Who Wants to be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval

Kyle W. La Londe
WHO WANTS TO BE AN ENVIRONMENTAL JUSTICE ADVOCATE?: OPTIONS FOR BRINGING AN ENVIRONMENTAL JUSTICE COMPLAINT IN THE WAKE OF ALEXANDER V. SANDOVAL

Kyle W. La Londe*

Abstract: The Supreme Court's decision in Alexander v. Sandoval significantly altered options for bringing an environmental justice claim. Several causes of action still remain, however, that can be an effective means of achieving environmental justice. This Article will explore these causes of action and show that each has unique characteristics and can present distinct opportunities. This Article will also address the importance of tailoring environmental justice claims to best suit the plaintiff. Finally, this Article will present a case study of a proposal to build a geothermal power plant in an area of California that is sacred to Native Americans, and suggest an effective strategy for bringing an environmental justice claim.

INTRODUCTION

On April 24, 2001, the Supreme Court dealt a major blow to the environmental justice movement.1 Its decision in Alexander v. Sandoval changed the landscape of the environmental justice movement, overturning thirty years of precedent and forcing environmental justice advocates to search for new mechanisms to pursue their goals.2 The Court chose to sharply and drastically depart from its own jurisprudence and that of several courts of appeals, which had established the framework for bringing environmental justice claims under Title VI of

* Attorney, U.S. Environmental Protection Agency, Office of Inspector General; J.D. 2003, The George Washington University Law School; B.A. 1999, University of California at Davis. The author would like to thank Shi-Ling Hsu for his encouragement and guidance on this project. He would also like to thank Gregory E. Maggs, Jeffrey Rosen, and Jessica Stockton for their advice and suggestions. The views and analysis expressed in this article are the author's own and do not reflect the official policy or legal position of the U.S. Environmental Protection Agency or the United States Government. Any remaining errors are the sole responsibility of the author.

the Civil Rights Act of 1964. In a 5 to 4 decision, the Court, led by Justice Scalia, held that there is no "private right of action to enforce regulations promulgated" under § 602 of Title VI. The Court arrived at this decision by using a strict textualist approach to interpreting the statute and discounting prior Supreme Court decisions as plurality opinions, noting that the Court is "bound by holdings, not language." This decision has greatly altered the framework under which environmental justice claims need to be pursued.

This Article will trace the environmental justice movement from its conception to its current state, analyzing the impact of the Court's decision in Sandoval and suggesting the use of alternative claims to mitigate its effect, paying special attention to the claims of Native Americans. The remainder of this Article consists of four parts. Part I outlines the origins of the environmental justice movement, documenting the range of cases it has encompassed and its conflict with other social movements. Part II scrutinizes the Court's decision in Sandoval, setting forth the Court's rationale and its treatment of precedent on the issue. Part III discusses the impact of the decision, noting its effect on the environmental justice movement. It also offers several alternate approaches to bringing an environmental justice claim, outlining the various causes of action and examining their relative strengths and weaknesses. Part IV discusses the importance of choosing the remedy best tailored to the particular client being represented, paying special attention to Native Americans.

I. BACKGROUND OF THE ENVIRONMENTAL JUSTICE MOVEMENT

No date can be affixed to, no person can be given credit for, and no particular event can be cited as, the genesis of the environmental

---

4 Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas joined Justice Scalia’s opinion. Sandoval, 532 U.S. at 277.
5 Id. at 293.
6 "Textualism is a theory of statutory interpretation holding that the meaning of a statute is controlled by the statute’s text, rather than by policy arguments, legislative history, or most other extrinsic sources." Gregory E. Maggs, Reconciling Textualism and the Chevron Doctrine: In Defense of Justice Scalia, 28 Conn. L. Rev. 393, 393 n.1 (1996); see also Sandoval, 532 U.S. at 288 ("We therefore begin (and find that we can end) our search for Congress’s intent with the text and structure of Title VI.").
7 Sandoval, 532 U.S. at 282.
justice movement. Its development has been slow, it has drawn from many sources, and it has faced many hurdles to become what is recognized today as one of the greatest social crusades of the modern era. While its origins cannot be adequately circumscribed, its evolution can be traced to several seminal twentieth century events.

The modern era of environmental justice began to take shape in the 1960s, as the civil rights movement was hitting full stride. Some attribute the origin of the modern movement to the United Farm Workers' struggle against pesticides in the workplace. Others point to Dr. Martin Luther King Jr.'s work to improve working conditions for African American garbage workers as the starting point. Sociologist Robert Bullard points to the drowning death of an eight-year-old

---

8 The evolution of the label used to represent the spirit of the movement is indicative of the difficulty in attributing the movement to a certain person, place, or event. See Christopher H. Foreman Jr., The Promise and Peril of Environmental Justice 9–13 (1998) (tracing the rhetorical shift in the language used to describe the modern incarnation of the movement from "environmental equity" and "environmental racism" to "environmental justice").

9 See Tseming Yang, Melding Civil Rights and Environmentalism: Finding Environmental Justice’s Place in Environmental Regulation, 26 Harv. Envtl. L. Rev. 1, 4–5 (2002) (chronicling the tensions between the civil rights and environmental movements and the failure to fully integrate the two movements).


11 See Yang, supra note 9, at 6–7 (noting the disconnect between the two movements); see also Charles Jordan & Donald Snow, Diversification, Minorities, and the Mainstream Environmental Movement, in Voices from the Environmental Movement: Perspectives for a New Era 71, 75–78 (Donald Snow ed., 1992) (noting that minorities could not become members of the Sierra Club’s California chapters until the 1950s).


13 Unequal Protection: Environmental Justice and Communities of Color 3–4 (Robert D. Bullard ed., 1994) (stating that King’s mission to improve working conditions for striking African American garbage workers before he was shot in 1968 was really one of environmental justice) [hereinafter Unequal Protection].
African American girl in a neighborhood garbage dump in 1967.\textsuperscript{14} To others, the first lawsuit alleging environmental discrimination, filed in 1979, was the beginning.\textsuperscript{15}

It was not until 1982, however, in Warren County, North Carolina that the environmental justice movement became cohesive with a clear objective: that minority communities should not be disproportionately burdened by environmental harms.\textsuperscript{16} In Warren County, an African American community led by the Rev. Benjamin Chavis\textsuperscript{17} protested the siting of a polychlorinated biphenyl (PCB) landfill in its neighborhood.\textsuperscript{18} The Warren County protests led to a study by the United States General Accounting Office (GAO), which confirmed that racial minorities were disproportionately burdened by harmful environmental risks.\textsuperscript{19} Four years later, the United Church of Christ, led by the Rev. Benjamin Chavis, conducted its own study, but expanded the scope beyond the southern United States, to which the GAO study had confined

\textsuperscript{14} Id. at 3. The drowning set off a campus riot at Southern University, a predominantly African American college in Houston, Texas. Id. Students were protesting the siting of the dump in the middle of the nearby African American neighborhood. Id.

\textsuperscript{15} See Bean v. Southwestern Waste Mgmt. Corp., 482 F. Supp. 673, 675–76 (S.D. Tex. 1979), aff’d mem., 782 F.2d 1038 (5th Cir. 1986). Plaintiffs alleged that locating a garbage dump in their mostly African American community violated § 1983 of the Civil Rights Act of 1871. Id. The court ultimately denied the plaintiff’s claim as it found there was no intentional discrimination shown. Id. at 681. Previously, however, a similar attempt to stop a waste facility from being located in the area was successful when the area was comprised of mostly white residents. Unequal Protection, supra note 13, at 4.


\textsuperscript{17} Michael Fisher, Environmental Racism Claims Brought Under Title VI of the Civil Rights Act, 25 Envtl. L. 285, 289 (1995) (noting that Chavis has been credited with coining the phrase “environmental racism”).

\textsuperscript{18} See NAACP v. Gorsuch, No. 82-768-CIV-5 (E.D.N.C. Aug. 10, 1982). The protests and accompanying lawsuit brought by the NAACP ultimately proved unsuccessful because the court noted that there was not “one shred of evidence” that race was a motivating factor in the siting of the landfill. Richard J. Lazarus, Pursuing “Environmental Justice:” The Distributional Effects of Environmental Protection, 87 Nw. U. L. Rev. 787, 832 (1993) (citing Gorsuch, No. 82-768-CIV-5, at 9–10 n.8).

itself. This study again found that race, more than any other factor, played a prominent role in the siting of hazardous waste facilities. In 1990, the Environmental Protection Agency (EPA) established the Environmental Equity Workgroup. The Workgroup’s 1992 report confirmed the earlier studies and went on to state that the disparity could not be attributed to income alone.

While the movement began by protesting hazardous sitings, it did not limit itself to these complaints. The movement soon began to attack the disproportionate enforcement of environmental laws. A 1992 study by the National Law Journal found that government enforcement of Superfund sites had been stricter in areas where the populations were predominantly white. In response to these accusations, the Clinton Administration issued an Executive Order which directed federal agencies to consider environmental justice implications when making decisions. EPA also took steps to remedy the problem by establishing the Office of Environmental Justice, a federal advisory committee, and by promulgating a formal administrative complaint process for bringing disparate-impact claims under Title VI of the Civil Rights Act of 1964. It is with this momentum that the environmental justice movement braced for the results of the Supreme Court’s decision in Alexander v. Sandoval.

21 Comm’n for Racial Justice, supra note 20, at xiii-xiv.
22 Latham Worsham, supra note 16, at 635.
24 See Marianne Lavelle & Marcia Coyle, Unequal Protection: The Racial Divide in Environmental Law, A Special Investigation, Nat’l L.J., Sept. 21, 1992, at S2 (noting that penalties at sites with the greatest concentration of whites were 500% higher than at sites with the greatest concentration of minorities).
26 See Yang, supra note 9, at 7.
II. THE CASE: ALEXANDER V. SANDOVAL

Sandoval was a class action lawsuit brought to enjoin the Alabama Department of Public Safety’s decision to administer driver’s license examinations in English only.27 Plaintiff Sandoval brought suit in the district court, alleging that the English-only policy violated Department of Justice (DOJ) regulations, promulgated under Title VI of the Civil Rights Act of 1964,28 which prohibit using federal funds in a way that effectively discriminates on the basis of race or national origin.29

Title VI, rooted in Congress’s spending clause power, prohibits discrimination by institutions that choose to utilize federal funds.30 Title VI contains two sections relevant to this Article. Section 601 sets forth the Title’s direct anti-discrimination provision. It states, “[n]o person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”31 Section 602 authorizes “[e]ach Federal department and agency” that “extend[s] Federal financial assistance” to “effectuate the provisions of section 2000d [§ 601]” through “issuing rules, regulations, or orders of general applicability” that will help achieve the objectives of the statute.32 Section 602 authorizes federal agencies to enforce the regulations they adopt pursuant to the Act’s guidelines.33 No private right of enforcement is explicitly stated.34 Pursuant to § 602, DOJ promulgated regulations stating that a “recipient . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.”35 It is under this DOJ regulation that Sandoval brought her claim in the litigation.36

The majority, per Justice Scalia, began its opinion by stating that the Supreme Court granted certiorari only on the narrow issue of “whether there is a private cause of action to enforce the [DOJ] regula-

28 See id. at 278–79.
30 Guardians Ass’n v. Civil Servo Comm’n, 463 U.S. 582, 598-99 (1983) (stating Title VI was enacted under Congress’s power to spend for the general welfare of the United States).
32 Id. § 2000d-1.
33 Id.
34 Id.; see also Sandoval, 532 U.S. at 288–89.
35 28 C.F.R. § 42.104(b) (2) (2003). For a similar Department of Transportation regulation see 49 C.F.R. § 21.5(b) (2) (2003).
36 Sandoval, 532 U.S. at 278–79.
tion." Justice Scalia then immediately sought to discount the Court's prior decisions on the issue by emphasizing that "[a]lthough Title VI has often come to this Court, it is fair to say (indeed, perhaps an understatement) that our opinions have not eliminated all uncertainty regarding its commands." He next analyzed whether a private right of action existed under § 602 and posited that if such a right did exist, it "must come, if at all, from the independent force of § 602" as "courts may not create one, no matter how desirable that might be as a policy matter." Justice Scalia further stated that "private rights of action to enforce federal law must be created by Congress." In order to determine whether Congress created a private right of action, the intent of Congress must be deciphered. To uncover this intent, Justice Scalia asserted that the Court need delve into the context of the Act's passage only when it is needed to clarify the text. He then held that the text of the statute was dispositive, alleviating the need to look at the context of the Act's passage. Finally, he concluded that Congress intended no private right of action to exist under § 602.

Justice Stevens dissented, contending that the majority misconstrued the Court's previous decisions by holding that DOJ regulations

37 Id. at 279.
38 See id.; see also Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 584 (1983) (providing for injunctive and declaratory relief for violations of Title VI regulations by state officials); Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (allowing private right of action under Title IX); Lau v. Nichols, 414 U.S. 563, 566-69 (1974) (allowing private right of action to enforce rights guaranteed by Title VI).
39 Sandoval, 532 U.S. at 286-87. The dissent points out that "the majority offers little affirmative support for its conclusion." Id. at 315 (Stevens, J., dissenting). In support of his decision, Justice Scalia cited a puzzling previous concurrence he wrote, in which no member of the Court joined. Id. at 287 (citing Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment)). Justice Scalia had stated, "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." Id. (citing Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment)).
40 Id. at 286. Justice Scalia further stated, "[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." Id. at 291.
41 Id. at 286-87 ("Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.").
42 Id. at 288.
43 See id.
44 See id. at 288-89 (indicating that if Congress had intended a private right of action it would have specified so in detail as it did in § 601).
45 Sandoval, 532 U.S. at 293 (Stevens, J., dissenting). Justice Stevens was joined by Justices Souter, Ginsburg, and Breyer.
do not establish a private right of action under Title VI. He also pointed out that an alternative means of relief may still be available: "[l]itigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief." Justice Stevens also criticized the Court's strict textualist approach to interpreting the statute. As the dissent artfully illustrated, the decision in Sandoval was a sharp and shocking departure from thirty years of precedent established under Title VI of the Civil Rights Act of 1964, which had allowed a private right of action under § 602.

III. ALTERNATE METHODS FOR LITIGATING ENVIRONMENTAL JUSTICE CLAIMS

While the decision in Alexander v. Sandoval closed the door to private individuals seeking to bring environmental justice claims under § 602 of Title VI, it was not the death knell of the environmental justice movement. Like the civil rights movement before it, activists and proponents of the environmental justice movement will have to overcome this setback, take new routes, and remain persistent in order to achieve their ultimate goal of environmental equality. Several other viable channels can still be used to address claims of discrimination in the environmental context. These channels include civil rights laws, constitutional challenges, common law tort claims, federal and state environmental laws,

46 Id. at 294 (Stevens, J., dissenting) ("[T]his Court has repeatedly and consistently affirmed the right of private individuals to bring civil suits to enforce rights guaranteed under Title VI."); see also id. at 295 n.1 (Stevens, J., dissenting) ("Just about every Court of Appeals has either explicitly or implicitly held that a private right of action exists to enforce all of the regulations issued pursuant to Title VI, including the disparate-impact regulations.").

47 Id. at 300 (Stevens, J., dissenting). Justice Stevens based this proposition on the Court's prior holdings. See id. at 299–300 (Stevens, J., dissenting) (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 635–45 (1983)).

48 See id. at 304 (Stevens, J., dissenting) ("The majority's statutory analysis does violence to both the text and the structure of Title VI.").

49 See id. at 294–96 (Stevens, J., dissenting); The Supreme Court, 2000 Term—Leading Cases, supra note 2, at 498.

50 See Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (allowing separate but equal accommodations for whites and blacks); Scott v. Sanford, 60 U.S. (19 How.) 393, 415 (1856) ("[Members of] the African race ... were not citizens ... of the United States, and were not therefore entitled to the privileges and immunities of citizens in other States.") (citing Crandall v. State, 10 Conn. 339 (1839)).

legislative remedies, and claims unique to particular minority groups. This section will explore these possible legal strategies, discussing their strengths and weaknesses and evaluating their ultimate utility.

A. Section 601 of Title VI

When the Supreme Court ruled that disparate-impact claims could no longer be brought under § 602 of Title VI, it did not altogether preclude environmental justice claims from being brought under Title VI.52 Title VI contains two sections that prohibit discrimination in federally funded programs.53 While prior to Sandoval, §§ 602 and its disparate-impact regulations provided an attractive option to private plaintiffs, the rigid construction of § 601 offers little hope.54 Section 601 of Title VI, unlike § 602, requires proof of discriminatory intent.55 Thus far this has proven to be a nearly insurmountable burden of proof. Almost every claim brought to date alleging intentional discrimination has failed.56 The exception is municipal services cases, where plaintiffs have alleged that cities or towns were providing municipal services in a discriminatory manner.57 Unfortunately, these cases have little applica-

55 See Sandoval, 532 U.S. at 280 ("[I]t is . . . beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination."); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 608 n.1 (1983) (Powell, J., concurring) ("Seven members of the Court agree that a violation of the statute itself requires proof of discriminatory intent.").
57 See Cole, supra note 51, at 537–38; see, e.g., Hawkins v. Town of Shaw, 437 F.2d 1286, 1290, 1292 (5th Cir. 1971), aff'd en banc, 461 F.2d 1171 (5th Cir. 1972) (finding a denial of equal protection where ninety-seven percent of homes not served by sanitary sewers were in black neighborhoods); Johnson v. City of Arcadia, 450 F. Supp. 1363, 1370–76, 1379 (M.D. Fla. 1978) (finding discrimination against black neighborhoods with respect to provision of water facilities, street paving, as well as park and recreational facilities).
bility to environmental justice claims. Therefore, using § 601 alone to challenge siting decisions is not a viable course of action.

B. Section 602: Compelling Agencies to Enforce Their Own Regulations

While there is no longer a private right of action to enforce agency regulations promulgated under § 602, a plaintiff may still seek redress by filing an administrative complaint with an agency, asking it to enforce its regulations. The regulations promulgated by EPA provide the best means for bringing a legal challenge on environmental justice grounds, as the permits issued by EPA will most likely be the source of many environmental justice claims. This Article will limit itself to a discussion of EPA's § 602 regulations.

One key advantage to using § 602 regulations to bring an environmental justice complaint is that these regulations cover a broad scope of activities. To bring a Title VI complaint, a plaintiff need only demonstrate that there is a federal funding nexus. Therefore, any program or activity receiving federal funding is implicated. Since EPA provides some form of funding to nearly every state environmental agency, the permits these agencies issue, as well as those issued by EPA, are all potentially subject to Title VI jurisdiction.

---

58 See Derrick Bell, Race, Racism and American Law 130-36 (2d ed. & Supp. 1984) (indicating that the small-town nature of these cases would distinguish them from most environmental justice claims); see also Lisa S. Core, Note, Alexander v. Sandoval: Why a Supreme Court Case About Driver's Licenses Matters to Environmental Justice Advocates, 30 B.C. ENVTL. AFF. L. REV. 191, 195 (2002).


60 See 40 C.F.R. § 7.35(b) (2002) (prohibiting use of discriminatory criteria in federal programs); id. § 7.35(c) (prohibiting the siting of a facility in an area where it will have a discriminatory effect).

61 See Mank, supra note 54, at 24.

62 EPA's regulations, like those of all other federal agencies, are modeled after the Department of Justice's regulations. See 28 C.F.R. § 42.107 (2002).


64 See id.

Another advantage to § 602 complaints is that proof of intentional discrimination is unnecessary. Unlike § 601's direct prohibition of intentional discrimination, § 602 authorizes federal agencies to promulgate rules which would effectuate the goals of § 601. This has been interpreted as allowing these regulations to prohibit actions that would have indefensible disparate impacts, and to allow funds to be withheld from programs that discriminate. This substantially lowers the burden of proof. Instead of proving a discriminatory intent, the plaintiff need only prove that the action has a discriminatory effect or disparate impact.

EPA first promulgated regulations under § 602 in 1973 and revised them in 1984. These regulations prohibit recipients of federal funds from "us[ing] criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, [or] national origin." They further prohibit recipients of funds from choosing a site or locating a facility where it would have a discriminatory effect. Despite this, EPA did nothing to enforce these rules until the mid-1990s. In February 1998, EPA published an Interim Guidance "to provide a framework under which it should process complaints filed under Title VI that allege discriminatory effects arising from the issuance of environmental permits." In 2000, EPA again issued guidance to "provide a framework for . . . [EPA] to process complaints filed under Title VI . . . alleging discriminatory effects resulting from the issuance of pollution control permits." Recently, high ranking officials within EPA

---

66 See Mank, supra note 54, at 23.
69 See Latham Worsham, supra note 16, at 646.
70 See 40 C.F.R. §§ 7, 12 (2001); see also Yang, supra note 10, at 164.
72 40 C.F.R. § 7.35(c).
73 See Latham Worsham, supra note 16, at 646 (noting that EPA viewed its primary goal as regulating pollution and feared that pursuing environmental justice claims would limit its ability to pursue this goal).
74 U.S. ENVTL. PROT. AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998). This guidance was issued in response to an Executive Order issued by President Clinton which instructed federal agencies to be more conscience about environmental justice. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).
75 See Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for
have indicated that they intend to make environmental justice a priority.\textsuperscript{76} Despite the guidance and recent statements, the progress of administrative complaints lodged with EPA remains exceedingly slow.\textsuperscript{77} To date, EPA has only rendered a substantive decision in one case.\textsuperscript{78}

There are several drawbacks to seeking administrative enforcement of § 602 regulations. First, there is no public right of participation incorporated into the process.\textsuperscript{79} Second, there is no time limit for which EPA must render a decision, allowing the process to drag on for several years.\textsuperscript{80} Third, the only substantive remedy EPA may impose is termination of a grantee’s funding.\textsuperscript{81} This extreme remedy will likely make EPA reluctant to impose it, unless the discrimination is severe and there are few positive benefits from the program.\textsuperscript{82} Fourth, there is no provision to provide damages to the plaintiff.\textsuperscript{83} Lastly, the plaintiff has no right to appeal the agency’s decision,\textsuperscript{84} while there is a right for the defendant to appeal.\textsuperscript{85} Given all of these drawbacks, filing an administrative complaint with EPA regarding Title VI may be an exercise in futility.


\textsuperscript{77} See Yang, supra note 10, at 168–69.


\textsuperscript{81} See 40 C.F.R. § 7.130 (2002).

\textsuperscript{82} Mank, supra note 54, at 28–29.

\textsuperscript{83} See 40 C.F.R. § 7.130.

\textsuperscript{84} Fisher, supra note 17, at 317 n.158 (citing Women’s Equity Action League v. Cavazos, 906 F.2d 742, 748 (D. C. Cir. 1990)).

\textsuperscript{85} See 40 C.F.R. § 7.130(3) (outlining appeals process for recipients of federal funds upon an EPA determination of noncompliance with § 602).
Currently, individuals are not entitled to bring an action under the Administrative Procedure Act (APA) to compel federal agencies to enforce their Title VI regulations, leaving little recourse for challenging EPA’s lethargy with Title VI complaints. Courts have reasoned that APA suits are unnecessary because plaintiffs have the option of directly challenging, in court, the recipients of funds who are violating Title VI. But, in light of the Supreme Court’s holding in Sandoval, the rationale for such decisions no longer exists, opening up the possibility that courts may begin to allow challenges under the APA.

Despite this possibility under the APA, there are also pragmatic considerations that make filing a suit under § 602 regulations unattractive. While the validity of regulations proscribing disparate impacts was not before the Court in Sandoval, the majority, per Justice Scalia, sought to address the topic. Justice Scalia initially stated that the Court would “assume for purposes of this decision that § 602 confers the authority to promulgate disparate-impact regulations.” He then proceeded in a footnote to attack the validity of this assumption despite several cases holding the contrary. He noted, “We cannot help observing, however, how strange it is to say that disparate-impact regulations are ‘inspired by, at the service of, and inseparably inter-

88 See id. No court to date has ruled that the APA is a viable option. See id. (“[W]e think that Cannon’s direct remedy against funding recipients is not only ‘adequate,’ but, as the Supreme Court recognized, is preferable to a direct suit against the agency itself.”); Women’s Equity Action League, 906 F.2d at 750–51 (D.C. Cir. 1991) (holding APA is a default remedy when statutory remedy is not adequate); Scherer v. United States, 241 F. Supp. 2d 1270, 1288 (D. Kan. 2002) (indicating that APA suits are only available when there is “no other adequate remedy in court”).
90 Id. at 285–86 n.6.
91 Id. at 286.
92 Id. at 286 n.6. The Supreme Court in plurality opinions and dicta has indicated that disparate-impact regulations are authorized under § 602. See Alexander v. Choate, 469 U.S. 287, 293–94 (1985); Guardians Ass’n v. Civil Serv. Comm’n, 463 U.S. 582, 592–93 (1983) (White, J.). Several circuit courts have held that disparate-impact regulations are authorized by § 602. See, e.g., Powell v. Ridge, 189 F.3d 387, 399–400 (3d Cir. 1999); N.Y. Urban League, Inc. v. New York, 71 F.3d 1031, 1036 (2d Cir. 1995); Latinos Unidos v. Sec’y of Hous. & Dev., 799 F.2d 774, 785 n.20 (1st Cir. 1986); see also Thomas A. Lambert, The Case Against Private Disparate Impact Suits, 34 Ga. L. Rev. 1155, 1163 (2000). In his dissent, Justice Stevens admonishes Justice Scalia for his failure to provide adequate weight to the Court’s prior, fractured Title VI opinions. See Sandoval, 532 U.S. at 295 (Stevens, J., dissenting). Justice Stevens states: “the failure of our cases to state this conclusion explicitly does not absolve the Court of the responsibility to canvass our prior opinions for guidance.” Id. (Stevens, J., dissenting)
twined with' § 601 . . . when § 601 permits the very behavior that the regulations forbid.”

Justice Scalia artfully discredited the Court’s previous, on-point opinions as plurality opinions or mere dicta, while at the same time citing his own concurrences and dissents in the very same opinions as authority for the proposition he was espousing.

This brief reference to the validity of disparate-impact regulations is demonstrative of the majority’s antipathy toward such regulations. While the Court was constrained from directly confronting the issue, as it was not raised in the courts below, the majority did provide a strong indication of how it would rule if given the opportunity. Given this, use of disparate-impact regulations to enforce environmental justice claims is not the most prudent course of action.

C. Other Constitutional and Civil Rights Causes of Action

The primary constitutional cause of action available for bringing environmental justice claims is the Equal Protection Clause of the Fourteenth Amendment. The Amendment expressly provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”

In environmental justice claims, this has been interpreted as requiring proof that persons similarly situated are being treated differently and there is intent to effectuate this discrimination. As in claims asserted under § 601 of the Civil Rights Act of 1964, claims under the Fourteenth Amendment will be nearly impossible to sustain.

---

93 Sandoval, 532 U.S. at 286 n.6 (quoting Justice Stevens’s dissenting opinion at page 307).


95 See Sandoval, 532 U.S. at 281–82; Respondents’ Brief at 9–10, Sandoval (No. 99-1908).


97 See U.S. Const. amend. XIV, § 1.

98 See id.


100 See supra Part III.A.
The immediate aftermath of the *Alexander v. Sandoval* decision provided hope for advocates that the private right to bring disparate-impact claims that the Court had just eliminated under § 602 still existed under 42 U.S.C. § 1983. In his dissent in the *Sandoval* case, Justice Stevens stated, “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 . . . .” Academic commentators and courts quickly latched onto Justice Stevens’s assertion, and the first environmental justice claims brought under § 1983 were successful.

However, the tide would soon turn with the same swiftness and decisiveness that swept away the private right to enforce disparate-impact regulations under § 602. In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, the Third Circuit Court of Appeals reversed a district court holding that allowed disparate-impact claims to be brought under § 1983. The court ruled, “if there is to be a private enforceable right under Title VI to be free from disparate-impact discrimination, Congress, and not an administrative agency or a court, must create this right.” The court grounded its opinion in the fact that the “implications of [the] case are enormous” and therefore it should be Congress and not the court that makes such a pivotal decision. The court distinguished prior cases allowing such claims by emphasizing that those cases had focused on carrying out congressional intent, and § 1983 should only be used as a vehicle to carry out Congress’s intent when its intent is plain. Since there was no clear intent in § 602 to allow a private right of action to enforce disparate-


102 *Sandoval*, 532 U.S. at 300.


105 Id. at 790.

106 Id.

107 See id.
impact claims, "particularly in light of Sandoval," there was no logical reason to allow such claims under § 1983.\textsuperscript{108}

Soon after the South Camden decision the Supreme Court sounded the death knell to bringing disparate-impact claims under § 1983.\textsuperscript{109} In Gonzaga University v. Doe the Court held that since the Family Educational Rights and Privacy Act of 1974\textsuperscript{110} created no privately enforceable rights, it could not be enforced under § 1983.\textsuperscript{111} The Court began its decision by establishing that its "implied right of action cases should guide the determination of whether a statute confers rights enforceable under § 1983."\textsuperscript{112} The Court then restated its finding in Sandoval that there was no evidence of intent by Congress to create an implied right of action to enforce disparate-impact regulations under Title VI.\textsuperscript{113} When read together, these two statements indicate that the Court would also not allow § 1983 to be used to enforce Title VI disparate-impact regulations.

D. Common Law Actions

Before the environmental regulatory framework was established by Congress in the 1970s, the common law of torts was the only remedy available to plaintiffs who sought to rectify environmental harm.\textsuperscript{114} The use of the common law in environmental cases is well established and can be traced back as far as 1842 in the United States.\textsuperscript{115} The main common law tort claims that can be used in an environmental context are public and private nuisance, trespass, and strict liability.\textsuperscript{116} These causes of action place liability upon actors who disturb protected property interests, cause physical injury or property damage, and substantially interfere with the possession or the use and enjoyment of one's property.

\textsuperscript{108} Id. at 790–91.
\textsuperscript{111} See Gonzaga Univ., 536 U.S. at 286–87.
\textsuperscript{112} Id. at 283.
\textsuperscript{113} Id. at 283–84.
\textsuperscript{114} See SUSAN J. BUCK, UNDERSTANDING ENVIRONMENTAL ADMINISTRATION AND LAW 2–4 (1996) (tracing the origins of common law from England to its first use in America to remedy environmental harm).
\textsuperscript{115} See Martin v. Wadell, 41 U.S. (16 Pet.) 367, 416 (1842) (analyzing the public trust doctrine); BUCK, supra note 114, at 3.
\textsuperscript{116} For a thorough analysis of environmental torts see GERARD W. BOSTON & M. STUART MADDEN, LAW OF ENVIRONMENTAL AND TOXIC TORTS 21–139 (1994).
The most frequently used common law tort in environmental litigation is nuisance.\textsuperscript{117} This is not mere happenstance; nuisance is used so frequently because it can be applied to a broad range of cases and can be used without demonstrating a direct physical invasion.\textsuperscript{118} In a private nuisance, the plaintiff must prove there has been a "nontrespassory invasion of [his] interest in the private use and enjoyment of [his] land" which has resulted in substantial harm.\textsuperscript{119}

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.\textsuperscript{120}

To bring an action under the public nuisance doctrine, the plaintiff must prove there has been "an unreasonable interference with a right common to the general public."\textsuperscript{121} In determining the unreasonableableness of the interference one must consider "whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort[, or the public convenience]."\textsuperscript{122} Other considerations are "whether the nuisance is proscribed by a statute, ordinance or administrative regulation" or is "of a continuing nature or has produced a permanent or long-lasting effect" and the "actor knows or has reason to know" that the action has a "significant effect upon the public right."\textsuperscript{123} In order to recover in a public nuisance claim, the plaintiff must have suffered a "harm of a kind different from that suffered by other members of the public"\textsuperscript{124} or "have author-

\textsuperscript{117} Steven Ferrey, Environmental Law: Examples and Explanations 16 (2d ed. 2001).

\textsuperscript{118} See Henry N. Butler & Jonathan R. Macey, Using Federalism to Improve Environmental Policy 8 (1996) (stating that the law of nuisance applies to "excessive noise, noxious odors, [and] smoke or dust settling on a landowner's property").

\textsuperscript{119} Restatement (Second) of Torts § 821D (1979).

\textsuperscript{120} Id. § 822.

\textsuperscript{121} Id. § 821B(1).

\textsuperscript{122} Id. § 821B(2) (a).

\textsuperscript{123} Id. § 821B(2) (b)-(c).

ity as a public official or public agency to represent the state or a political subdivision in the matter," or otherwise "have standing to sue as a representative of the general public."\textsuperscript{125}

A plaintiff may seek both damages and equitable relief, including an injunction, in nuisance actions.\textsuperscript{126} These actions are particularly viable in environmental justice siting cases when a hazardous waste plant is sited in a minority neighborhood, as the products of the plant are likely to unreasonably interfere with the residents' use and enjoyment of their land and cause substantial harm to them.\textsuperscript{127}

Nevertheless, minority communities are presented with numerous barriers to sustaining both private and public nuisance causes of action.\textsuperscript{128} In a private nuisance case, a court may balance the harm the plaintiffs are suffering against the social utility of the action creating the harm.\textsuperscript{129} In one celebrated case, a court denied the plaintiff's request for an injunction and allowed the defendant to pay permanent damages in lieu of the injunction, as the social utility of the plant was deemed to outweigh the damage it was causing.\textsuperscript{130} Such a result in an environmental justice suit is nothing but a defeat, as the sole purpose of the claim is to abate the harm the actor is causing to the community. In public nuisance cases it is difficult to demonstrate harm distinct from other persons in the area, thereby causing the courts to deny standing.\textsuperscript{131} Also, like the proof of intentional discrimination, proof that the conduct is intentional or unreasonable can be unattainable, especially when the facility is operating under a valid permit.\textsuperscript{132} Causation can also be difficult to prove because information on

\textsuperscript{125} \textit{Restatement (Second) of Torts} § 821C.
\textsuperscript{126} \textit{Butler \& Macey}, \textit{supra} note 118, at 8.
\textsuperscript{127} \textit{See} Bean v. Southwestern Waste Mgmt. Corp., 482 F. Supp. 673, 677 (S.D. Tex. 1979) (holding that although plaintiffs demonstrated a substantial threat of irreparable injury, they were not likely to show discriminatory intent under § 1983), aff'd mem., 782 F.2d 1038 (5th Cir. 1986).
\textsuperscript{128} \textit{See} Latham Worsham, \textit{supra} note 16, at 640.
\textsuperscript{129} \textit{See Butler \& Macey}, \textit{supra} note 118, at 8.
\textsuperscript{130} Boomer v. Atl. Cement Co., 257 N.E.2d 870, 873–75 (N.Y. 1970) (reasoning that the costs of shutting down the defendant's plant would be disproportionately large compared with the harm it was causing); \textit{see also} \textit{Restatement (Second) of Torts} § 951 cmt. a (1979) (allowing damages to be awarded in place of an injunction if to do otherwise would impose undue hardship on the defendant).
\textsuperscript{131} \textit{See} State \textit{ex rel. Vandervort} v. Grant, 286 P. 63 (Wash. 1930) (holding that respondent could not maintain public nuisance action because the harm he suffered from the obstruction of a public street and sidewalk could not be distinguished from its effect on the public generally).
toxins and their effects is constantly evolving. Nuisance claims also may be prohibited by relevant federal and state statutes. Lastly, because these nuisance claims focus on harm to the individual, they run contrary to the environmental justice movement's focus on harm to the minority community.

A closely related doctrine to nuisance that is also applicable in environmental justice claims is the tort of trespass. Trespass actions can be used to seek an injunction or damages when a toxic release has interfered with an owner's possessory interest in real property. Trespass is distinguished from nuisance by the requirement that there be a direct physical invasion of the land rather than a mere interference with the use and enjoyment of the land. While trespass is often a viable claim in environmental justice cases, it does have its limitations. First, there are causation problems. The party asserting the trespass claim must be able to prove the harm he is suffering is a result of the trespass on his property; as with nuisance claims, this can be nearly impossible to prove. Second, trespass only applies to property owners. Since many residents in minority communities do not own their property, they would not be eligible for damages.

A strict liability action can be used when a defendant has engaged in an abnormally dangerous activity and has subjected the plaintiff to a risk of harm as a result. In determining whether an activity is abnormally dangerous courts consider several factors. Given the subjective

---

135 See Fisher, supra note 17, at 310.
136 FERREY, supra note 117, at 21.
138 See FERREY, supra note 117, at 21.
139 See Farber, supra note 133, at 1226-33.
140 See Kathy Seward Northern, Battery and Beyond: A Tort Law Response to Environmental Racism, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485, 545 (1997).
141 RESTATEMENT (SECOND) OF TORTS § 520 (1979). Some of the factors are: (a) presence of a high degree of risk of harm; (b) likelihood the harm will be great; (c) inability to terminate risk through the exercise of reasonable care; (d) whether the activity is common usage; (e) appropriateness of the activity in relation to the location; and (f) social utility of the activity. Id.; see also State Dep't of Envtl. Prot. v. Ventron Corp., 468 A.2d 150, 159-60
nature of each claim, the likelihood of success in a strict liability action is uncertain. Additionally, a strict liability claim will only allow recovery for damages. Therefore, a strict liability claim cannot be brought to prevent a harmful siting, and damage may be inflicted upon a community before the harm can be redressed.

E. Environmental Laws

Many of the aforementioned legal actions have been used by environmentalists to fill in the gaps where the elaborate environmental statutory framework fails to provide a remedy. While the existing environmental statutes do provide EPA with authority to address environmental justice concerns, the discretion given to EPA and the bevy of factors it must consider often subordinate environmental justice considerations. Traditional environmental statutes, such as the Clean Air Act and Clean Water Act, do not explicitly set forth the statutory framework for bringing an environmental justice claim; instead, environmental justice is but one of many considerations to be weighed during the permitting process. Therefore, unlike traditional environmental claims where advocates are forced to turn away

(N.J. 1993) (finding disposal of waste to be an abnormally dangerous activity). But see Avemco Ins. Co. v. Rooto Corp., 967 F.2d 1105, 1109 (6th Cir. 1992) (applying these factors, but holding storage of waste not abnormally dangerous).


See FERREY, supra note 117, at 15.

See Barry E. Hill & Nicholas Targ, The Link Between Protecting Natural Resources and the Issue of Environmental Justice, 28 B.C. ENVTL. AFF. L. REV. 1, 8-9 (2000); see also Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994) (requiring EPA to consider environmental justice when making decisions); Richard J. Lazarus & Stephanie Tai, Integrating Environmental Justice into EPA Permitting Authority, 26 ECOLOGY L.Q. 617 (1999) (outlining EPA authority to implement environmental justice); Memorandum from Gary S. Guzy, General Counsel, Office of General Counsel, EPA, to Steven A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assistance; Robert Perciasepe, Assistant Administrator, Office of Air and Radiation; Timothy Fields, Jr., Assistant Administrator, Office of Solid Waste and Emergency Response; J. Charles Fox, Assistant Administrator, Office of Water (Dec. 1, 2000) (on file with author) (describing EPA statutory and regulatory authority to address environmental justice).

See Hill & Targ, supra note 144, at 7-10; see also Yang, supra note 9, at 14-15 (noting that because environmental standards are constructed to achieve the greatest good for the greatest number of people, they often fail to take into account the unique circumstances of minorities).

from the statutory framework when their claims are not explicitly pro-
vided for, environmental justice advocates may turn to these statutes
and argue that inadequate weight was given to environmental justice
concerns when the permits were issued.\textsuperscript{147}

In fact, one environmental scholar, Luke Cole, has even stated that
efficient use of existing environmental statutes may be the best means
for bringing an environmental justice claim.\textsuperscript{148} He believes that it may
be the easiest way to block a facility from being sited in a minority
community.\textsuperscript{149} This is based on the fact that judges are more familiar
and comfortable with environmental laws, and the clarity of these laws
makes them more likely to rule in favor of credible plaintiffs.\textsuperscript{150}

The National Environmental Policy Act (NEPA) is the act most
amenable to bringing an environmental justice claim.\textsuperscript{151} NEPA requires
federal agencies to consider environmental factors before they make
major federal decisions that will significantly impact the human envi-
ronment.\textsuperscript{152} The permits issued by EPA under federal environmental
statutes fall under this requirement.\textsuperscript{153} If a decision reaches the NEPA
threshold, an Environmental Impact Statement (EIS) must be pre-
pared.\textsuperscript{154} An EIS is a lengthy, public, analytical document that outlines
the environmental effects of an action before the action is under-
taken.\textsuperscript{155} The EIS, like NEPA as a whole, imposes no substantive re-
quirements on agency decisionmaking, but rather imposes only proce-
dural requirements.\textsuperscript{156} While NEPA does not allow environmental
justice advocates to stop a project because of harmful environmental

\textsuperscript{147} One must also consider the availability of claims based on state environmental stat-
utes. See Chuck D. Barlow, State Environmental Justice Programs and Related Authorities, in THE

\textsuperscript{148} See Cole, supra note 51, at 526 (noting an environmental justice litigation hierar-
chy); see also Lazarus, supra note 18, at 827–28.

\textsuperscript{149} Cole, supra note 51, at 526.

\textsuperscript{150} See id.


\textsuperscript{152} Id. § 4332(c); see also Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S.

\textsuperscript{153} For a more complete discussion of which statutes require compliance with NEPA, see
U.S. ENVTL. PROT. AGENCY, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE

\textsuperscript{154} 40 C.F.R. § 1501.4(b)–(c) (2002).

\textsuperscript{155} See OLGA L. MOYA, FEDERAL ENVIRONMENTAL LAW: THE USER’S GUIDE 56 (1997);
Gordon R. Alphonso et al., Fire, Wood, and Water: Trends in Forest Management Requirements,
18 NAT. RESOURCES & ENV’T 18, 19 (2003).

\textsuperscript{156} See FERREY, supra note 117, at 68.
impacts, it does allow them to delay the project and force agencies to think through their permit decisions entirely. By forcing an agency to strictly comply with the requirements of NEPA, an environmental justice advocate can drive up the cost and time required for the issuance of a siting permit for both the agency and the recipient, perhaps causing the recipient to choose an alternate site to avoid future problems.

The Council on Environmental Quality has issued a guidance for using NEPA to implement environmental justice. The guidance states that "[e]ach federal agency should analyze the environmental effects, including human health, economic, and social effects of federal actions, including effects on minority populations, low-income populations, and Indian tribes, when such analysis is required by NEPA." The guidance enunciates six principles by which environmental justice issues should be identified and addressed.

While NEPA can be an effective tool in dissuading the potential siting of a harmful environmental hazard, it cannot totally prevent the siting, as it is merely a procedural statute. As a result, a delay in the siting and an increase in public awareness may be the only victories for a plaintiff. Yet, it is the culmination of several small victories that often results in an ultimate success. NEPA provides an excellent op-

---


160 Id. at 4 (citing Presidential Memorandum Accompanying Executive Order 12,898, 30 WEEKLY COMP. PRES. DOC. 279, 280 (Feb. 11, 1994)).

161 Id. at 8–9. These principles are: (1) consideration of the racial composition of the area affected by the proposed action, and whether there may be a disproportionate impact on minority populations; (2) consideration of relevant public health and industry data and the potential for exposure to environmental hazards; (3) recognition of "the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action"; (4) development of "effective public participation strategies"; (5) assurance of "meaningful community representation in the process"; and (6) assurance of "tribal representation in the process in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government's trust responsibility to federally-recognized tribes, and any treaty rights." Id.

162 See Karlen, 444 U.S. at 227.

163 See Fisher, supra note 17, at 308–09.
portunity to draw attention to the environmental justice movement. It drives up the costs for siting environmentally hazardous facilities in minority neighborhoods and thereby eliminates the benefit of siting them there. It also forces government agencies to become more environmentally conscious and accountable for their decisions. Lastly, it can help create the broad public support for the environmental justice movement that has thus far been lacking.\textsuperscript{164}

\textbf{F. The Kitchen Sink Approach}

While the abovementioned legal actions provide several singular options for bringing an environmental justice claim, the best approach for bringing an environmental justice claim is to use all of the options available to achieve the best result for the minority community. While each claim has its relative strengths and limitations, when taken as a whole, the claims provide a solid basis for challenging a hazardous waste siting. When bringing an environmental justice suit, one must remember why the suit is being brought: not to gain a victory in the courtroom, but instead to prevent a minority population from being harmed by a hazardous siting. With this in mind, goals outside of the legal realm must be considered, such as making projects more costly for defendants, raising community morale, garnering attention for the cause, and forcing politicians to deal with the problem.\textsuperscript{165} A civil rights or constitutional action brings media attention to the problem and forces a political response, a NEPA claim causes costs to rise and delays the proposed siting, and a common law claim addresses the unfairness and disregard for the well-being of the community most affected.\textsuperscript{166} All of these actions are meritorious and aid environmental justice advo-

\textsuperscript{164} For an example of how a NEPA suit can draw together a broad section of the American population, see \textit{Public Citizen v Department of Transportation}, 316 F.3d 1002, 1008–09, 1032 (9th Cir. 2003), which sustained a challenge by a coalition of environmental, labor, and public interest groups to the Department of Transportation’s decision to open the U.S.-Mexico border to cross border commercial traffic without the performance of an EIS.

\textsuperscript{165} See Cole, supra note 51, at 541. For an example of a political resolution to a problem similar to that raised by the Sandoval decision, see \textit{Wards Cove Packing Co. v. Atonio}, 490 U.S. 642, 660–61 (1989), which held that the plaintiff has the burden of production rather than the higher burden of persuasion in Title VII cases. In 1991, Congress reversed the Court’s interpretation by amending Title VII to place the higher burden back on the defendant. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000); see also Gregory E. Maggs, \textit{Translating Federalism: A Textualist Reaction}, 66 GEO. WASH. L. REV. 1198, 1203–04 (1998) (discussing the option of amending the Constitution when changes are really deemed necessary, and how this option is often overlooked by parties after they receive an adverse ruling from the Supreme Court).

\textsuperscript{166} See supra Part III.A–E.
cates in achieving their ultimate goal of preventing hazardous sittings from harming minority communities. It is irrelevant whether this is done through a legal decision or through increasing costs and creating such pressure that the siting is changed to another location.

IV. THE NATIVE AMERICAN PARADOX

A. Special Circumstances of Native Americans

The multitude of legal actions available for asserting an environmental justice claim are quite broad and amenable to most circumstances affecting minority communities. Nevertheless, claims cannot be used equally in all circumstances; instead, advocates must carefully choose the claims that are best suited to their particular factual setting. The distinctive status of Native Americans requires a different tailoring and selection of options than one would do for the typical plaintiff in an environmental justice suit.¹⁶⁷ This special tailoring and selection is required because Native Americans’ connection to the environment in which they live is frequently much stronger than the connection felt by the average plaintiff, and certain claims may be used for their cases that would normally be too difficult to sustain when representing other groups. Native Americans have deep economic, cultural, and religious ties to their land, as it is often the same land their ancestors inhabited hundreds of years ago.¹⁶⁸ Therefore, weight must be given to more than just the mere physical harm that a hazardous siting will cause to the Native community; the cultural and religious consequences must also be taken into account.¹⁶⁹ Additionally, many Native Americans live on land that is exclusively their own; it is their sovereign territory¹⁷⁰ from which they manage their affairs with little or no interference from the outside world.¹⁷¹ Of equal importance, but outside the scope of this Article, is that in addition to asserting the aforementioned claims,¹⁷²

¹⁶⁸ See id. at 472, 496–97.
¹⁶⁹ See id. at 496–97.
¹⁷² See, e.g., Dean B. Suagee, The Application of the National Environmental Policy Act to "Development" in Indian Country, 16 Am. INDIAN L. REV. 377 (1991) (analyzing the role of NEPA on Native lands).
they may also use a number of statutes and treaties that have been enacted over the years to protect their interests. ¹⁷³

B. Medicine Lake Highlands Case Study

The case of a proposed geothermal power plant in California, set to harness energy from lands considered sacred to Native Americans living in the region, provides an enlightening illustration of the need to tailor legal arguments in an environmental justice complaint to the needs of the affected community.¹⁷⁴ The battle for drilling rights to the geothermal energy in the Medicine Lake Highlands of California¹⁷⁵ dates back to the 1980s when several companies purchased leases of Native land held in trust by the federal government and the power potential of the region was discovered.¹⁷⁶ In 1996, the Pit River Tribe passed a resolution opposing the geothermal exploration in the Medicine Lake Highlands.¹⁷⁷ In 1999, the Bureau of Land Management issued an Environmental Impact Statement approving drilling, with mitigation measures, on the Medicine Lake land, despite acknowledging significant impacts on traditional Native cultural and religious values.¹⁷⁸ In 2000, the Bureau of Land Management reversed its decision and put a halt to the drilling.¹⁷⁹ California Energy General Corporation, the predecessor to the current owner, Calpine, responded to this decision


¹⁷⁸ See id. at tbl.ES.6.

by filing a $100 million Fifth Amendment takings claim against the government. The complaint was dropped on December 20, 2002, when the Bush Administration capitulated to Calpine’s demands and allowed drilling to resume on the Medicine Lake lands. This decision by the Bush Administration not only broke a commitment to not build a power plant on the land, but also contradicted a recommendation by the Advisory Council on Historic Preservation, which recommended that the region be preserved in its current state. In reply to the Bush Administration’s decision to exploit the land, the Pit River Tribe, along with a coalition of Native and environmental organizations, filed suit to stop further development in the Medicine Lake region.

The Medicine Lake region has long had special significance to the Native populations living in close proximity. The Native inhabitants of the region consider the land to be a spiritual sanctuary, believing that the Earth’s Creator descended from nearby Mount Shasta, bathed in the lake after creating the Earth, imparted his spirit into the waters, and gave it healing powers. Tribal medicine men still use the site to conduct coming-of-age ceremonies, while others use it to cleanse their body and soul. It is a region in which tribal members have been attempting to fight off incursions for over 150 years. Tribal members are already forced to wait until nightfall to use the sacred waters because of recreational sightseers. The proposed Calpine geothermal plant will further disrupt the use of this sacred water and, in the view of many who use it, destroy its spiritual significance.

---

181 Id.; see also Dean E. Murphy, U.S. Approves Power Plant in Area Indians Hold Sacred, N.Y. TIMES, Nov. 28, 2002, at A32. This article quoted an Agriculture Department spokesman: “the Justice Department said we are going to lose boatloads of taxpayer money if we don’t find a way to give these guys a fairer hearing.” Murphy supra, at A32. It also stated that the Calpine suit had heavily influenced the decision. Id.
182 See Murphy, supra note 181, at A32; see also BUREAU OF LAND MGMT., RECORD OF DECISION: TELEPHONE FLAT GEOTHERMAL DEVELOPMENT PROJECT ON FEDERAL LEASES CA 12370, CA 12371, CA 12372, CA 13803, CA 21933, and CA 25008 (2002).
183 Pit River Tribe v. Dep’t of Interior, No. 02-CV-1314 (E.D. Cal. filed June 17, 2002) (not yet briefed).
184 Murphy, supra note 181, at A32.
185 Id.
186 See id.
187 Bailey, supra note 175, at B1 (detailing the history of the land from settler incursions during the 1850s gold rush to current power exploration).
188 Murphy, supra note 181, at A32.
189 See Eric Bailey, Geothermal Plant Near Tribal Site Approved: Reversal of Clinton-era Agreement Angers Native Americans Who Call the California Lake Sacred, L.A. TIMES, Nov. 27, 2002, at
For these reasons, opposition to the Calpine plant has garnered widespread support from Native American organizations.\(^{190}\)

In an effort to overcome the extensive opposition to the project, Calpine has lobbied extensively to gain support for its geothermal plant.\(^{191}\) Calpine has been able to successfully drive wedges between tribes and tribal members in the region through extensive payoffs.\(^{192}\) It has taken notice of the meager financial means of the Native community and exploited that fact in an effort to gain the support of tribal members who value economic stability more than their spiritual heritage.\(^{193}\) Calpine has even paid local tribal members to represent it in Congress in an effort to gain support for future projects.\(^{194}\)

The Medicine Lake case demonstrates that the existing environmental justice framework does not always fully comprehend the consequences that certain sitings have on the community being harmed.\(^{195}\) While the indigenous people of the region face potential environmental harm from the geothermal plant, they also risk losing their cultural identity.\(^{196}\) This dynamic is often overlooked in the traditional environmental justice model, where the focus is on factors such as

---


\(^{192}\) See id.

\(^{193}\) Id. (discussing a supposed payoff of $25,000 to the Shasta Nation to assist them in their quest for federal tribal recognition, over $500,000 spent in lobbying, and several scholarship awards).

\(^{194}\) Id. One of these paid consultants, Rosemary Nelson, has been quoted as saying, “I wonder how relevant any of these historic and spiritual sites are to your life … when Indians have the highest unemployment, alcoholism and suicide rates? Preserving cultural sites is important, but it hasn’t solved the problems of Native Americans, We honor our ancestors by living successfully in the present.” Id. Other tribal members have been quoted as saying, “[t]hat healing power and all that is baloney; that went out in the 1900s.” Bailey, supra note 175, at B1 (statement of Pit River Tribe member Erin Forrest, Calpine supporter).


\(^{196}\) See supra notes 184–190 and accompanying text; see also Hill & Targ, supra note 144, at 31 (explaining how the impact of a change in local ecology can have a significant effect on native populations).
statutory interpretation, causation, and intent.\textsuperscript{197} Despite these difficulties, a cause of action still must be selected in an effort to mitigate as much harm as possible.

\textbf{C. Selecting the Best Cause of Action}

While the lawyers for the native inhabitants of the Medicine Lake region have not yet briefed their complaint and fully articulated their causes of action, they must be careful in their selection, as not all of the aforementioned causes of action can be sustained in court.\textsuperscript{198} Title VI offers little hope of relief for the Medicine Lake plaintiffs. As discussed above, § 601 and its requisite proof of intentional discrimination is not a viable option in this case because there is no evidence of intentional discrimination.\textsuperscript{199} In order to prove intentional discrimination they would have to establish that the primary motivation of Calpine in building the plant was to harm the native inhabitants of the region, and that the decision was not precipitated by another valid reason.\textsuperscript{200} Given that there is a geothermal source of energy in the region, providing Calpine with a nondiscriminatory reason for locating the plant there, it will be difficult for plaintiffs to prove intentional discrimination.\textsuperscript{201}

Also, given the Supreme Court's ruling in \textit{Alexander v. Sandoval}, a § 602 disparate-impact complaint is also not an effective option.\textsuperscript{202} In \textit{Sandoval}, the Court ruled that disparate-impact claims will no longer be entertained by the courts.\textsuperscript{203} Therefore, the only option the plaintiffs have for a Title VI claim is to file an administrative complaint with EPA.\textsuperscript{204} The attorneys for the plaintiffs chose to use this option and quickly filed a § 602 complaint with EPA.\textsuperscript{205} The complaint was filed in January of 2002; however, to date, no action has been taken by EPA.\textsuperscript{206} The complaint was almost immediately placed on suspended status by EPA, as the attorneys for the plaintiffs had also filed a complaint in

\textsuperscript{197} See supra Part III.
\textsuperscript{198} See supra Part III.
\textsuperscript{199} See supra Part III.A.
\textsuperscript{201} See supra Part III.
\textsuperscript{202} See supra Part II.
\textsuperscript{204} See supra Part III.B.
\textsuperscript{206} Id.
It is EPA policy to take no affirmative steps to investigate a Title VI complaint if there is a concurrent action filed in district court concerning matters related to the Title VI complaint. Given the track record of EPA in administering Title VI complaints, the plaintiffs were left with the option of either filing a complaint with EPA and waiting, hoping they will resolve it in a more expedited manner than they have with similar complaints in the past, or file an action in district court. In this case, the attorneys chose to file a claim in district court, essentially foreclosing Title VI as a colorable option, given EPA’s refusal to deal with Title VI complaints while concurrent actions are open in district court. Additionally, reliance on the finality of an EPA administrative action could be a risky proposition in light of the strong language against the very existence of Title VI regulation in Sandoval. If EPA were to rule in the plaintiff’s favor, the decision could be reversed on appeal if the validity of the regulations themselves and the administrative process are challenged. The lawyers should also resist relying on a complaint alleging a violation of the Equal Protection Clause of the Fourteenth Amendment. An equal protection claim, like the § 601 claim, would be nearly impossible to maintain given the required proof of intentional discrimination. Absent a confession by a Calpine official, this burden of proof will not be met, as there is no proof of intentional discrimination from the facts available. From the current evidence, it seems clear that this location was chosen because of the geothermal energy source, and not because of a desire to harm the members of the Medicine Lake community.

A disparate-impact claim brought under § 1983 will also likely be impossible to maintain. While Justice Stevens provided hope that such a claim could be maintained in his Sandoval dissent, the Supreme Court has subsequently foreclosed § 1983 as an option in its decision in Gonzaga University v. Doe. Therefore, bringing a § 1983 claim would have no benefit, other than to give the court an opportunity to

207 Id.; see also Pit River Tribe v. Dep’t of Interior, No. 02-CV-1314 (E.D. Cal. filed June 17, 2002) (not yet briefed).
208 See 28 C.F.R. §§ 42.07, 50.3 (2003).
209 See supra Part III.B.
210 See supra Part III.B.
211 See supra Part III.C.
212 See supra Part III.C.
213 See supra Part III.C.
clarify that § 1983 is not a viable vehicle for bringing an environmental claim.

The traditional common law complaints of nuisance offer a greater chance for victory. Nuisance claims can be tailored to address the harm that the Medicine Lake plaintiffs are suffering. While the overall harm to the environment in the Medicine Lake case will not be as significant as the harm suffered in other notable environmental justice cases because the plant will be small in scale and geothermal plants are generally cleaner running than coal fired power plants, the plaintiffs will still suffer significant harm. They will suffer harm of a spiritual rather than environmental nature and a nuisance action may be used to address this harm. The precise harm suffered will be the loss of the sacred water and its concomitant healing power.

Nevertheless, a private nuisance claim will likely fail because the courts may balance the harm the plaintiffs are suffering—loss of the water's spiritual powers—against the benefits of the proposed plant, a source of clean energy for a state in desperate need of more power. California, the site of the plant, is emerging from recent power shortages that caused substantial damage to the state's economy as a result of forced business closings and rolling blackouts. When the state's need for power is weighed against the spiritual loss to a small percentage of its population, a court will likely tip the scales in favor of the greater public interest, the power plant.

A public nuisance claim is the more attractive option. As described above, in a public nuisance claim the plaintiff must prove that there has been "an unreasonable interference with a right common to the general public." A plaintiff also needs to demonstrate that the harm is "of a continuing nature or has produced a permanent or long-lasting effect" and the "actor knows or has reason to know" that the action has a "significant effect upon the public right." Lastly, the plaintiff must have suffered a "harm of a kind different from that suffered by other

\[214\text{ See supra Part III.D.}\]
\[215\text{ See supra notes 174–194 and accompanying text.}\]
\[216\text{ See supra Part III.D.}\]
\[217\text{ See Boomer v. Atl. Cement Co., 257 N.E.2d 870, 872–75 (N.Y. 1970) (holding that the costs of shutting down the defendant's plant would be disproportionate to the harm it was causing).}\]
\[218\text{ See Carl Hulse, Energy Matters Return to Fore on Capitol Hill, N.Y. TIMES, Apr. 10, 2002, at C1.}\]
\[219\text{ See Boomer, 257 N.E.2d at 872–75.}\]
\[220\text{ RESTATEMENT (SECOND) OF TORTS § 821(B)(1) (1979).}\]
\[221\text{ Id. § 821B(2)(c).}\]
members of the public.\textsuperscript{222} In this case, the disturbance of the spiritual powers of the lake will be the unreasonable interference with a right common to the public.\textsuperscript{223} The plaintiff will also be able to demonstrate that the interference is unreasonable since the defendant, Calpine, has been apprised of the cultural significance of the region and has still chosen to proceed with the plant.\textsuperscript{224} Since the land has been granted to the tribe and its members by the federal government, the requisite possessory interest in the land has been met as well.\textsuperscript{225} The plant will also produce a permanent and long lasting effect on the region because the spiritual value of the water will be destroyed, with no possibility of regenerating in the future.\textsuperscript{226}

Typically, the most difficult aspect of the public nuisance action is demonstrating that the plaintiff is suffering harm different from that being suffered by others similarly situated.\textsuperscript{227} In this case, Calpine may have inadvertently enabled the defendant to meet this element. In its effort to gain approval for the plant, Calpine lobbied members of the tribe to gain their support.\textsuperscript{228} It achieved its goal, and even got some tribal members to declare that there are no longer any spiritual powers in the lake.\textsuperscript{229} Given these statements by some tribal members, a plaintiff alleging that there are still spiritual powers in the water will be a plaintiff who is suffering a harm of a kind different than that suffered by the other members of the region, those who believe there are no spiritual powers. Therefore, a public nuisance claim may be a viable option for stopping the construction of the Calpine plant.

Trespass and strict liability causes of action would not be appropriate for this fact pattern.\textsuperscript{230} The plant will not cause a direct physical invasion of the plaintiff’s land; instead the plant will interfere with the plaintiff’s use and enjoyment of their land, making nuisance the appropriate cause of action rather than trespass. A strict liability claim

\textsuperscript{222} Id. § 821C(1); see also Anderson v. W.R. Grace & Co., 628 F. Supp. 1219, 1233 (D. Mass. 1986) (holding that a personal injury to one’s health rather than to property satisfies this requirement). For a detailed discussion of the special injury rule, see Denise E. Antolini, Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule, 28 Ecology L.Q. 755 (2001).

\textsuperscript{223} See Anderson, 628 F. Supp. at 1233; \textsc{Restatement (Second) of Torts} § 821C(1); Antolini, supra note 222; supra notes 174–194 and accompanying text.

\textsuperscript{224} See supra Part III.D.

\textsuperscript{225} See supra Part III.D.

\textsuperscript{226} See supra Part III.D.

\textsuperscript{227} See supra Part III.D.

\textsuperscript{228} See supra Part IV.

\textsuperscript{229} See supra Part IV.

\textsuperscript{230} See supra Part III.D.
will also not work because the geothermal plant will not be an abnormally dangerous activity.  

A National Environmental Policy Act (NEPA) complaint may also be appropriate because it not only fully takes into account the apparent harms, but also takes into account the cumulative and collective impacts of the proposed action. NEPA, more than any of the other causes of action, takes into account the cultural and social impacts an action will have on the community being affected. The Council on Environmental Quality guidelines require that “interrelated cultural, social . . . and historical” factors be considered when evaluating the environmental effects. Therefore, the spiritual impacts must be considered along with the environmental impacts. The strong impacts on the Native Americans living in the Medicine Lake region make NEPA another strong option, as the proposed geothermal plant is certainly a major action that will significantly affect the environment. The permits required to begin operating the plant make it a federal action and the more than de minimis size of the plant makes it a major federal action. The end result of the plant will have a significant impact on the human environment. Additionally, the procedural delays caused by the filing of a NEPA complaint may also effect Calpine’s decision to proceed with the project.

The best approach to the Medicine Lake case is to use several causes of action. As discussed above, a common law nuisance claim and a NEPA action are the most appropriate claims for this factual setting. Of course, lawyers could still use the other causes of action to their advantage, despite their low chance of success in the courtroom. A Title VI or Equal Protection complaint could be used to draw public attention to the proposed plant and its harmful effects. An allegation of intentional discrimination will often bring with it attention from the media. This public attention and accompanying political pressure can bring about a less traditional solution, such as a political resolu-

231 See supra note 141.
232 See Sierra Club v. Marsh, 769 F.2d 868, 877–78 (1st Cir. 1985) (stating that not only should cumulative effects be considered, but also indirect effects that may come later but are reasonably foreseeable); 40 C.F.R. § 1508.27 (2002).
233 See supra Part III.E.
234 See supra note 161 and accompanying text.
235 See supra Part III.E.
236 See supra Part III.E.
237 See supra Part III.E.
238 See supra Part III.F.
tion of the matter. While Sandoval foreclosed one vehicle for bringing an environmental justice claim, it did not end the environmental justice movement, as the Medicine Lake example demonstrates.

D. Results of Similar Cases

In cases analogous to the Medicine Lake predicament, courts have responded with varying degrees of sensitivity. In a 2000 case involving water rights, the Hawaii Supreme Court chose to take into account the distinctive characteristics of the indigenous plaintiffs when it rendered its decision. In reaching its holding, the court took into account traditional Hawaiian culture and rights, and reconceptualized the public trust doctrine in order to preserve the customs of the indigenous plaintiffs.

In stark contrast to the Hawaii court’s ruling, the Ninth Circuit took a more conservative approach to a claim brought by the Apache Tribe of Arizona. In that case, the Apache were attempting to halt further construction of an observatory on land that the Apache consider sacred ground. The court dismissed the case, holding that their claim was moot because the harm they sought to prevent had already occurred and “no effective relief for the alleged NHPA [National Historic Preservation Act] violation” could be granted. A significant portion of the project had already been completed, power lines and structures had already been erected, and little was left to be done to bring the project to conclusion. While the court acknowledged that completion of a project does not necessarily make a case moot, they held that in this particular instance no relief could be granted because it would be impractical to remove the harm. The court did not address whether the construction could be halted and the structures already built could be torn down to restore the land to

240 See supra Part II.
241 See In re Water Use Permit Applications, 9 P.3d 409, 449 (Haw. 2000).
242 Id. at 439–50; Yamamoto & Lyman, supra note 195, at 352–59.
246 Id.
247 See id.
its prior state. While the Hawaii court demonstrated that courts can balance cultural significance to a particular group against the needs of society as a whole, the Ninth Circuit demonstrated that courts will not always accord much weight to culture when balancing interests.

CONCLUSION

The Supreme Court's ruling in Alexander v. Sandoval has greatly altered the framework for bringing an environmental justice claim. Its impact on the movement has been more of a forced reorganization than a shutting down. Several causes of action still remain that can be effectively used to achieve environmental justice. When choosing which cause of action to assert, careful attention must be paid to ensure that the needs of plaintiffs, and the special circumstances that surround their cases, are adequately accounted for. As this Article has pointed out, each case has unique characteristics, and with those unique characteristics come distinctive opportunities. It is these opportunities that an environmental justice advocate must seize upon.

248 See id. at 354–55.