact that the racial makeup of an area is a stronger predictor of the siting of hazardous waste TSDFs than its socioeconomic characteristics provides compelling evidence for racial explanations of this disparity.[145] Racial disparities can arise when people of color reside in highly segregated neighborhoods that are already targeted for new facility siting and may also have other industrial land uses.[146] These land use patterns, resulting in part from past racial discrimination in zoning, property law, and housing, continue to endure today.[147] Even though obvious discriminatory practices of the past have been made illegal, more subtle forms of discrimination continue to exist, which result in the concentration of minorities in areas that are environmentally undesirable.[148] This may happen by discouraging their migration to better areas and encouraging their migration to less desirable ones.[149]

Moreover, institutional forms of discrimination in environmental policy and industry practices limit the access of people of color to information and participation in decision-making processes related to facility siting, which leads to the concentration of new facilities in minority neighborhoods.[150] The issue of whether undesirable land uses are disproportionately sited in minority and poor neighborhoods or whether minority individuals are driven to live in these areas is an important consideration, but discussions must also consider appropriate solutions to these inequities.

IV. ALTERNATIVE PATHS TO DISPARATE IMPACT LITIGATION

A. The Section 1983 Strategy

Prior to the *Sandoval* decision, private individuals could use private causes of action to enforce federal regulations enacted under section 602 of Title VI.[151] Some circuits allowed individuals to use private rights of action to enforce Title VI regulations by arguing that these regulations

144. *Id.*
145. *Id.* at 16.
146. *Id.*
147. *Id.*
148. Mohai & Saha, *supra* note 142.
149. *Id.*
150. *Id.*
151. Black, *supra* note 43.

constitute "rights" as defined by 42 U.S.C. § 1983, which grants individuals the right to take legal action if their constitutional or statutory rights have been violated.[152] These regulations, enacted by various federal agencies, prohibited policies and actions that had racially disparate effects, allowing citizens to bring private lawsuits to address issues such as environmental racism, racial disparities in education, and other barriers that impeded the participation of racial minorities in public programs.[153] While *Sandoval* does not entirely invalidate section 602 regulations, it does create uncertainty regarding their legal standing in the judicial system.[154] As there is no longer an inferred private cause of action to enforce these regulations, the interpretation of these regulations is unclear.[155]

However, the decision in *Sandoval* effectively closed off this avenue for individuals to enforce section 602 regulations privately; lack of private enforcement for section 602 may lead to a setback for civil rights.[156] This change hinders the enforcement of civil rights legislation and creates obstacles to equal opportunity for people of all races and ethnicities and forces plaintiffs to be creative and find new ways to achieve the same ends that implied causes of action under section 602 provided for over thirty years.[157] The resolution of this issue will depend on future court rulings or new legislation enacted by Congress.[158] As long as there is no further guidance from the Supreme Court or Congress, plaintiffs may want to base their claims on previously established causes of action by the Court in similar circumstances.[159]

One of the most feasible alternatives for future private actions is section 1983 of Title 42 of the U.S. Code, a Reconstruction Era legislation.[160] Section 1983 allows lawsuits to be filed against government officials or the government for violating "rights, privileges, or immunities secured by the Constitution and laws."[161] It is possible that the implementing regulations for Title VI fall under the protections of section

152. *Id.* at 363.
153. *Id.* at 357.
154. *Id.* at 363.
155. *Id.*
156. *Id.*
157. *Id.* at 357-358.
158. *Id.* at 363.
159. *Id.*
160. Kevin G. Welner, Alexander v. Sandoval*: A Setback for Civil Rights*, 9 EDUC. POL'Y ANALYSIS ARCHIVES at *4 (2001), https://nepc.colorado.edu/publication/alexander-v-sandoval-a-setback-civil-rights.
161. *Id.*

1983.[162] Lawsuits filed under section 1983 circumvent the complicated analysis involved in the implied right of action.[163] Moreover, Congress specifically intended for section 1983 to provide civil rights plaintiffs with direct access to judicial relief.[164] In addition, in his dissent in *Sandoval*, Justice Stevens stated:

> First, to the extent that the majority denies relief to the respondents merely because they neglected to mention 42 U.S.C. § 1983 in framing their Title VI claim, this case is 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 § 1983 to obtain relief.[165]

Section 1983 grants individuals the right to file a lawsuit for deprivation of any right under the federal constitution or laws.[166] The outcomes of various efforts to assert disparate impact claims through a § 1983 action have been inconsistent, and post-*Sandoval*, courts are split on how to use § 1983 to enforce Title VI regulations. *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*[167] was the first to consider the implications of *Sandoval* for enforcing Title VI regulations.[168] In *South Camden*, the court determined that the Supreme Court's decision in *Sandoval* only dealt with the question of whether a private right of action can be inferred from section 602, and did not address the issue of whether individuals can bring a claim under section 1983 for violations of Title VI.[169] The court determined that the prior precedent in its circuit allowing individuals to bring a section 1983 suit to enforce Title VI regulations is still valid and enforceable.[170]

However, the Third Circuit reversed the district court's assertion in *South Camden* that *Sandoval* did not preclude recognizing a § 1983 claim to enforce Title VI regulations. The Third Circuit court found that *Sandoval's* implications actually preclude such a claim. On the other hand, a more recent decision by the Tenth Circuit held that § 1983 claims can still be valid even after *Sandoval*. Because the Court in *Sandoval* did

162. *Id.*
163. *Id.*
164. *Id.*
165. Alexander v. Sandoval, 532 U.S. 275, 299-300 (2001).
166. Black, *supra* note 43, at 364.
167. S. Camden Citizens in Action v. N.J. Dep't of Env't Prot., 145 F. Supp. 2d 505 (D.N.J. 2001).
168. Black, *supra* note 43, at 365.
169. *Id.*
170. *Id.*

not consider whether a plaintiff might use § 1983 to privately enforce section 602, some circuits that have recognized a private cause of action under § 1983 might continue to do so.[171]

Another issue to consider about § 1983 relates to statutory versus regulatory rights. With respect to statutory § 1983 claims, the Court has long said that congressional intent to provide the remedy is assumed.[172] But the Court has said this in relation to *statutory* rights, and the right to be free of disparate impact discrimination is a *regulatory* right. Therefore, an environmental justice plaintiff will not enjoy the presumption of a § 1983 remedy when the right she asserts is regulatory, and many claims may fall under this category.[173] Currently, the connection between the EPA's regulations on disparate impact and the explicit language of Title VI is too tenuous to support a private action; agency objectives alone cannot replace the intentions of Congress.[174] It should also be noted that even if § 1983 may still be used to enforce Title VI regulations on disparate impact, § 1983 only applies to actions taken by state actors, and private entities are not subject to private lawsuits for violations of the Title VI disparate impact regulations.[175]

B. The Equal Protection Approach

Another possible recourse for plaintiffs is to allege a violation of the Equal Protection Clause of the Fourteenth Amendment.[176] The Equal Protection Clause provides that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction equal protection of the laws."[177] If an agency's policies have an adverse racial impact, individual plaintiffs may have grounds to assert a violation of the Equal Protection Clause.[178] Although early Equal Protection cases centered

171. *Id.*

172. Lisa S. Core, Alexander v. Sandoval*: Why a Supreme Court Case About Driver's Licenses Matters to Environmental Justice Advocates*, 30 B.C. ENV'T. AFF. L. REV. 191, 241 (2002), https://heinonline.org/HOL/P?h=hein.journals/bcenv30&i=199.

173. *Id.*

174. *Id.* at 242.

175. Randal S. Jeffrey, Elisabeth Ryden Benjamin & Constance P. Carden, *Drafting an Administrative Complaint to Be Filed with the U.S. Department of Health and Human Services' Office for Civil Rights*, 35 CLEARINGHOUSE REV. 276, 277 (2001), https://heinonline.org/HOL/P?h=hein.journals/clear35&i=276.

176. Andrew J. Kornblau, *Racial Injustice*—Ferguson v. City of Charleston *and the State Title VI in the Post*-Sandoval *Era*, 2 RUTGERS J. L. & URB. POL'Y 353, 376 (2005), https://heinonline.org/HOL/P?h=hein.journals/rutjulp2&i=283.

177. U.S. CONST. amend. XIV, § 1.

178. Kornblau, *supra* note 176, at 376.

around statutes and policies that were racially discriminative on their surface, policies that are facially neutral must establish an invidious intent to prove unconstitutionality.[179]

However, this could potentially reintroduce the debate over the distinction between §§ 602 and 601, meaning there may not be a high probability of success for an equal protection claim.[180] Moreover, even when disparate impact is evident, it is nearly impossible for plaintiffs to prove discriminatory intent.[181] Proving disparate impact in regard to environmental discrimination would be an even greater challenge, as environmental discrimination often stems from the lingering effects of past discrimination, making it arduous to meet the equal protection test.[182] The requirement for intent ignores the widespread and entrenched nature of institutional racism throughout the country, and this presents a particularly acute challenge for plaintiffs pursuing environmental justice claims. Such claims frequently arise when a community suffers from adverse effects caused by multiple pollution sources; the cumulative impact of these harmful environmental effects poses significant obstacles for demonstrating intent on the part of any individual actor.[183]

C. The Deliberate Indifference Framework

Another potential substitute for pursuing a private right of action under Title VI could be to seek enforcement of such claims through the "deliberate indifference theory."[184] The deliberate indifference standard has already been applied in the context of Title IX sexual harassment policies and could potentially serve as a way to establish a private right of action under Title VI.[185] The main focus of deliberate indifference ignores a plainly discriminatory policy while having knowledge of the disparate results.[186] There are

> four basic elements of deliberate indifference: (1) there must be an official with the authority and power to correct the discrimination; (2) the official must be on notice that the recipient could be liable in the event that certain misconduct occurred; (3) the official must have actual notice of the misconduct; and (4) the official must be

179. *Id.*
180. *Id.* at 377.
181. Core, *supra* note 172, at 195.
182. *Id.* at 196.
183. *Id.*
184. Kornblau, *supra* note 176, at 377.
185. *Id.*
186. *Id.*

> deliberately indifferent to the violation of a victim's rights, misconduct, or discrimination.[187]

In *Monteiro v. Tempe Union High School District*,[188] the Ninth Circuit expanded the deliberate indifference framework to include Title VI, which imposed an obligation on schools to address racial harassment between students after becoming aware of it.[189] While the deliberate indifference standard is straightforward to apply in cases of racial and sexual harassment, as such conduct often involves blatant violations of regulations, applying this framework can become more complex in other circumstances.[190] Since deliberate indifference has only been used in harassment cases, courts may be hesitant to extend it to other forms of discrimination, such as disparate impact.[191]

Although *Sandoval* ruled out the existence of an implied private right of action under section 602, it did not call into question the authority of federal agencies to establish regulations addressing disparate impact under it.[192] Consequently, there is no separate implied private cause of action under section 602 for unintentional discrimination that has a disparate impact.[193] However, such disparate impact would still be a violation of Title VI, which a federal agency could prohibit and which a recipient would be obligated to remedy upon receiving notice of the violation.[194] Similar to the argument regarding Title IX, deliberate indifference towards such a violation would be deemed as intent and could result in the assertion of a private right of action.[195] If a plaintiff is able to meet the elements under deliberate indifference theory, this theory could serve as an alternative method of preventing certain discriminatory policies.[196]

D. The Administrative Path Through OCR

The OCR is charged with ensuring that the public has equal access to programs and services funded by the U.S. Department of Health and

187. *Id.*
188. Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022 (9th Cir. 1998).
189. *Id.* at 1034-1035.
190. Kornblau, *supra* note 176 at 378.
191. *Id.*
192. *Id.* at 381.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*

Human Services.[197] It was first established in 1967 as a component of the now-defunct U.S. Department of Health and Welfare. Following the department's division into the U.S. Department of Health and Human Services and the U.S. Department of Education in 1980, each department created and maintained its own civil rights office.[198] One of the responsibilities of the OCR is to enforce several antidiscrimination statutes, some of which include Title VI of the Civil Rights Act of 1964, section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and the Age Discrimination Act of 1975.

These antidiscrimination statutes cover a wide range of discriminatory policies and practices, and the OCR's enforcement of these statutes is evident in their handling of a diverse array of cases.[199] Some of OCR's more recent cases include challenges to the following: discrimination, both intentional and disparate impact, on the basis of race; redlining, i.e. the refusal to supply services to predominantly minority geographic areas; failure to supply interpreter services to clients with limited English proficiency at welfare offices and medical facilities; and discrimination on the basis of disability, such as HIV status.[200]

Under federal law, the OCR has the power to investigate complaints, seek a voluntary resolution, and ensure compliance in cases where a resolution cannot be reached. The risk of federal financial aid suspension or termination is a significant motivator for voluntary compliance. Alternatively, if a complaint cannot be resolved voluntarily, the OCR may refer the case to the U.S. Department of Justice for court-enforced enforcement proceedings. If an advocate is considering filing an OCR complaint when they have the option to file a civil rights complaint in federal court, the first issue to address is whether filing the OCR complaint is the most effective way to address the civil rights violations. Advocates should consider several factors when making this determination, such as who will have control of the case, the susceptibility of the OCR to political influence, the preferable respondent, the resources required for the case, and the remedies sought for the violations. These factors highlight the legal nature of court action compared to the administrative nature of filing an OCR complaint. However, particularly because this remedy is limited to programs and services that receive funding from the U.S. Department of Health and Human Services, it is not an adequate replacement for an individual's private right to action.

197. Jeffrey, Benjamin, and Carden, *supra* note 175 at 278.
198. *Id.*
199. *Id.* at 279.
200. *Id.*

E. The Legislative Solution

In 2017 U.S. Senator Cory Booker, a Democrat representing New Jersey, introduced the Environmental Justice Act of 2017, with subsequent versions proposed in 2019 and 2021.[201] If passed, the bill would have codified and expanded upon several components of Clinton's Executive Order 12898, a 1994 executive order on environmental justice.[202] The 2017 bill included requirements for federal agencies to address environmental justice in their actions and permitting decisions, and would have enhanced legal protections for communities of color, low-income communities, and Indigenous communities to guard against environmental injustice.[203] Most importantly though, the bill would have reinstated a private right of action for discriminatory practices under the Civil Rights Act, superseding the Court's decision in *Alexander v. Sandoval*.[204] Individual citizens would no longer have to rely upon a government agency to bring actions against entities engaging in discriminatory practices that have a disparate impact.[205]

The Environmental Justice For All Act, reintroduced in 2021 by representatives Grijalva and McEachin, and again in 2023,[206] represents the most comprehensive legislative attempt yet. Beyond reinstating private rights of action, it requires cumulative impact assessments in Clean Water Act and Clean Air Act permitting decisions and establishes federal funds for addressing environmental justice communities' needs.[207] However, like its predecessors, these bills have not been enacted by Congress. [208] Despite failing to pass through Congress, these bills demonstrate the potential of the federal government to create a means of a private right of action to fill the gap left by *Sandoval*.

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201. William C. C. Kemp-Neal, *Environmental Racism: Using Environmental Planning to Lift People out of Poverty, and Re-Shape the Effects of Climate Change & Pollution in Communities of Color*, 32 FORDHAM ENV'T L. REV. 295, 316 (2020), https://ir.lawnet.fordham.edu/elr/vol32/iss3/1.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. Adam Mahoney, *Proposed Bill Treats Environmental Justice as a Civil Rights Issue*, CAPITAL B NEWS (2023), https://capitalbnews.org/environmental-justice-act-congress/.

207. Luis, *Ranking Member Grijalva, Rep. Lee, Senators Duckworth and Booker Introduce the A. Donald McEachin Environmental Justice For All Act*, RAÚL GRIJALVA (Mar. 22, 2023), https://grijalva.house.gov/ranking-member-grijalva-rep-lee-senators-duckworth-and-booker-introduce-the-a-donald-mceachin-environmental-justice-for-all-act/.

208. Environmental Justice Act of 2017, H.R. 4114, 115th Cong. (2017) https://www.govtrack.us/congress/bills/115/hr4114; A. Donald McEachin Environmental Justice For All Act, S.919, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/senate-bill/919.

F. The Clean Air Act Alternative

The recent decisions have led several commentators to conclude that the attainment of environmental justice via the private enforcement of disparate impact regulations is no longer viable.[209] Nonetheless, there are grounds to believe that these regulations could still be enforced in limited circumstances where Congress has provided an appropriate statutory "handle."[210] Section 110(a)(2)(E) of the Clean Air Act (CAA) may serve as a handle for private enforcement of disparate impact regulations in limited circumstances where Congress has provided the appropriate statutory means.[211] The provision requires that each state provide assurances, before EPA approval, that it is not prohibited by federal law from executing its proposed state implementation plan (SIP).[212] Assuming that the EPA's disparate impact regulations are valid federal law, this provision prohibits the EPA from approving parts of SIPs that would result in racial discrimination.[213] In the event that such a SIP is approved, the CAA's citizen suit provision could potentially serve as a means of compelling the administrator to reject SIPs found to violate section 110(a)(2)(E). [214]

The plain language of Title VI indicates that Congress expressed no clear or unambiguous intent to limit the scope of "discrimination" to intentional discrimination.[215] The legislative history of Title VI indicates that, due to disagreement among members of Congress as to the definition and scope of the term "discrimination," Congress deliberately left the question unresolved, opting instead to defer the issue to agency discretion.[216] In the absence of explicit congressional intent to limit Title VI's scope, agencies' regulations on disparate impact must be evaluated under the *Chevron* framework, as established by the Court in *Chevron, U.S.A. v. Natural Resources Defense Council, Inc*.[217] According to *Chevron*, a court must defer to a permissible agency interpretation of an ambiguous statute.[218] Thus, given the lack of clear congressional intent to

209. Brian Crossman, *Resurrecting Environmental Justice: Enforcement of EPA's Disparate-Impact Regulations through Clean Air Act Citizen Suits*, 32 B. C. ENV'T AFF. L. REV. 599, 601 (2005), https://heinonline.org/HOL/P?h=hein.journals/bcenv32&i=607.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 621.

216. *Id.*

217. *Id.*

218. *Id.*

restrict Title VI to intentional discrimination and the fact that disparate-impact regulations are a reasonable construction of the law, the EPA's disparate impact regulations remain valid federal law after *Sandoval*.[219]

The continued validity of the EPA's disparate impact regulations as federal law is a significant development because it permits their enforcement, despite the absence of a private right of action.[220] Such enforcement, however, requires a statutory handle like the one found in section 110 of the CAA, which regulates the submission and approval of SIPs.[221] Section 110(a)(2)(E) of the CAA provides a means of enforcing the EPA's Title VI disparate impact regulations by mandating that states provide assurances that their implementation plans will not violate any federal law, including the EPA's disparate impact regulations.[222] As a provision of federal law, compliance with these regulations is required by the CAA.[223] While the meaning of "necessary assurances" has not been explicitly defined by the EPA, courts have held that states have an affirmative duty to provide a detailed demonstration of compliance.[224] This duty requires the administrator to make a reasoned judgment on the matter and provide a detailed statement of the rationale for the decision.[225] The "necessary assurances" clause places an affirmative duty on states, requiring them to take action that inspires confidence in their compliance with the regulations.[226] The potential private enforcement of section 110(a)(2)(E) could potentially revive the environmental justice movement if advocates are able to find a means to do so.[227]

V. CONCLUSION

The Supreme Court's decision in *Alexander v. Sandoval* marked a critical setback for environmental justice advocacy by eliminating private rights of action to enforce disparate impact regulations under Title VI. While empirical evidence consistently demonstrates that hazardous environmental facilities and exposures disproportionately affect minority and low-income communities, proving discriminatory intent remains a nearly insurmountable barrier. Though alternative legal strategies have

219. *Id.* at 621-622.
220. *Id.* at 622.
221. *Id.*
222. *Id.*
223. *Id.* at 623.
224. *Id.*
225. *Id.* at 624.
226. *Id.*
227. *Id.* at 625.

emerged—including section 1983 claims, Equal Protection challenges, deliberate indifference frameworks, and administrative complaints—these approaches face significant limitations and have failed to fill the enforcement gap created by *Sandoval*. The Clean Air Act's statutory framework may offer a limited avenue for private enforcement of the EPA's disparate impact regulations in the specific context of state implementation plans. However, absent congressional action to restore private enforcement mechanisms through new legislation, vulnerable communities face severely constrained options for challenging facially neutral policies that result in discriminatory environmental burdens. The persistence of racial and socioeconomic disparities in exposure to environmental hazards, combined with limited enforcement tools, suggests that achieving environmental justice may require fundamental reforms to both civil rights and environmental law frameworks.