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## Responding to Environmental Injustice: The Civil Rights Act and American Federal Institutional and Systemic Barriers to Private Redress of Disparate Environmental Harm

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# RESPONDING TO ENVIRONMENTAL INJUSTICE: THE CIVIL RIGHTS ACT AND AMERICAN FEDERAL INSTITUTIONAL AND SYSTEMIC BARRIERS TO PRIVATE REDRESS OF DISPARATE ENVIRONMENTAL HARM

*Michael B. Jones<sup>A</sup>*  
*Peter J. Jacques<sup>B</sup>*

## ABSTRACT

This article discusses the use of private action in federal institutions for relief from disparate racial impacts. The courts have eliminated consideration of § 602 disparate impact regulations as the basis for a private right of action challenging environmental harms. Legislative action seems unlikely in this era of gridlock and partisan polarization. Agency action seems to offer the most avenues for consideration of environmental justice concerns. However, agencies are bureaucratic and subject to election results, Congressional oversight and budgetary limitations, and backlogs of determination of environmental justice complaints. Deeply rooted systemic institutional racism further constrains possible reforms to the federal branches of government.

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I. BACKGROUND – IDENTIFYING THE PROBLEM – ESTABLISHING THAT  
DISPARATE ENVIRONMENT IMPACTS EXIST  
IN MINORITY COMMUNITIES

Environmental justice seeks a remedy to the disparate impacts on minority communities of environmental harms and degradation, resulting from governmental and business decisions regarding environmental matters. “Environmental Justice’ is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>1</sup> The history of environmental justice is well known: protests in Warren County, North Carolina, first brought environmental impacts suffered in minority communities to national attention.<sup>2</sup> Studies made after the Warren County events by the Government Accountability Office (GAO)<sup>3</sup> and the United Church of Christ (UCC)<sup>4</sup> (updated in 2007<sup>5</sup>) established that environmental harms are dispro-

1. *What is Environmental Justice?*, EPA.GOV (Feb. 4, 2014), <http://www.epa.gov/environmentaljustice>.

2. Paul Mohai, David Pellow & J. Timmons Roberts, *Environmental Justice*, 34 ANN. REV. ENV'T & RES. 405, 406-07, 410, 422 (2009).

3. *Siting of Hazardous Waste Landfills and Their Correlation With Racial and Economic Status of Surrounding Communities*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, <http://archive.gao.gov/d48t13/121648.pdf> (last visited Dec. 2, 2013).

4. BENJAMIN F. CHAVIS, JR. & CHARLES LEE, UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTES SITES, ix (1987).

5. BULLARD ET AL., TOXIC WASTES AND RACE AT TWENTY: A REPORT PREPARED FOR THE UNITED CHURCH OF CHRIST JUSTICE & WITNESS MINISTRIES (2007).

portionately located in poor and minority communities. Different theories have been developed for the reasons underlying disparate impacts in minority neighborhoods. Some studies assert that non-minorities have more economic resources, are more mobile, and are more likely to move from locations with environmental impacts.<sup>6</sup> However, most studies indicate that the environmental harms are placed in existing minority neighborhoods and that the disparate impact comes not from non-minorities moving out of a neighborhood but from the initial siting decision.<sup>7</sup> Interestingly, as knowledge has increased regarding environmental risks, the initial siting of environmental harms into minority neighborhoods has increased.<sup>8</sup> Statistical studies<sup>9</sup> and meta-studies<sup>10</sup> confirm that the siting of environmental harms or risk exposure to pollutants are correlated to race, as demonstrated by the location, density and proximity of such risks in minority communities.<sup>11</sup> Such placement leads to institutionalized racism.<sup>12</sup> Improved modeling and statistical techniques in more recent studies found strong correlation of race to placement of environmental risks.<sup>13</sup>

The right to be free of racial discrimination from agencies and programs that receive federal funding was set forth in the Civil Rights Act.<sup>14</sup> In light of clear evidence that disparate racial impact of environmental harms does exist, which presumably would violate the Civil Rights Act, the efficacy of action by aggrieved persons seeking remedy of disparate environmental impacts within the United States federal institutions of the courts, the legislative branch, and executive agen-

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6. Laura Pulido, *Rethinking Environmental Racism: White Privilege and Urban Development in Southern California*, 90 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 12 (2000).

7. Manuel Pastor, Jr., Jim Sadd & John Hipp, *Which Came First? Toxic Facilities, Minority Move-In, and Environmental Justice*, 23 J. OF URB. AFF. 1 (2001).

8. Mohai et al., *supra* note 2, at 413.

9. Mohai et al., *supra* note 2, at 417; Raquel Penderhughes, *The Impact of Race on Environmental Quality: An Empirical and Theoretical Discussion*, 39 SOC. PERSP. 231, 235-37, 243 (1996); Phillip H. Pollock & M. Elliot Vittas, *Who Bears the Burden of Environmental Pollution? Race, Ethnicity, and Environmental Equity in Florida*, 76 SOC. SCI. Q. 294, 303 (1995); Evan J. Ringquist, *Equity and the Distribution of Environmental Risk: The Case of TRI Facilities*, 78 SOC. SCI. Q. 811, 818 (1997).

10. Evan J. Ringquist, *Assessing Evidence of Environmental Inequities: A Meta-Analysis*, 24 J. OF POL'Y ANALYSIS & MGMT. 223, 224, 233, 235, 241 (2005).

11. Ringquist, *supra* note 9, at 822.

12. Penderhughes, *supra* note 9, at 233; David Schlosberg, *Theorizing Environmental Justice: The Expanding Sphere of Discourse*, 22 ENVTL. POL. 37, 39 (2013).

13. Jayajot Chakraborty, *Cancer Risk from Exposure to Hazardous Air Pollutants: Spatial and Social Inequities in Tampa Bay, Florida*, 22 INT'L J. OF ENVTL. HEALTH RES. 165, 178, 180 (2012).

14. 42 U.S.C. § 2000d (2014).

cies is now assessed. Historical systemic racism is also considered as a factor and limitation for the possibility of institutional action and reform.

## II. TITLE VI – THE CIVIL RIGHTS ACT – § 601 AND § 602

Title VI of the Civil Rights Act of 1965<sup>15</sup> is central to the understanding of possible citizen action in federal institutions to ameliorate the effects of disparate racial effects. The Act prohibits intentional racial discrimination by any group or program receiving federal funds<sup>16</sup> and further requires all federal agencies to implement regulations to avoid disparate racial impacts resulting from agency actions.<sup>17</sup> Title VI is made applicable to state and local agency action by the 14th Amendment to the Constitution of the United States.<sup>18</sup> These statutory provisions have long provided that there is a private cause of action for intentional discriminatory actions pursuant to § 601.<sup>19</sup> The history of private individuals seeking governmental relief through litigation, leg-

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15. *Id.*

16. “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.” *Id.*

17. § 2000d-1 provides:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

18. U.S. CONST. amend. XIV; *see also* Lane v. Pena, 518 U.S. 187 (1996).

19. *See* discussion *infra* Part IV.

islative accomplishment, and agency action for disparate racial impacts of governmental actions has been much more problematic. Having set forth the applicable statutory provisions, this paper now considers the application of the statute for environmental matters in the federal judicial, legislative, and executive agency contexts.

### III. JUDICIAL ACTION - PRE-SANDOVAL LITIGATION REGARDING PRIVATE RIGHTS OF ACTION FOR DISPARATE IMPACTS RESULTING FROM GOVERNMENTAL ACTIONS

The Supreme Court of the United States has demonstrated an increasing reluctance over the past twenty-five years to find a private right of action to prevent judicially the disparate racial impact of governmental actions or third party actions receiving federal funds. Initial cases seemed to permit judicially created private rights of action. The Supreme Court has examined the contours of Title VI.<sup>20</sup> The majority decision in *Lau v. Nichols* held that § 601 prohibited disparate racial impact.<sup>21</sup> At least three justices went further and found that regulations approved pursuant to § 602 would also create privately enforceable rights.<sup>22</sup> In *Cannon v. University of Chicago*,<sup>23</sup> the Court considered Title IX<sup>24</sup> of the Educational Act.<sup>25</sup> Analogizing Title IX to § 601 of the Civil Rights Act, the Court held that Title IX created individual standing to bring a private right of action to sue for violations of Title IX, notwithstanding the lack of express provision therefore in the legislation.<sup>26</sup> Early cases were open to the idea of inferring a private right of action from the context of enactment and the legislative history of the statute.<sup>27</sup>

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20. *Lau v. Nichols*, 414 U.S. 563 (1974).

21. *See id.*

22. *Id.*

23. 441 U.S. 677 (1979).

24. Compare § 2000d with 20 U.S.C. § 1681(a). “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. §1681 (a) (2014). The statutory language is identical to § 601, Title VI, Civil Rights Act, except for the substitution of gender bias for racial bias.

25. *See* 441 U.S. 677 (1979).

26. *See Cannon*, 441 U.S. at 717.

27. *See Cort v. Ash*, 422 U.S. 66 (1975). The *Cort* decision set forth a four prong test to determine whether a private right of action could be inferred in the absence of a specific legislative statement either specifically creating or specifically rejecting a private right of action. (a) is the movant one of class for which the statute was intended; (b) indications of legislative intent (c) would the private right of action be consistent with the legislative intent of the statute; and (d) is this area traditionally left to the states so that a federal

Despite this early expansive reading of rights existing as a result of federal legislation, the more recent history of decisions from the Supreme Court of the United States showed a growing reluctance for recognition of individual private causes of action for anything other than demonstrable personal actual prejudice, absent a clear and specific legislation statement creating such an individual right of action. The Court first determined that the equal protection provisions of the 14th amendment did not create a private right of action.<sup>28</sup>

However, the existence of private rights of action pursuant to regulations promulgated pursuant to § 602 and how to consider disparate racial impact of governmental actions continued to concern the Court. In *Regents of University of California v. Bakke*,<sup>29</sup> the Supreme Court considered whether quotas for racially disadvantaged applicants to medical school violated the equal protection rights of non-minority applicants denied admission. The University of California set aside a specific number of seats for minority admission to medical school.<sup>30</sup> The Court held that such minority-designated admission seats were prohibited.<sup>31</sup> However, no one theory received a majority of support. Five justices determined that the quotas were unlawful and Mr. Bakke must be admitted, while a different set of five justices stated that any consideration of race is prohibited.<sup>32</sup> Interestingly, the *Bakke* Court did not reach the question regarding whether or not a private right of action existed under § 602 and assumed, without deciding, that such a right did exist.<sup>33</sup> The *Bakke* decision did permit consideration of race in admissions to correct previous discrimination, so long as specific quotas were not utilized to correct the previous discrimination.<sup>34</sup>

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action would be inappropriate. *Id.* at 78. The *Cort* decision held that the federal election statutes did not contemplate private enforcement. *Id.* at 78.

28. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1976); *Washington v. Davis*, 426 U.S. 229 (1976). Both cases held that to invoke the 14th Amendment, litigants must demonstrate actual discrimination, not simply a disparate racial impact. *Id.*

29. 438 U.S. 265 (1978).

30. *Id.* at 269-70.

31. *Id.* at 271.

32. *Id.* at 271, 272.

33. *Id.* at 283-84. The concurrence of Justice White indicated that four of the justices stated that such a right did exist, and four assumed so for the purposes of the decision. Justice White, citing *Cort*, indicated that such a right of action did not exist. *Id.* at 379-81.

34. *Id.* at 317-18. The concurrence of Justice Brennan, joined by Justices White, Marshall, and Blackmun stated:

“[b]ut this should not and must not mask the central meaning of today’s opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial

The *Guardians Assn. v. Civil Serv. Comm'n of New York City* decision determined that compensatory relief—not set forth specifically in the applicable statute—would not be a permitted remedy for racial bias in police promotions.<sup>35</sup> Only the statutorily provided declaratory and injunction relief would be granted.<sup>36</sup> However, the Court still struggled with whether the disparate impact regulations required by § 602 created a private right of action for enforcement.<sup>37</sup> The Court next considered § 602 private actions in *Alexander v. Choate*.<sup>38</sup> In *Choate*, the Court held that state regulations limiting the number of in-hospital days covered each year by Medicare did not violate Title VI, even though handicapped persons might need more hospital days each year, because the regulation was neutral on its face, and both handicapped and non-handicapped persons were equally affected.<sup>39</sup> The *Choate* decision recognized that the *Guardians Assn.* case did not have a majority decision regarding whether there was a private right of action pursuant to § 602 regulations, and further indicated that the *Guardians Assn.* decision could be read to permit disparate impact analysis.<sup>40</sup> However, with the passage of time, and a new line-up of Justices, the Court finally determined conclusively whether or not regulations promulgated pursuant to § 602 of Title VI of the Civil Rights Act created an individual cause of action for disparate racial impacts.

#### IV. JUDICIAL ACTION - *ALEXANDER v. SANDOVAL* – THE END OF AN IMPLIED PRIVATE RIGHT OF ACTION FOR DISPARATE IMPACT

In 1990, the State of Alabama enacted legislation making English the official language of the State.<sup>41</sup> The motor licensing agency determined that, based upon the English-only requirement, all applicants for driver's licenses must take the test in English.<sup>42</sup> Mr. Sandoval challenged the English-only driving test as having a discriminatory disparate racial impact, as prohibited by § 602. The Supreme Court of the United States in *Alexander v. Sandoval*, in a 5 to 4 deci-

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prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area." *Id.* at 325.

35. 463 U.S. 582, 584 (1983).

36. *Id.*

37. A three Justice opinion indicated that *Bakke* did not set limits on considering disparate impacts. *Id.* at 589-90.

38. 469 U.S. 287 (1985).

39. *Id.* at 302.

40. *Id.* at 292-94.

41. *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001).

42. *Id.*



sion, determined that regulations promulgated pursuant to § 602 to prohibit disparate impacts of agency action did not create a private right of action.<sup>43</sup> The majority reasoned:

1. § 601 of the Civil Rights Act specifically provided that private citizens could bring litigation alleging intentional discrimination.<sup>44</sup>
2. § 602 of the Civil Rights Act required federal governmental agencies to implement regulations regarding disparate racial impacts from agency actions.<sup>45</sup>
3. § 602 did not provide for a private right of action. As a further indication that no private right of action was created, § 602 did not provide for any private remedy.<sup>46</sup>
4. Private rights of action must be specifically created by the legislative branch.<sup>47</sup>
5. The regulations promulgated under § 602 cannot create a private right of action because regulations may only implement legislative enactments, and cannot expand the legislation created.<sup>48</sup>
6. Therefore, there is no private right of action to enforce the regulations of any agency regarding disparate impacts promulgated by the agency as required by § 602.<sup>49</sup>

The majority saw *Bakke*, *Guardians Assn.*, and *Choate* as rejecting the *Lau* decision and, therefore, consistent with the majority opinion in rejecting any private right of action created by § 602 regulations.<sup>50</sup> The dissent, however, opined that the majority opinion misstated and misinterpreted the pre-*Sandoval* cases.<sup>51</sup> The previous cases, according to the dissent, did in fact permit private rights of action as a reasonable statutory construction by the Court, not as an impermissible policy decision.<sup>52</sup> Frustrated by the majority specifically foreclosing individual litigants from bringing § 602 actions, the dissent invited future litigants to bring actions for disparate racial impacts

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43. *Id.* at 293.

44. *Id.* at 280.

45. *Id.* at 281-82.

46. *Id.* at 289.

47. *Sandoval*, 532 U.S. at 286.

48. *Id.* at 291.

49. *Id.* at 293.

50. *Id.* at 290.

51. *Id.* at 294-95.

52. *Sandoval*, 532 U.S. at 296-98.

pursuant to § 1983.<sup>53</sup> Notwithstanding the strong dissent, the *Sandoval* decision has effectively ended individual actions to enforce § 602 regulations and has brought into doubt any possibility of a federal court created private right of action.

#### V. § 1983 LITIGATION – INVITATION FROM THE *SANDOVAL* DISSENT

The *Sandoval* dissent invited litigants to bring actions for disparate racial impacts pursuant to § 1983,<sup>54</sup> which provides:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.<sup>55</sup>

The availability of § 1983 relief challenging environmental action specifically for disparate racial impact was considered in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*.<sup>56</sup> The plaintiffs, the South Camden group, brought an action to block the issuance of a permit authorizing a cement company to operate a plant alleged to have an adverse and disparate racial impact on a local community.<sup>57</sup> The trial court initially found disparate impact and granted a temporary injunction against the issuance of the permit.<sup>58</sup> After the District Court entry of the injunction, the Supreme Court issued the *Sandoval* decision. In response to the decision, the trial court found that, notwithstanding *Sandoval*, there was a private right of action for enforcement under § 1983.<sup>59</sup> The Third Circuit reversed, applied *Sandoval*, and held that § 1983 did not contain specific legislative language establishing a private right of action; therefore, private

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53. *Id.* at 300 n.6.

54. 42 U.S.C. § 1983 (2014).

55. *Id.*

56. 274 F.3d 771 (3d Cir. 2001).

57. *Id.* at 774.

58. *Id.* at 776.

59. *Id.*

rights of action regarding environmental disparate impacts did not exist pursuant to § 1983.<sup>60</sup>

The Supreme Court has not directly considered § 1983 private rights of action since *Sandoval*. Post-*Sandoval*, however, the Supreme Court has reaffirmed its reluctance to establish a private right of action to enforce any legislation, absent a specific legislatively created private right. Although not considering either racial impact or environmental laws, the Supreme Court held that an educational confidentiality statute did not create a private right to sue for alleged violations in *Gonzaga University v. Doe*.<sup>61</sup> In light of *Sandoval* and *Gonzaga*, § 1983 private right of action litigation would seem to have little chance of Supreme Court approval. The current Court should be expected to take a constrained view of the Court's role in legislative matters in the foreseeable future. Court-created rights for a private right of action under any legal theory, absent specific Congressional creation, are unlikely.

## VI. JUDICIAL ACTION – OTHER OPENINGS FOR LITIGATION SUCCESS?

### A. *Diminished Value of Property Interests – Title IX Fair Housing – § 1982 – Taking of Property*

Racial discrimination is prohibited in property ownership and leasing.<sup>62</sup> Official government actions that disproportionately impact the property rights of citizens of color may be subject to litigation attack.<sup>63</sup> Private parties may assert rights pursuant to § 1982.<sup>64</sup> Under

60. *Id.* at 791.

61. 536 U.S. 273 (2002).

62. 42 U.S.C. § 1982 (2014) states, “[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” See also Title VIII, of the Fair Housing Act, 42 U.S.C.A § 3604(a)-(b) (2014), stating, in part:

“[I]t shall be unlawful— (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith. . . because of race, color, religion, sex, familial status, or national origin.

Discrimination includes “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B) (2014).

63. See, e.g., *Hurd v. Hodge*, 334 U.S. 24 (1948) (finding real property restrictive covenants prohibiting sales to African Americans unconstitutional).

64. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

these circumstances, disparate impacts on private property rights would seem to be a cognizable action. However, even prior to *Sandoval*, the Supreme Court demonstrated its reluctance to overturn governmental actions with a disparate racial impact on property values and upheld governmental actions based upon municipal regulatory powers.<sup>65</sup> In response to § 1982 statutory and 13th Amendment constitutional challenges to a road closure that impacted a minority neighborhood, the Court held that the action of the City of Memphis was not by context or pretext racially motivated, but was within the municipality's power to regulate traffic.<sup>66</sup> The Court stated:

“The argument that the closing violates the Amendment must therefore rest, not on the actual consequences of the closing, but rather on the symbolic significance of the fact that most of the drivers who will be inconvenienced by the action are black. But the inconvenience of the drivers is a function of where they live and where they regularly drive—not a function of their race; the hazards and the inconvenience that the closing is intended to minimize are a function of the number of vehicles involved, not the race of their drivers or of the local residents. Almost any traffic regulation—whether it be a temporary detour during construction, a speed limit, a one-way street, or a no-parking sign—may have a differential impact on residents of adjacent or nearby neighborhoods. Because urban neighborhoods are so frequently characterized by a common ethnic or racial heritage, a regulation's adverse impact on a particular neighborhood will often have a disparate effect on an identifiable ethnic or racial group. To regard an inevitable consequence of that kind as a form of stigma so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom. Proper respect for the dignity of the residents of any neighborhood requires that they accept the same burdens as well as the same benefits of citizenship regardless of their racial or ethnic origin.

This case does not disclose a violation of any of the enabling legislation enacted by Congress pursuant to § 2 of the Thirteenth Amendment. To decide the narrow constitutional question presented by this record we need not speculate about the sort of impact on a racial group that might be prohibited by the Amendment itself. We merely hold that the impact of the closing of West Drive on nonresidents of Hein Park is a routine burden of citizenship; it does not reflect a violation of the Thirteenth Amendment.”<sup>67</sup>

The *City of Memphis* case does indicate that the Court is not reaching the circumstances under which disparate racial impacts would create a

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65. *City of Memphis v. Greene*, 451 U.S. 100 (1981).

66. *Id.* at 127.

67. *Id.* at 128-9.

cognizable action under § 1982 or the federal constitution,<sup>68</sup> thereby leaving an opening for further litigation efforts. However, § 1982 does not set forth a specific private right of action for disparate racial impact.<sup>69</sup> In light of the *Sandoval* decision, coupled with the absence of a specific private right of action for disparate racial impacts, a citizen asserting § 1982 protection would be required to establish actual discriminatory intent.<sup>70</sup> Therefore, § 1982 remains an unlikely vehicle to reassert disparate racial impact analysis into federal judicial cases.<sup>71</sup>

However, property ownership in minority communities may open another avenue of court challenges to environmental decisions from governmental agencies and policies receiving federal funding. Constitutional “taking of property” arguments were not considered in the *City of Memphis* case. However, individual citizens could argue a complete or partial taking of property as a result of environmental policy actions, such as the siting of a waste disposal plant. The evidence necessary for such an eminent domain action would not emphasize the racial composition of the neighborhood. An aggrieved party would have to establish the value of the property before and after the environmental policy implementation; and that difference would be the “taking” for which compensation would be sought.<sup>72</sup> The racially disparate impact would underlie such actions, but would not be a legal basis asserted for relief for a neighborhood suffering the disparate impact of the environmental policy decision.

### B. Private Right of Action Statutes

Specific federal environmental statutes provide for a private enforcement right of action.<sup>73</sup> For example, the Clean Air Act (CAA)<sup>74</sup>

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68. *Id.* at 121, 128-9.

69. *See* 42 U.S.C. §1982.

70. *See Sandoval*, 532 U.S. 275.

71. Consistent with the equal protection discussion, 14th Amendment review of governmental impacts on property requires a specific discriminatory intent, as the 14th Amendment is not activated for a disparate impact on property rights. *See Arlington Heights*, 429 U.S. 252; *Davis*, 426 U.S. 229.

72. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Regulatory action resulting in permanent placement on the property, e.g., telegraph, telephone, and cable lines, would be a “taking” requiring compensation. *Id.* For environmental justice actions, the argument could be made that the placing of environmental hazards increased exposures and thereby constituted a similar permanent placement of hazards on the actual property.

73. *See* EPA, PLAN EJ 2014: LEGAL TOOLS (2014), available at <http://www.epa.gov/compliance/ej/resources/policy/plan-ej-2014/ej-legal-tools.pdf> [hereinafter PLAN EJ 2014].

74. Clean Air Act, 42 U.S.C § 7401 (1970).

provides for a private right of action. Private rights of action in such statutes include forcing the Environmental Protection Agency (EPA) to perform a required function. This is important as a legal theory; if EPA does not consider disparate racial impact of an agency action (required to have regulations pursuant to § 602), then there is a private cause of action for enforcement of disparate racial impact under CAA. EPA has actively promoted the use of federal environmental statutes for private individuals by providing detailed analysis of the legal remedies available in specific private right of action statutes.<sup>75</sup> However, there continues to be reluctance by the Circuit Courts to expand private citizen actions under the CAA;<sup>76</sup> the same reluctance presumably would exist under other environmental statutes with a specific private right of action.

#### VII. A FINAL THOUGHT ABOUT JUDICIAL ACTION – THE NEED FOR MORE SOCIAL SCIENCE RESEARCH

*Sandoval* appears to end § 602 relief for private claims of disparate racial impacts. However, social science research may provide a basis for future litigation challenging decisions and actions with harmful environmental impacts on a racially discriminatory basis. Certain studies have found actual discrimination in governmental environmental actions.<sup>77</sup> Improved methodological techniques<sup>78</sup> and meta-studies<sup>79</sup> are establishing strong statistical correlations between race and environmental siting and risk decisions. If such research and statistical methodology continues to develop, § 601 arguments of actual discrimination may be possible. Proof of intent is required to provide a level of certainty, and rigorous quantitative social science methods can and do provide the same thing—measurable certainty.

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75. See PLAN EJ 2014, *supra* note 73.

76. See, e.g., *McEvoy v. IEI Barge Servs., Inc.*, 622 F.3d 671 (7th Cir. 2010) (finding there is no private right of action under the CAA to enforce State of Illinois legislative provisions).

77. See Robert D. Bullard, *Solid Waste Sites and the Black Houston Community*, 53 SOC. INQUIRY 273 (1983) (finding actual discrimination in placement of wastes established); see also Mohai et al., *supra* note 2, at 409.

78. Chakraborty, *supra* note 13, at 178, 180 (discussing quantitative geo-statistical analysis and research relative to environmental justice studies).

79. Meta-studies combine numerous empirical studies on a subject, through statistically recognized methodology that “normalize” the empirical results from each study, allowing a further statistical analysis of the results across studies. See generally Ringquist, *supra* note 10, at 224, 233, 235, 241.

Further, *Bakke* does leave open *consideration* of racial factors (while prohibiting mandatory quotas) to correct past prejudices.<sup>80</sup> This social science research could establish the long-term land use, zone, placement, density, and other factors that underlie 100 years of decisions regarding placement of environmental hazards into minority communities. Social science research is recognized as valid evidence to be used under the National Environmental Policy Act to determine environmental impacts and, therefore, creates legislative authority to utilize research that establishes disparate racial impacts.<sup>81</sup> As the placements occurred in existing minority communities, and the disparate impact was not caused by minorities moving into communities after the placement of the environmental hazard,<sup>82</sup> this evidence shows the equivalent of intentional prejudice as well as the prejudicial impacts of a new placement into a minority neighborhood. Driver's licenses are a state privilege; clean air and water, healthy food, and lack of exposure to toxic chemicals are important for actual life. There is no history of tests, taxes, or other impediments to members of a certain community to obtaining driver's licenses, so that the "English-Only" requirement could be seen as neutral. In comparison, there *were* such intentional and actual impacts in voting, housing, and placement of environmental hazards. State action regarding driver's licenses—indeed, *Sandoval* itself—could be distinguished from a private action challenge to environmental matters since the prejudice from the environmental decision would be yet another example in a long history of environmental prejudice as established in social science research. Environmental prejudice, therefore, is arguably more akin to voting prejudice. A long history of environmental prejudice, either intentional or resultant disparate impact, should be granted Court recognition and protection. Consequently, the social science research that finds such prejudice provides an appropriate avenue for individuals to assert their claims.

### VIII. LEGISLATIVE ACTION

Congress has the power to pass legislation in response to a decision of the Supreme Court interpreting a federal statute, in an attempt

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80. *Bakke*, 438 U.S. at 317-18.

81. See 42 U.S.C. §4332(2)(A) (2014) (“[A]ll agencies of the Federal Government shall— (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking [sic] which may have an impact on man’s environment.”).

82. See *supra* notes 2, 6-7, 9-13, 77 (discussing cited research studies).

to avoid or change the judicial decision.<sup>83</sup> In the aftermath of the *Sandoval* decision, and in the face of apparent reluctance from federal courts to find a private right of action for racial disparate impacts under § 1983, legislative action could make Congressional intent clear regarding private rights of action, and address specifically the holdings of the *Sandoval*, *South Camden*, and *Gonzaga* decisions. Calls for legislative action have requested that Congress enact specific revisions to statutory law to confirm that Congress intends a private right of action for disparate racial impact pursuant to regulations promulgated pursuant to both § 602 of the Civil Rights Act and § 1983.<sup>84</sup> Senator Robert Menendez (D-NJ) introduced a bill in the 109th Congress in 2006 entitled the “Environmental Justice Enforcement Act of 2006.”<sup>85</sup> The legislation was reintroduced in the 110th Congress.<sup>86</sup> Other than re-titling the Act to reflect the changed calendar year from 2006 to 2008,<sup>87</sup> the two Senate bills were identical. Both bills were sharply critical of the *Sandoval* decision, introduced Congressional findings that the Supreme Court had misinterpreted the legislative history of Congressional action, and proposed that Congress always intended that private actions could be brought in court for disparate racial impacts of governmental actions or actions by agencies and programs receiving federal funding.<sup>88</sup> The “Environmental Justice Enforcement Act” added a specific definition to § 601 of the Civil Rights Act that defined “discrimination” subject to § 601 enforcement to include a disparate racial impact<sup>89</sup> and provided a specific right of private action pursuant to

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83. See generally *Dep’t of Transp. v. Paralyzed Veterans*, 477 U.S. 597 (1986) (following the Supreme Court’s determination that disability laws did not apply to air travel, Congress subsequently passed 49 U.S.C. § 41705, legislation designed to make it clear that disability discrimination prohibitions applied to air travel).

84. See, e.g., U.S. COMM’N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE ch. 8 (2003), available at <http://www.usccr.gov/pubs/envjust/ch8.htm>. Recommendation 2.1 states, “In light of the *Sandoval*, *South Camden*, and *Gonzaga* decisions, Congress should pass a Civil Rights Restoration Act to clearly and unambiguously provide for a private right of action for disparate impact claims under § 602 of Title VI and § 1983.” *Id.*

85. See S. 4009, 109th Cong. §1 (2006).

86. See S. 2918, 110th Cong. (2008).

87. *Id.* § 1.

88. *Id.* § 2(1), (4); see also, S. 4009, 109th Cong. § 2(1), (4) (2006).

89. See S. 2918, 110th Cong. (2008) (providing the following definition for disparate impact:

(b)(1)(A) Discrimination (including exclusion from participation and denial of benefits) based on disparate impact is established under this title only if—(i) a person aggrieved by discrimination on the basis of race, color, or national origin (referred to in this title as an ‘aggrieved person’) demonstrates that an entity subject to this title (referred to in this title as a ‘covered entity’) has a policy or practice that causes a disparate impact on the basis of race, color, or national origin and the



§ 602, including any agency regulation promulgated pursuant to § 602.<sup>90</sup> The proposed legislation would add a new § 602A to Title VI of the Civil Rights Act, setting forth the damages private citizens could recover.<sup>91</sup> The proposed legislation specifically included agency regulations in the disparate impact discrimination definition and in the provisions explicitly creating private rights of action for disparate impacts.<sup>92</sup> Both bills were referred to committee, and therewith died.

Even more limited legislative action to promote environmental justice has failed. Over twenty years, proposed environmental justice legislation to collect information on areas of environmental impact and to require nondiscriminatory compliance with environmental laws,<sup>93</sup> to prohibit the siting of waste disposal sites in environmental disadvantaged locations,<sup>94</sup> and to codify Executive Order 12898—and require EPA implementation thereof—<sup>95</sup> have all died in committee. While there is certainly demand from civil rights and environmental activists for legislative action,<sup>96</sup> in the present political climate of significant

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covered entity fails to demonstrate that the challenged policy or practice is related to and necessary to achieve the nondiscriminatory goals of the program or activity alleged to have been operated in a discriminatory manner . . . .

See S. 4009, 109th Cong. §3 (2006) (using identical language).

90. The proposed private right of action pursuant to § 602 as set forth in S. 2918, 110th Cong. § 4 (2008) is the creation of new subsection (b) to the said section, which states, “(b) Any person aggrieved by the failure of a covered entity to comply with this title, including any regulation promulgated pursuant to this title, may bring a civil action in any Federal or State court of competent jurisdiction to enforce such person’s rights.” See S. 4009, 109th Cong. §4 (2006) (using identical language).

91. S. 2918, 110th Cong. § 5 (2008) (providing:  
SEC. 602A. ACTIONS BROUGHT BY AGGRIEVED PERSONS.

(a) CLAIMS BASED ON PROOF OF INTENTIONAL DISCRIMINATION.—In an action brought by an aggrieved person under this title against a covered entity who has engaged in unlawful intentional discrimination (not a practice that is unlawful because of its disparate impact) prohibited under this title (including its implementing regulations), the aggrieved person may recover equitable and legal relief (including compensatory and punitive damages), attorney’s fees (including expert fees), and costs, except that punitive damages are not available against a government, government agency, or political subdivision.

(b) CLAIMS BASED ON THE DISPARATE IMPACT STANDARD OF PROOF.—In an action brought by an aggrieved person under this title against a covered entity who has engaged in unlawful discrimination based on disparate impact prohibited under this title (including its implementing regulations), the aggrieved person may recover equitable relief, attorney’s fees (including expert fees), and costs.).

See S. 4009, 109th Cong. § 5 (2006) (using identical language).

92. See S. 2918; S. 4009; S. 4009; S. 2918; S. 4009.

93. See H.R. 2105, 103rd Cong. (1993); S. 1161, 103rd Cong. (1993).

94. See H.R. 1924, 103rd Cong. (1993).

95. See, e.g., S. 642, 109th Cong. (2007); H.R. 1103, 109th Cong. (2007).

96. See *supra* note 84.

challenges to environmental science,<sup>97</sup> sharp ideological and political divides amongst voters,<sup>98</sup> and high levels of divergence between legislators from each of the two political parties in support of environmental issues,<sup>99</sup> legislative action to create an explicit private right of action for judicial redress of disparate racial environmental impacts seems unlikely. While legislative action appears foreclosed in the current political climate, activist attention may turn to federal administrative agencies to remedy racial disparate impacts of environmental actions.

## IX. ADMINISTRATIVE ACTION

Activist action to assure environmental justice may be most effective in the executive agency context.<sup>100</sup> As previously set forth, § 602 of Title VI of the Civil Rights does require federal agencies to promulgate regulations that prohibit disparate racial impacts of federal agency action.<sup>101</sup> EPA, as a federal agency, implemented regulations to require consideration of disparate racial impacts of all statutes administered by EPA.<sup>102</sup>

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97. Riley E. Dunlap, Peter J. Jacques, & Mark Freeman, *The Organization of Denial: Conservative Think Tanks and Environmental Skepticism*, 17 ENVTL. POL. 349, 356-57 (2008) (discussing conservative think tanks that developed reports questioning the science underlying the finding that human action has contributed to global warming).

98. Riley E. Dunlap, Aaron M. McCright, & Chenyang Xiao, *Politics and Environment in America: Partisan and Ideological Cleavages in Public Support for Environmentalism*, 10 ENVTL. POL. 23, 42-44 (2001).

99. Charles R. Shipan & William R. Lowry, *Environmental Policy and Party Divergence in Congress*, 54 POL. RES. Q. 245, 251, figure 1 (2001).

100. The 2003 United States Civil Rights Commission Report, *see supra* note 84, included a recommendation that Title VI enforcement efforts be focused on agency action:

2.2 In light of the currently limited legal enforceability of disparate impact discrimination regulations promulgated under § 602 of Title VI, federal agencies providing financial assistance to state and local agencies must vigorously enforce their existing nondiscrimination regulations by assuming greater oversight responsibility, implementing effective policy and guidelines for administrative enforcement of Title VI violations, and imposing appropriate penalties when violations of Title VI occur.

As a result of the constraints of the *Sandoval*, *South Camden*, and *Gonzaga* decisions, and the Commission's Recommendation 2.1, *supra* note 84, and Recommendation 2.2, the report continued:

Based on these judicial limitations, the Commission finds that both civil rights groups and environmental justice groups are left with few legal channels for challenging disparate impact discrimination under Title VI. While § 1983 is a tool that can be utilized in federal courts that have not barred this enforcement, much of these groups' civil rights enforcement attempts must be at the administrative level.

Both Recommendation 2.2 and the subsequent quote are at page 169 of the said report.

101. *See* 42 U.S.C. § 2000d-1.

102. 40 C.F.R. § 7.10, *et seq.*

The executive branch has historically promoted consideration of disparate racial impact and environmental justice concerns regarding policies, groups, and agencies receiving federal funds. President Clinton signed Executive Order 12898 in 1994.<sup>103</sup> The Executive Order (EO) established environmental justice as the public policy of all federal agencies, stating:

To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.<sup>104</sup>

EO 12898 also established an Interagency Working Group on Environmental Justice<sup>105</sup> tasked with the responsibility to ascertain and share data regarding locations of disparate impact<sup>106</sup> and to make agency policies and strategies for environmental justice.<sup>107</sup> The Interagency Group was required to make a report to the president within fourteen months of the issuance of EO 12898.<sup>108</sup> Federal agencies would now be responsible for assuring that persons were not discriminated against based upon federal action and policies.<sup>109</sup>

Even prior to EO 12898, EPA had created an Office of Environmental Justice.<sup>110</sup> EPA's environmental justice group was established in response to an agency study that found significant disparate impacts<sup>111</sup> and recommended the creation of a specific part of the agency

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103. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

104. *Id.* at § 1-101.

105. *Id.* at § 1-102.

106. *Id.* at § 1-102(b).

107. *Id.* at § 1-103(a).

108. *Id.* at § 1-104.

109. Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. at 7630-31.

110. Originally called The Office of Environmental Equity, the division was created in 1992 and renamed the Office of Environmental Justice in 1994. *Environmental Justice: Basic Information*, EPA.gov (last updated May 24, 2012), <http://www.epa.gov/environmentaljustice/basics/ejbackground.html>.

111. EPA, Office of Policy, Planning, and Evaluation Workgroup, *Environmental Equity: Reducing Risk for All Communities*, Workgroup Report to the Administrator (June 1992), available at [http://www.epa.gov/environmentaljustice/resources/reports/annual-project-reports/reducing\\_risk\\_com\\_vol1.pdf](http://www.epa.gov/environmentaljustice/resources/reports/annual-project-reports/reducing_risk_com_vol1.pdf) at 5, 7, 32.

for environmental justice concerns.<sup>112</sup> Agency action and consistency, however, is unpredictable. Even with early recognition of environmental justice issues, the implementation of § 602 regulations, and an entire portion of the agency charged with promoting environmental justice concerns, EPA has not consistently moved forward on environmental justice and attempts to regulate adverse impacts from racial disparate impacts.<sup>113</sup> The Supreme Court determined in 2007 that EPA must regulate greenhouse gases,<sup>114</sup> but EPA is still in the rulemaking process regarding greenhouse gases.<sup>115</sup> The delay in implementing such regulations became a political issue in the 2012 presidential election, with one Republican senator accusing President Obama of intentionally delaying EPA regulations on greenhouse gases for re-election concerns.<sup>116</sup> The agency has a significant backlog of environmental justice complaints,<sup>117</sup> which have typically resulted in lawsuits brought to compel agency action.<sup>118</sup>

In response to these criticisms, EPA has taken multiple agency actions in an attempt to finalize incorporation of § 602 environmental justice concerns into agency action. EPA has issued its Plan EJ

112. *Id.* at 69.

113. Government Accounting Office, “*ENVIRONMENTAL JUSTICE: EPA Needs to Take Additional Actions to Help Ensure Effective Implementation*” (October 2011) (stating that EPA had not fully implemented the § 602 mandate). Of course, executive agencies are also subject to political pressures and election results. Presidential administration changes lead to more or less favorable response to environmental concern or support for EPA. Under presidential administrations unfavorable to environmental concerns and/or protecting marginal communities, activists should anticipate limited progress in implementing environmental justice concerns, and indeed must be vigilant against agency attempts to roll back or limit environmental justice policies and regulations. Congressional oversight, approval of agency political appointments, funding, and legislative action also may constrain the agency ability to create and implement environmental justice policies, regulations, and enforcement when Congressional majorities, even in one house of the legislature, are in opposition to such agency actions.

114. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

115. *Climate Change: Regulatory Initiatives*, <http://www.epa.gov/climatechange/EPAactivities/regulatory-initiatives.html> (last visited Jun. 3, 2014).

116. Matt Dempsey, *New Senate Report Reveals Economic Pain of Obama-EPA Regulations Put on Hold Until After the Election*, U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS (Oct. 18, 2012), [http://www.epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=743423EF-07B0-4DB2-BCED-4B0D9E63F84B](http://www.epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=743423EF-07B0-4DB2-BCED-4B0D9E63F84B).

117. As of 2011, there were 38 unresolved complaints, some dating back to 1994. EPA, OPEN COMPLAINTS REPORT (2011), available at [http://epa.gov/civilrights/docs/extcom/2011\\_0922\\_title\\_vi\\_open-complaints.pdf](http://epa.gov/civilrights/docs/extcom/2011_0922_title_vi_open-complaints.pdf); see also Corbin Hair, *Environmental Injustice: EPA Neglects Discrimination Claims from Polluted Communities*, THE CTR. FOR PUB. INTEGRITY, (last updated May 19, 2014), <http://www.publicintegrity.org/2011/12/14/7660/environmental-injustice-epa-neglects-discrimination-claims-polluted-communities>.

118. See, e.g., *Garcia v. McCarthy*, No. 13-cv-03939-WHO, 2014 WL 187386 (N.D. Cal. Jan. 16, 2014).

2014.<sup>119</sup> The Plan EJ 2014 requires EPA to conduct a full review by 2014 of how EPA is implementing Environmental Justice issues.<sup>120</sup> Plan EJ 2014 is not a rule or regulation, but rather a policy statement for day-to-day implementation of environmental justice matters into all EPA actions and decisions.<sup>121</sup> Communities affected by environmental decisions must be involved.<sup>122</sup> Environmental justice must be included in permitting decisions,<sup>123</sup> compliance and enforcement decisions,<sup>124</sup> and rule making.<sup>125</sup> EPA also has a pending plan to better enforce Title VI regulations, entitled “Draft Supplemental Plan: Title VI Advancing Environmental Justice Through Title VI of the Civil Rights Act.”<sup>126</sup> The draft report makes disparate impact considerations mandatory in compliance and permitting programs.<sup>127</sup> EPA specifically recognizes enforcement of § 602 regulations as an important part of its enforcement responsibilities.<sup>128</sup> When all reports are implemented and all regulations are promulgated (presumably by 2014), environmental justice will finally be implemented fully by EPA, as first required by EO 12898—20 years previously. Interestingly, EPA is also reaching out to business interests seeking permitting and other environmental impacts encouraging early outreach to affected communities.<sup>129</sup> If business interests do in fact reach out to minority communities (presumably to streamline applications and to attempt to avoid challenges, community opposition, and subsequent litigation), there will be an opening for communities and activists to raise environmental justice and disparate impact concerns. Further, all agency action with environmental impacts requires an Environmental Impact Statement

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119. PLAN EJ 2014, *supra* note 73.

120. *Id.*

121. *Id.*

122. National Environmental Justice Advisory Council, EPA.GOV <http://www.epa.gov/environmentaljustice/nejac/index.html#advice> (last updated Sept. 11, 2013).

123. *See* PLAN EJ 2014, *supra* note 73, at 54.

124. *Id.* at 69.

125. *Id.* at 48.

126. *See id.*

127. *Id.* at 6-7.

128. *See* PLAN EJ 2014, *supra* note 75.

129. *See EPA Activities to Promote Environmental Justice in the Permit Application Process*, EPA.GOV, [http://www.epa.gov/region10/pdf/ej/ej\\_permitting\\_FRN\\_4\\_29.pdf](http://www.epa.gov/region10/pdf/ej/ej_permitting_FRN_4_29.pdf); *see also* Christopher J. Bosso, *Rethinking the Concept of Membership in Nature Advocacy Organizations*, 31 THE POL’Y STUD. J. 397, 410 (2003) (discussing how environmental groups are also reaching out to business interests to seek both strategic alliances and financial support; with both the agency and interest groups seeking business support, both groups could bring environmental justice concerns to their respective business partners).

(EIS),<sup>130</sup> another opportunity for disparate community and racial impacts to be raised.

Once final rules and procedures are in place, as set forth in the aforementioned Plan EJ 2014 and the specific provisions regarding Title VI enforcement, environmental justice issues must be considered in all permitting, siting, and enforcement actions. The new requirement to consider § 602 concerns creates a significant opening for environmental justice activists. If any federal agency fails to consider disparate racial impacts in future matters such as issuing permits or in an EIS, judicial challenges by private individuals or interest groups could be pursued against EPA (or other agency or third party seeking EPA approval for a proposed action). The failure to take a required agency action—in this case, consideration of disparate impacts—in that agency’s decision-making could potentially lead to judicial review of administrative action.<sup>131</sup> Further, if a disparate impact is presented and ignored by the agency, that lack of consideration arguably could constitute intentional discrimination under § 601. The Administrative Procedures Act provides that any person affected by the adverse agency action may bring an action.<sup>132</sup> With this specific provision for private rights of action, *Sandoval* and *Gonzaga* should not prohibit private action reviews of adverse administrative agency actions and the failure of agencies to consider environmental justice concerns in making administrative decisions. While EPA is subject to political constraints depending on the president in office and the make-up of Congress, options such as the strong policy in support of environmental justice, activist involvement in agency decision making, and litigation challenges for the failure to consider or follow § 602 regulations and concerns may constitute the best avenue for utilization of federal institutions to advance environmental justice matters.

## X. REFLECTION ON STRUCTURE AND THEORY

It is worth taking a step back from the details to take stock of a few facts that point to an “American dilemma” regarding fair treatment in environmental politics and law. Observe the following:

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130. National Environmental Policy Act, 42 U.S.C. §§ 4321, 4332 (ESI requirement); *see also* 40 C.F.R. § 1500-1508.

131. Administrative Procedures Act, 5 U.S.C. § 500. This Act relates specifically to review of federal agency action. Any state or local action, receiving federal funds, may be subject to the state administrative review act, which is beyond the scope of this article.

132. 5 U.S.C. § 702.

1. Disparate exposure of racial minorities to environmental burdens are well documented across a deep body of research.<sup>133</sup> Environmental racism is a de facto condition in the United States.
2. Extant environmental racism means that racial minorities bear a disproportionate body burden that leads to *predictably* higher levels of pre-mature death and diseases like cancer.<sup>134</sup>
3. Extant law has thus far failed to change facts 1 and 2. Extant law and their operationalization through the institutions of United States governance are and have been impotent to protect citizens from significant danger.
4. Opportunities to change fact 3, such as through improved legislation, have systematically and consistently failed, and failed through deliberation and therefore political choice.
5. Given fact 4, we can infer that leaders of key federal institutions, such as Congress and the courts, in majority, prefer the status quo to interventions. By extension, the regrettable preference of the republic expressed through its institutions is to allow environmental injustice to continue.

It is conspicuous that overt individual instances of racial discrimination in housing, employment, and other areas of public life are prohibited by the Civil Rights Act, but individuals themselves cannot find a remedy or redress of grievance with the government for tangible harm from acts of environmental discrimination. Consequently, the theory of institutional racism, or institutional “racialisation,”<sup>135</sup> is strongly supported. This concept originated with black power activists, Stokely Carmichael and Charles V. Hamilton.<sup>136</sup> One scholar explains: “[i]nstitutional racism, it was argued, was deeply embedded in established conventions in US society, which relied on anti-black attitudes of inferiority, even if individual whites did not themselves discriminate

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133. Mohai et al. *supra* note 2, at 405-30.

134. See, e.g., Timothy W. Collins et al., *Understanding Environmental Health Inequalities through Comparative Intracategorical Analysis: Racial/Ethnic Disparities in Cancer Risks from Air Toxics in El Paso County, Texas*. HEALTH & PLACE 17, no. 1, 335-44 (2011); Chakraberty, *supra* note 13 at 674-79; Robert J. Brulle & David N. Pellow, *Environmental Justice: Human Health and Environmental Inequalities* ANN. REV. OF PUB. HEALTH 27, no. 1, 103-24 (2006).

135. Coretta Phillips, *Institutional Racism and Ethnic Inequalities: An Expanded Multilevel Framework*, 40(1) J. OF SOC. POL'Y 173 (2011).

136. STOKELY CARMICHAEL AND CHARLES V. HAMILTON, BLACK POWER: POLITICS OF LIBERATION IN AMERICA 4-5 (1967).

against individual blacks.”<sup>137</sup> If the courts require evidence of discriminatory intent, but individual discrimination is not the principle source of environmental discrimination, institutional remedies are required. At the same time, if the institutional racism theory is correct, successfully correcting the matter will continue to face institutional obstruction. Carmichael and Hamilton argued that while most white citizens would never participate in a church bombing, they nonetheless “continue to support political officials and institutions that would and do perpetuate institutionally racist policies.”<sup>138</sup> They argue that white citizens are able to absolve themselves of blame because there is no overt discrimination being committed, and for this white population there is “no American dilemma.”<sup>139</sup> The everyday lives of most white middle-class and affluent families go on unmolested. Meanwhile, so long as energy, transportation, cement, chemical, and other companies produce hazardous pollution as a by-product of assuring that middle-class and affluent lifestyle, the pollution and environmental risks must go somewhere. It is politically inconceivable that this pollution will go in the middle-class or affluent white neighborhoods. Importantly, it is not politically inconceivable that these hazards would go to poor minority neighborhoods. It stands to reason that environmental justice will be unattainable until poor minority neighborhoods have the same intrinsic (if not economic) value as wealthy white ones; the roots of institutional racialization are exposed and changed; and political and advocacy pressures lead to institutional changes in all three branches of the federal government to recognize environmental justice concerns and to establish effective mechanism to assure private citizens the right to take action against any inequitable environmental injustice.

#### CONCLUSION

This article has set forth the proposition that federal institutional action to implement disparate racial impact environmental justice concerns is highly constrained. The Courts prohibited utilization of § 602 regulations to create private rights of actions for disparate racial impacts. The current legislative gridlock makes Congressional action to create such private rights of action unlikely. The best hope for

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137. Phillips, *supra* note 135, at 173.

138. CARMICHAEL, *supra* note 136, at 5.

139. *Id.* (Carmichael and Hamilton are referring to racial discrimination, which for the majority of white citizens was not a problem to them and did not require dramatic interventions. They further note that any real problem that came from the Civil Rights Movement was a disruption to normal social activity and business).



environmental justice advocacy may lie with agency actions. However, executive agencies are also politically constrained and influenced by Congressional funding, oversight, and presidential electoral result. Even in administrations favorable to environmental concerns, agency bureaucracies are slow to act; and countervailing political pressures may be brought upon the agency to delay or weaken agency action. Overarching the limitations to federal institution action set forth in this article is the well-documented historical systemic racism that further constrains institutional action, and makes any demand for reform more difficult.