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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

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¹ See *Alexander v. Sandoval*, 532 U.S. 275 (2001).

² See *The Supreme Court, 2000 Term—Leading Cases*, 115 HARV. L. REV. 306, 498 (2001).

the Civil Rights Act of 1964.³ In a 5 to 4 decision, the Court, led by Justice Scalia,⁴ held that there is no “private right of action to enforce regulations promulgated” under § 602 of Title VI.⁵ The Court arrived at this decision by using a strict textualist⁶ approach to interpreting the statute and discounting prior Supreme Court decisions as plurality opinions, noting that the Court is “bound by holdings, not language.”⁷ 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

³ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified as amended at 42 U.S.C. § 2000d (2000)).

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.⁸ 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.⁹ While its origins cannot be adequately circumscribed, its evolution can be traced to several seminal twentieth century events.¹⁰

The modern era of environmental justice began to take shape in the 1960s, as the civil rights movement was hitting full stride.¹¹ Some attribute the origin of the modern movement to the United Farm Workers' struggle against pesticides in the work place.¹² Others point to Dr. Martin Luther King Jr.'s work to improve working conditions for African American garbage workers as the starting point.¹³ 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).

¹⁰ While many scholars have tied the origins of the environmental justice movement to the civil rights movement, which began in the 1950s along with the environmental movement, those views are too restrictive. See Tseming Yang, *The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation*, 29 B.C. ENVTL. AFF. L. REV. 143, 143–145 (2002) (calling the environmental justice movement “the confluence of the two great social movements of the twentieth century”); see also LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 20 (2001) (noting that some commentators trace the roots of the struggle in North America to over 500 years ago when the first Europeans arrived on the continent and began displacing the Native Americans); Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1243 (1968); Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 733–34 (1986).

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).

¹² See COLE & FOSTER, *supra* note 10, at 19–20.

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 1967.¹⁴ To others, the first lawsuit alleging environmental discrimination, filed in 1979, was the beginning.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.¹⁶ In Warren County, an African American community led by the Rev. Benjamin Chavis¹⁷ protested the siting of a polychlorinated biphenyl (PCB) landfill in its neighborhood.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.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

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.*

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.

¹⁶ See Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631, 634–36 (2000); see also Dale Russakoff, *As in the 60s, Protestors Rally; but This Time the Foe Is PCB*, WASH. POST, Oct. 11, 1982, at A1.

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”).

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).

¹⁹ See EXECUTIVE OFFICE FOR U.S. ATTORNEYS, VOL. NO. 48, UNITED STATES ATTORNEYS BULLETIN 1 (2000), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab4801.pdf; U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983). The study was requested by Walter Fauntroy, the District of Columbia's delegate to the U.S. House of Representatives, who was arrested for his participation in the Warren County Protests. See Fisher, *supra* note 17, at 296–97.

itself.²⁰ This study again found that race, more than any other factor, played a prominent role in the siting of hazardous waste facilities.²¹ In 1990, the Environmental Protection Agency (EPA) established the Environmental Equity Workgroup.²² The Workgroup's 1992 report confirmed the earlier studies and went on to state that the disparity could not be attributed to income alone.²³

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.²⁴ In response to these accusations, the Clinton Administration issued an Executive Order which directed federal agencies to consider environmental justice implications when making decisions.²⁵ 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 1964.²⁶ It is with this momentum that the environmental justice movement braced for the results of the Supreme Court's decision in *Alexander v. Sandoval*.

²⁰ See COMM'N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987); EXECUTIVE OFFICE FOR U.S. ATTORNEYS, *supra* note 19, at 1.

²¹ COMM'N FOR RACIAL JUSTICE, *supra* note 20, at xiii-xiv.

²² Latham Worsham, *supra* note 16, at 635.

²³ See 1 ENVIRONMENTAL EQUITY WORKGROUP, U.S. ENVTL. PROT. AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 6-15 (1992), available at http://www.epa.gov/compliance/resources/publications/ej/reducing_risk_com_voll.pdf; U.S. ENVTL. PROT. AGENCY, ABOUT ENVIRONMENTAL JUSTICE, at <http://www.epa.gov/oswer/ej/aboutej.htm> (last visited Nov. 1, 2003). But see Douglas A. Anderton et al., *Hazardous Waste Facilities: "Environmental Equity" Issues in Metropolitan Areas*, 18 EVALUATION REV. 123, 129-33 (1994) (finding no correlation between hazardous waste siting and race); Daniel Kevin, "Environmental Racism" and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies, 8 VILL. ENVTL. L.J. 121, 121-22 (1997) (questioning environmental justice advocates and their claims of a relationship between race and the siting of environmentally undesirable land uses).

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).

²⁵ Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

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-

²⁷ *Alexander v. Sandoval*, 532 U.S. 275, 278–79 (2001).

²⁸ *See id.* at 278–79.

²⁹ *See* 42 U.S.C. §§ 2000d–2000d-1 (2000); *Sandoval*, 532 U.S. at 278–79.

³⁰ *Guardians Ass'n v. Civil Serv. 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).

³¹ 42 U.S.C. § 2000d.

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.”³⁷ 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.”³⁸ 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.”³⁹ Justice Scalia further stated that “private rights of action to enforce federal law must be created by Congress.”⁴⁰ In order to determine whether Congress created a private right of action, the intent of Congress must be deciphered.⁴¹ 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.⁴² He then held that the text of the statute was dispositive, alleviating the need to look at the context of the Act’s passage.⁴³ Finally, he concluded that Congress intended no private right of action to exist under § 602.⁴⁴

Justice Stevens dissented,⁴⁵ 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.⁴⁶ 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.”⁴⁷ Justice Stevens also criticized the Court’s strict textualist approach to interpreting the statute.⁴⁸ 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 § 602.⁴⁹

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.⁵⁰ Several other viable channels can still be used to address claims of discrimination in the environmental context.⁵¹ 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)).

⁵¹ One environmental justice scholar, Luke Cole, placed § 602 third on his four-tier hierarchy for bringing environmental justice claims. *See Luke W. Cole, Environmental Justice Litigation: Another Stone in David’s Sling*, 21 *FORDHAM URB. L.J.* 523, 526 (1994).

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-

⁵² See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

⁵³ See 42 U.S.C. § 2000d (2000) (commonly referred to as § 601 and prohibiting intentional discrimination); 42 U.S.C. § 2000d-1 (2000) (known as § 602 allowing agencies to promulgate regulations that effectuate the provisions of § 601).

⁵⁴ See Bradford M. Mank, *Title VI, in THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 23, 23–24 (Michael B. Gerrard ed., 1999).

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.”).

⁵⁶ See *Cole*, *supra* note 51, at 538–39 (discussing the difficulty of proving intentional discrimination in environmental justice cases brought under the Equal Protection Clause of the Constitution); see also *R.I.S.E. Inc. v. Kay*, 768 F. Supp. 1144, 1150 (E.D. Va. 1991) (finding no discriminatory intent in the siting of garbage dump in minority community by county board of supervisors); *El Pueblo para el Aire y Agua Limpio v. Chem. Waste Mgmt.*, No. CV-F-91-578-OWW (E.D. Cal. filed July 7, 1991) (determining no discriminatory intent in siting of toxic waste incinerator); *Bordeaux Action Comm’n v. Metro. Nashville*, No. 390-0214 (M.D. Tenn. filed Mar. 12, 1990) (failing to find discriminatory intent in operation of garbage dump in minority community).

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.⁵⁸ 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.⁵⁹ The regulations promulgated by EPA⁶⁰ 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.⁶¹ This Article will limit itself to a discussion of EPA's § 602 regulations.⁶²

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.⁶³ Therefore, any program or activity receiving federal funding is implicated.⁶⁴ 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.⁶⁵

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).

⁵⁹ See 42 U.S.C. § 2000d-1 (2000). For a list of agencies that have promulgated such regulations under § 602, see Paul K. Sonn, Note, *Fighting Minority Underrepresentation in Publicly Funded Construction Projects After Croson: A Title VI Litigation Strategy*, 101 YALE L.J. 1577, 1581 n.25 (1992).

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).

⁶³ 42 U.S.C. § 2000d (2000).

⁶⁴ See *id.*

⁶⁵ See Mank, *supra* note 54, at 23. Of particular import are the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the legislation that created the Superfund, and the Resource Conservation and Recovery Act (RCRA). See Lazarus, *supra* note 18, at 835 n.215. Under these acts most states receive federal funds to clean up hazardous waste. See 42 U.S.C. §§ 6931, 6947–6949, 9604, 9611 (2000); Lazarus, *supra* note 18, at 835 n.215.

Another advantage to § 602 complaints is that proof of intentional discrimination is unnecessary.⁶⁶ Unlike § 601's direct prohibition of intentional discrimination, § 602 authorizes federal agencies to promulgate rules which would effectuate the goals of § 601.⁶⁷ 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.⁶⁸ 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.⁶⁹

EPA first promulgated regulations under § 602 in 1973 and revised them in 1984.⁷⁰ 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."⁷¹ They further prohibit recipients of funds from choosing a site or locating a facility where it would have a discriminatory effect.⁷² Despite this, EPA did nothing to enforce these rules until the mid-1990s.⁷³ 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."⁷⁴ 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."⁷⁵ Recently, high ranking officials within EPA

⁶⁶ See Mank, *supra* note 54, at 23.

⁶⁷ 42 U.S.C. § 2000d-1 (2000).

⁶⁸ See *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985) (detailing the nature of discrimination prohibited by Title VI) (citing *Guardians Ass'n v. Civil Ser. Comm'n*, 463 U.S. 582, 584, 607-08 (1983)).

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.

⁷¹ See 49 Fed. Reg. 1661 (Jan. 12, 1984) (codified at 40 C.F.R. § 7.35(b) (2002)).

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.⁷⁶ Despite the guidance and recent statements, the progress of administrative complaints lodged with EPA remains exceedingly slow.⁷⁷ To date, EPA has only rendered a substantive decision in one case.⁷⁸

There are several drawbacks to seeking administrative enforcement of § 602 regulations. First, there is no public right of participation incorporated into the process.⁷⁹ Second, there is no time limit for which EPA must render a decision, allowing the process to drag on for several years.⁸⁰ Third, the only substantive remedy EPA may impose is termination of a grantee's funding.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.⁸² Fourth, there is no provision to provide damages to the plaintiff.⁸³ Lastly, the plaintiff has no right to appeal the agency's decision,⁸⁴ while there is a right for the defendant to appeal.⁸⁵ Given all of these drawbacks, filing an administrative complaint with EPA regarding Title VI may be an exercise in futility.

Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650, 39,667-70 (June 27, 2000).

⁷⁶ In 2001, EPA Administrator Whitman recommitted the Agency to "a firm commitment to the issue of environmental justice and its integration into all programs, policies, and activities, consistent with existing environmental laws . . ." CHRISTINE TODD WHITMAN, U.S. ENVTL. PROT. AGENCY, EPA'S COMMITMENT TO ENVIRONMENTAL JUSTICE 1 (2001), available at http://www.epa.gov/compliance/resources/policies/ej/admin_ej_commit_letter_081401.pdf. EPA's top enforcement official, John Peter Suarez, said the agency is looking at ways to incorporate environmental justice more into its case selection process and he is making clearing the backlog of environmental justice complaints a priority. *Environmental Justice, Supplemental Projects Among Priorities at EPA Compliance Office*, 11 Daily Envtl. Rep. (BNA) B-34-B-35 (Jan. 16, 2003).

⁷⁷ See Yang, *supra* note 10, at 168-69.

⁷⁸ See *St. Francis Prayer Ctr. v. Mich. Dep't of Envtl. Quality*, EPA File No. 5R-98-R5, http://www.epa.gov/civilrights/docs/ssdec_ir.pdf (last visited Oct. 19, 2003); Letter from Anne E. Goode, Director, EPA, to Father Phil Schmitter and Sister Joanne Chiaverini, St. Francis Prayer Center 6 (Oct. 30, 1998) (on file with author) (finding no violation of Title VI).

⁷⁹ See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 706 n.41 (1979).

⁸⁰ Luke W. Cole, *Civil Rights, Environmental Justice, and the EPA: A Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. & LITIG. 309, 321-22 (1994).

⁸¹ See 40 C.F.R. § 7.130 (2002).

⁸² Mank, *supra* note 54, at 28-29.

⁸³ See 40 C.F.R. § 7.130.

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)).

⁸⁵ See 40 C.F.R. § 7.130(b) (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)⁸⁶ to compel federal agencies to enforce their Title VI regulations, leaving little recourse for challenging EPA's lethargy with Title VI complaints.⁸⁷ 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.⁸⁸ 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.⁸⁹

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.⁹⁰ Justice Scalia initially stated that the Court would "assume for purposes of this decision that § 602 confers the authority to promulgate disparate-impact regulations."⁹¹ He then proceeded in a footnote to attack the validity of this assumption despite several cases holding the contrary.⁹² 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-

⁸⁶ Administrative Procedure Act (APA), 5 U.S.C. § 704 (2000).

⁸⁷ See *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 191–92 (4th Cir. 1999).

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").

⁸⁹ See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001).

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."⁹³ 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.⁹⁴

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.⁹⁵ Given this, use of disparate-impact regulations to enforce environmental justice claims is not the most prudent course of action.⁹⁶

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.⁹⁷ The Amendment expressly provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."⁹⁸ 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.⁹⁹ As in claims asserted under § 601 of the Civil Rights Act of 1964, claims under the Fourteenth Amendment will be nearly impossible to sustain.¹⁰⁰

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

⁹⁴ See *id.* at 279–82 (Scalia, J., concurring in the judgment) ("[W]e have abandoned the expansive rights-creating approach exemplified by *Cannon* . . . and perhaps ought to abandon the notion of implied causes of action entirely." (citing *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 77 (1992)); *id.* at 286–87 (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in the judgment)); *id.* at 292–93 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (quoting *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting))).

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

⁹⁶ For a thorough analysis of this aspect of the case, see John Arthur Laufer, Note, *Alexander v. Sandoval and Its Implications for Disparate Impact Regimes*, 102 COLUM. L. REV. 1613 (2002).

⁹⁷ See U.S. CONST. amend. XIV, § 1.

⁹⁸ See *id.*

⁹⁹ See *Terry Props., Inc. v. Standard Oil Co.*, 799 F.2d 1523, 1536 (11th Cir. 1986) (finding no discriminatory intent in the siting of an industrial plant in a largely African American community).

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. § 1983.¹⁰¹ 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”¹⁰² Academic commentators and courts quickly latched onto Justice Stevens’s assertion, and the first environmental justice claims brought under § 1983 were successful.¹⁰³

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 § 1983.¹⁰⁴ 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.”¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ Since there was no clear intent in § 602 to allow a private right of action to enforce disparate-

¹⁰¹ 42 U.S.C. § 1983 (2000); *Alexander v. Sandoval*, 532 U.S. 275, 299–300 (2001) (Stevens, J., dissenting).

¹⁰² *Sandoval*, 532 U.S. at 300.

¹⁰³ See Bradford C. Mank, *Using Section 1983 to Enforce Title VI’s Section 602 Regulations*, 49 U. KAN. L. REV. 321 (2001); see also *Robinson v. Kansas*, 295 F.3d 1183 (10th Cir. 2002) (indicating that disparate-impact claims may still be brought under § 1983); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 52–55 (D. Mass. 2002) (allowing a disparate-impact suit pursuant to § 1983); *White v. Engler*, 188 F. Supp. 2d 730, 744–45 (E.D. Mich. 2001) (permitting suit under § 1983 in the context of dispersal of education funds); *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 145 F. Supp. 2d 505, 517 (D.N.J. 2001), *rev’d*, 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 536 U.S. 939 (2002) (holding *Sandoval* did not foreclose bringing a § 602 claim under § 1983).

¹⁰⁴ *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 274 F.3d 771, 790–91 (3d Cir. 2001).

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 § 1983.¹⁰⁸

Soon after the *South Camden* decision the Supreme Court sounded the death knell to bringing disparate-impact claims under § 1983.¹⁰⁹ In *Gonzaga University v. Doe* the Court held that since the Family Educational Rights and Privacy Act of 1974¹¹⁰ created no privately enforceable rights, it could not be enforced under § 1983.¹¹¹ 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.”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.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.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.¹¹⁵ The main common law tort claims that can be used in an environmental context are public and private nuisance, trespass, and strict liability.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.

¹⁰⁸ *Id.* at 790–91.

¹⁰⁹ See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 286–87 (2002).

¹¹⁰ Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-380, 88 Stat. 571 (codified at 20 U.S.C. § 1232g (2000)).

¹¹¹ See *Gonzaga Univ.*, 536 U.S. at 286–87.

¹¹² *Id.* at 283.

¹¹³ *Id.* at 283–84.

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).

¹¹⁵ See *Martin v. Wadell*, 41 U.S. (16 Pet.) 367, 416 (1842) (analyzing the public trust doctrine); BUCK, *supra* note 114, at 3.

¹¹⁶ For a thorough analysis of environmental torts see GERALD 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.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.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.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.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.”¹²¹ In determining the unreasonableness 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.”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.”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”¹²⁴ or “have author-

¹¹⁷ STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES AND EXPLANATIONS 16 (2d ed. 2001).

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”).

¹¹⁹ RESTATEMENT (SECOND) OF TORTS § 821D (1979).

¹²⁰ *Id.* § 822.

¹²¹ *Id.* § 821B(1).

¹²² *Id.* § 821B(2)(a).

¹²³ *Id.* § 821B(2)(b)–(c).

¹²⁴ *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).

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."¹²⁵

A plaintiff may seek both damages and equitable relief, including an injunction, in nuisance actions.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.¹²⁷

Nevertheless, minority communities are presented with numerous barriers to sustaining both private and public nuisance causes of action.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.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.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.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.¹³² Causation can also be difficult to prove because information on

¹²⁵ RESTATEMENT (SECOND) OF TORTS § 821C.

¹²⁶ BUTLER & MACEY, *supra* note 118, at 8.

¹²⁷ 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).

¹²⁸ See Latham Worsham, *supra* note 16, at 640.

¹²⁹ See BUTLER & MACEY, *supra* note 118, at 8.

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); see also 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).

¹³¹ See *State 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).

¹³² See *supra* Part III.A; see also James E. Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 UCLA L. REV. 429, 453-54 (1971).

toxins and their effects is constantly evolving.¹³³ Nuisance claims also may be prohibited by relevant federal and state statutes.¹³⁴ 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.¹³⁵

A closely related doctrine to nuisance that is also applicable in environmental justice claims is the tort of trespass.¹³⁶ 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.¹³⁷ 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.¹³⁸ 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.¹³⁹ 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.¹⁴⁰

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.¹⁴¹ Given the subjective

¹³³ See generally Daniel A. Farber, *Toxic Causation*, 71 MINN. L. REV. 1219, 1226-33 (1987).

¹³⁴ See *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981) (holding Clean Water Act preempted common law claim); *Papas v. Upjohn Co.*, 926 F.2d 1019, 1026 (11th Cir. 1991) (holding Federal Insecticide, Fungicide, and Rodenticide Act prohibited common law remedy); *Buchanan v. Simplot Feeders Ltd.*, 952 P.2d 610, 614 (Wash. 1998) (prohibiting a nuisance claim because of state "Right-to-Farm" statute).

¹³⁵ See Fisher, *supra* note 17, at 310.

¹³⁶ FERREY, *supra* note 117, at 21.

¹³⁷ RESTATEMENT (SECOND) OF TORTS § 158 cmt. i (1979); see also *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1192 (6th Cir. 1988); *Miller v. Cudahy Co.*, 592 F. Supp. 976, 1007 (D. Kan. 1984), *aff'd in part, rev'd in part, remanded*, 858 F.2d 1449 (10th Cir. 1988).

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 Env'tl. 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.¹⁴² 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.¹⁴³ While the existing environmental statutes do provide EPA with authority to address environmental justice concerns,¹⁴⁴ the discretion given to EPA and the bevy of factors it must consider often subordinate environmental justice considerations.¹⁴⁵ 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.¹⁴⁶ 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. Roto Corp.*, 967 F.2d 1105, 1109 (6th Cir. 1992) (applying these factors, but holding storage of waste not abnormally dangerous).

¹⁴² See Robert H. Cutting, *One Man's Ceiling Is Another Man's Floor: Property Rights as the New Double-Edged Sword*, 31 ENVTL. L. 819, 828–29 (2001).

¹⁴³ See FERREY, *supra* note 117, at 15.

¹⁴⁴ 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).

¹⁴⁵ 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).

¹⁴⁶ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000); Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000); *see also* 42 U.S.C. § 7408(f)(1)(C) (requiring EPA to consider sensitive populations in the establishment of National Ambient Air Quality Standards).

from the statutory framework when their claims are not explicitly provided 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.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.¹⁴⁸ He believes that it may be the easiest way to block a facility from being sited in a minority community.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.¹⁵⁰

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

¹⁴⁷ One must also consider the availability of claims based on state environmental statutes. See Chuck D. Barlow, *State Environmental Justice Programs and Related Authorities*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 140 (Michael B. Gerrard ed., 1999).

¹⁴⁸ See Cole, *supra* note 51, at 526 (noting an environmental justice litigation hierarchy); see also Lazarus, *supra* note 18, at 827–28.

¹⁴⁹ Cole, *supra* note 51, at 526.

¹⁵⁰ See *id.*

¹⁵¹ See National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370d (2000).

¹⁵² *Id.* § 4332(c); see also *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 771–72 (1983).

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 CONCERNS INTO EPA'S NEPA COMPLIANCE ANALYSIS* 5–7 (1998), available at http://www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf.

¹⁵⁴ See 40 C.F.R. § 1501.4(b)–(c) (2002).

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).

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.¹⁵⁷ 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 Quality¹⁵⁸ has issued a guidance for using NEPA to implement environmental justice.¹⁵⁹ 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.”¹⁶⁰ The guidance enunciates six principles by which environmental justice issues should be identified and addressed.¹⁶¹

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.¹⁶² As a result, a delay in the siting and an increase in public awareness may be the only victories for a plaintiff.¹⁶³ Yet, it is the culmination of several small victories that often results in an ultimate success. NEPA provides an excellent op-

¹⁵⁷ See *Strycker’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227–28 (1980) (holding that NEPA is merely a procedural statute, and does not demand particular results).

¹⁵⁸ The Council on Environmental Quality (CEQ) was set up to outline NEPA compliance guidelines. See 42 U.S.C. § 4321(2)(5) (2000); 40 C.F.R. §§ 1500–1508 (outlining CEQ regulations); *The Role of Collaborative Groups in Federal Land and Resources: A Legal Analysis*, 23 J. LAND RESOURCES & ENVTL. L. 67, 130 (2003). The CEQ was granted authority to issue binding orders through an executive order by President Carter in 1977. Exec. Order No. 11,991, 42 Fed. Reg. 26,967 (May 24, 1977).

¹⁵⁹ COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 15–16 (1997), available at <http://ceq.eh.doe.gov/nepa/regs/ej/justice.pdf> [hereinafter CEQ GUIDANCE].

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.¹⁶⁴

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.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.¹⁶⁶ All of these actions are meritorious and aid environmental justice advo-

¹⁶⁴ For an example of how a NEPA suit can draw together a broad section of the American population, see *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.

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 *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, *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).

¹⁶⁶ See *supra* Part III.A–E.

cates in achieving their ultimate goal of preventing hazardous sitings 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

¹⁶⁷ See Dean B. Suagee, *Turtle's War Party: An Indian Allegory on Environmental Justice*, 9 J. ENVTL. L. & LITIG. 461, 464-69 (1994) (providing an analysis of the environmental justice concerns of Native Americans).

¹⁶⁸ See *id.* at 472, 496-97.

¹⁶⁹ See *id.* at 496-97.

¹⁷⁰ See *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

¹⁷¹ See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 123 (1982); see also *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

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

¹⁷³ See Judith V. Royster, *Native American Law*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 157 (Michael B. Gerard ed., 1999).

¹⁷⁴ See *Indian Tribes Fighting Proposal for Power Plant Suit: Project Would Ruin Lake's Spiritual Power*, SAN JOSE MERCURY NEWS, July 18, 2002, at 19, available at 2002 WL 24309075.

¹⁷⁵ Medicine Lake Highlands refers to the entire region, including the Telephone Flat and Four Mile Hill developments. The Highlands region sits in the Modoc National Forest in northern California, on the edge of the largest shield volcano in the United States. See Eric Bailey, *Electrical v. Spiritual: Indian Tribes Hope to Block Construction of a Geothermal Plant They Fear Will Drain Healing Force of Medicine Lake*, L.A. TIMES, July 17, 2002, at B1; Suzan Shown Harjo, *Indian Country Today*, *Oncida, N.Y.*, Guest Column, INDIAN COUNTRY TODAY, Dec. 16, 2002, 2002 WL 104725126.

¹⁷⁶ See Ken Hoover, *Opposition to 2 Geothermal Proposals; Foes Say Siskiyou County Power Plants Would Harm Land, Defile Tribal Sites*, S.F. CHRON., Sept. 13, 1999, at A20.

¹⁷⁷ BUREAU OF LAND MGMT., ENVIRONMENTAL IMPACT STATEMENT AND ENVIRONMENTAL IMPACT REPORT PREPARED FOR THE PROPOSED TELEPHONE FLAT GEOTHERMAL DEVELOPMENT PROJECT 3.6.2.4 (1999) (Resolution No. 96-08-25 of the Pit River Tribe), available at <http://www.ca.blm.gov/alturas/telephone/index.html>.

¹⁷⁸ See *id.* at tbl.ES.6.

¹⁷⁹ See *Proposed Geothermal Developments at Medicine Lake Highlands*, available at http://www.ca.blm.gov/news/2000/05/nr/decision_background.html (last visited Sept. 18, 2003); see also 64 Fed. Reg. 27,782, 27,783 (May 21, 1999) (noting EPA's skepticism of the Bureau of Land Management's Environmental Impact Statement).

by filing a \$100 million Fifth Amendment takings claim against the government.¹⁸⁰ 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.¹⁸¹ 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.¹⁸² 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.¹⁸³

The Medicine Lake region has long had special significance to the Native populations living in close proximity.¹⁸⁴ 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.¹⁸⁵ Tribal medicine men still use the site to conduct coming-of-age ceremonies, while others use it to cleanse their body and soul.¹⁸⁶ It is a region in which tribal members have been attempting to fight off incursions for over 150 years.¹⁸⁷ Tribal members are already forced to wait until nightfall to use the sacred waters because of recreational sightseers.¹⁸⁸ 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.¹⁸⁹

¹⁸⁰ Cal. Energy Gen. Corp. v. United States, No. 00-CV-619 (Fed. Cl. filed Oct. 17, 2000).

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 2500 8 (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

A1; see also Bailey, *supra* note 175, at B1 (quoting Jerald Jackson, a tribal elder, as equating the situation to "a Catholic going to confession and someone opening the door").

¹⁹⁰ See International Indian Treaty Council Resolution No. 2002-10, adopted Sept. 21, 2002, at http://www.treatycouncil.org/new_page_571111121.htm (supporting Pit River Tribe's opposition to geothermal plant development and urging federal agencies to halt the project); The National Congress of American Indians Resolution No. JUN-00-021, June 25-28, 2000, at http://www.ncai.org/data/docs/resolution/2000_midyear_session/mid-yr00021.htm.

¹⁹¹ See Scott Winokur & Christian Berthelsen, *Calpine's Quest for Power: American Indians Split over Bay Area Supplier's Efforts to Tap What Some View as Their Own Source of Sacred, Spiritual Energy*, S.F. CHRON., Mar. 5, 2001, at A1.

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 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).

¹⁹⁵ See Erik K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 354 (2001) (discussing a similar situation faced by native Hawaiians).

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.¹⁹⁷ Despite these difficulties, a cause of action still must be selected in an effort to mitigate as much harm as possible.

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.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.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.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.²⁰¹

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

¹⁹⁷ See *supra* Part III.

¹⁹⁸ See *supra* Part III.

¹⁹⁹ See *supra* Part III.A.

²⁰⁰ See 42 U.S.C. § 2000d (2000).

²⁰¹ See *supra* Part III.

²⁰² See *supra* Part II.

²⁰³ *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001).

²⁰⁴ See *supra* Part III.B.

²⁰⁵ See U.S. ENVTL. PROT. AGENCY, TITLE VI COMPLAINTS FILED WITH EPA AS OF FEBRUARY 28, 2003 4 (2003), available at <http://www.epa.gov/ocrpage1/docs/t6csfeb2003.pdf>.

²⁰⁶ *Id.*

district court.²⁰⁷ 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.²⁰⁸ 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.²⁰⁹ 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*.²¹⁰ 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.²¹¹ An equal protection claim, like the § 601 claim, would be nearly impossible to maintain given the required proof of intentional discrimination.²¹² 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*.²¹³ 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.²¹⁴ 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 nature²¹⁵ and a nuisance action may be used to address this harm.²¹⁶ 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.²¹⁷ 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.²¹⁸ 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.²¹⁹

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.”²²⁰ 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.”²²¹ Lastly, the plaintiff must have suffered a “harm of a kind different from that suffered by other

²¹⁴ See *supra* Part III.D.

²¹⁵ See *supra* notes 174–194 and accompanying text.

²¹⁶ See *supra* Part III.D.

²¹⁷ 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 See Carl Hulse, *Energy Matters Return to Fore on Capitol Hill*, N.Y. TIMES, Apr. 10, 2002, at C1.

²¹⁹ See *Boomer*, 257 N.E.2d at 872–75.

²²⁰ RESTATEMENT (SECOND) OF TORTS § 821(B)(1) (1979).

²²¹ *Id.* § 821B(2)(c).

members of the public."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.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.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.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.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.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.²²⁸ It achieved its goal, and even got some tribal members to declare that there are no longer any spiritual powers in the lake.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.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

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).

²²³ See *Anderson*, 628 F. Supp. at 1233; RESTATEMENT (SECOND) OF TORTS § 821C(1); Antolini, *supra* note 222; *supra* notes 174–194 and accompanying text.

²²⁴ See *supra* Part III.D.

²²⁵ See *supra* Part III.D.

²²⁶ See *supra* Part III.D.

²²⁷ See *supra* Part III.D.

²²⁸ *Supra* Part IV.

²²⁹ See *supra* Part IV.

²³⁰ See *supra* Part III.D.

will also not work because the geothermal plant will not be an abnormally dangerous activity.²³¹

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.²³² 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.²³³ The Council on Environmental Quality guidelines require that “interrelated cultural, social . . . and historical” factors be considered when evaluating the environmental effects.²³⁴ 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.²³⁵ 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.²³⁶ Additionally, the procedural delays caused by the filing of a NEPA complaint may also effect Calpine’s decision to proceed with the project.²³⁷

The best approach to the Medicine Lake case is to use several causes of action.²³⁸ 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.²³⁹ 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.²⁴⁰

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.²⁴¹ 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.²⁴²

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.²⁴³ In that case, the Apache were attempting to halt further construction of an observatory on land that the Apache consider sacred ground.²⁴⁴ 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.²⁴⁵ 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.²⁴⁶ 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.²⁴⁷ 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

²³⁹ See Greg Lucas, *Tribes Wager Newfound Clout on Sacred Land: Bill Gives Power to Veto Project Proposed near Spiritual Ground*, S.F. CHRON., July 29, 2002, at A1 (documenting an effort by tribal leaders to gain a legislative veto to projects on native lands).

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.

²⁴³ See *Mount Graham Coalition v. McGee*, 52 Fed. Appx. 354, 355 (9th Cir. 2002).

²⁴⁴ See National Trust Legal Defense Fund, *LDL Update*, (October 2001), available at http://www.nationaltrust.org/legal_advocacy/docs/review10-01.pdf.

²⁴⁵ *Mount Graham Coalition*, 52 Fed. Appx. at 355.

²⁴⁶ *Id.*

²⁴⁷ See *id.*

its prior state.²⁴⁸ 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.