

NOTE

THE IMPACT OF FORESIGHT: REFRAMING DISCRIMINATORY INTENT TO PROPERLY REMEDY ENVIRONMENTAL RACISM*

ABSTRACT

For too long, minority communities have been forced to accept the consequences of living near landfills, hazardous waste sites, industrial facilities, contaminated water sources, and other locally undesirable land uses at higher rates than nonminority communities. Many environmental justice advocates hope for expanded availability of the disparate impact theory under Title VI of the Civil Rights Act of 1964 to remedy these injustices because the disparate impact theory does not require a showing of discriminatory intent. The disparate impact theory, however, is ill-suited for the environmental racism context, and litigants face difficulty satisfying its requirements. Instead, courts should adopt a broader understanding of discriminatory intent using the foreseeability test originally proposed by Justice Thurgood Marshall. This test, which would allow plaintiffs to make a prima facie case of discriminatory intent when they can show the foreseeability of a disparate impact, would allow for a more comprehensive understanding of discrimination.

* University of Houston Law Center J.D. Candidate 2022. I wish to express my sincere gratitude to Boards 59 and 60 of the *Houston Law Review* for their diligent editorial work. It has been my honor and privilege to work with and learn from you. I thank my husband, Bradley Williams, for his love, support, and feedback. May we treat this Earth thoughtfully and all of its inhabitants equitably.

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I. INTRODUCTION

In 1982, protesters in Warren County, North Carolina, demonstrated against the state’s burying of more than 32,000 cubic yards of soil contaminated by toxic polychlorinated biphenyls in Afton, an 84% Black community.¹ Paradoxically, Afton made little sense as a dumping site because researchers concluded it would “only be a matter of time” before the toxins seeped into the community’s water supply.²

In April 2014, the city of Flint, Michigan—a majority Black city—began drawing its water supply from the Flint River.³ But the city failed to adequately treat the water, and the corrosive river caused lead-bearing particles to separate from the pipes, in turn poisoning the water’s users.⁴

Today, Cancer Alley, an eighty-five-mile-long stretch of the Mississippi River between New Orleans and Baton Rouge, contains among the highest concentration of cancer-causing chemicals in the United States.⁵ The fossil fuel and petrochemical facilities emitting the chemicals are situated increasingly in Black, poor communities.⁶

The foregoing examples depict environmental racism, which is a concept that describes environmental injustice occurring along racialized lines. Specifically, the term explains the tendency for minority communities to suffer from more toxin exposure than White communities.⁷ Toxins come from various sources: landfills, hazardous waste sites, industrial facilities, and contaminated

1. ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 30 (2d ed. 1994) [hereinafter *DUMPING IN DIXIE*].

2. *Id.* at 30–31.

3. Merrit Kennedy, *Lead-Laced Water in Flint: A Step-By-Step Look at the Makings of a Crisis*, NPR (Apr. 20, 2016, 6:39 PM), <https://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis> [https://perma.cc/399J-5A3N].

4. Dustin Renwick, *Five Years On, the Flint Water Crisis Is Nowhere Near Over*, NAT’L GEOGRAPHIC (Apr. 25, 2019), <https://www.nationalgeographic.com/environment/2019/04/flint-water-crisis-fifth-anniversary-flint-river-pollution> [https://perma.cc/WX8L-3P3X].

5. Antonia Juhasz, *Louisiana’s ‘Cancer Alley’ Is Getting Even More Toxic—But Residents Are Fighting Back*, ROLLING STONE (Oct. 30, 2019, 12:59 PM), <https://www.rollingstone.com/politics/politics-features/louisiana-cancer-alley-getting-more-toxic-905534/> [https://perma.cc/F2YE-SZU8].

6. *Id.*

7. Anthony R. Chase, *Assessing and Addressing Problems Posed by Environmental Racism*, 45 RUTGERS L. REV. 335, 337 (1993).

water sources, to name a few.⁸ Black residents especially, due to decades of residential segregation and structurally racist policies, are more likely to live in areas with a greater exposure to pollution.⁹ Black communities struggle to prevent the siting of waste facilities due to a lack of organizational and financial resources,¹⁰ unlike their White counterparts.¹¹

The emergence of the environmental justice movement in the 1980s brought attention to these disparities.¹² Just as advocates began to seriously consider Title VI of the Civil Rights Act of 1964 (Title VI) as a way to remedy the discriminatory effects of various environmental issues, however, the Supreme Court shut down those nascent efforts.¹³ In *Alexander v. Sandoval*, the Supreme Court limited causes of action under Title VI to claims of discriminatory intent, rather than allowing claims of disparate impact.¹⁴ The disparate impact test recognizes the discriminatory *impact* of a challenged practice on minorities, while the discriminatory intent test requires a showing of intent.¹⁵ Plaintiffs struggle to prove intent when covert racism and institutional racism form the basis of the challenged practice.¹⁶ Before *Sandoval*, environmental justice advocates relied on the disparate impact theory to remedy the adverse effects of hazardous siting decisions on minority communities.¹⁷

8. See Jasmine Bell, *5 Things to Know About Communities of Color and Environmental Justice*, CAP (Apr. 25, 2016), <https://www.americanprogress.org/issues/race/news/2016/04/25/136361/5-things-to-know-about-communities-of-color-and-environmental-justice/> [https://perma.cc/Z3FJ-W8MK].

9. See, e.g., Anthony Nardone et al., *Associations Between Historical Residential Redlining and Current Age-Adjusted Rates of Emergency Department Visits Due to Asthma Across Eight Cities in California: An Ecological Study*, 4 LANCET PLANETARY HEALTH e24, e27–29 (2020).

10. DUMPING IN DIXIE, *supra* note 1, at 15.

11. *Id.* at 37–38 (explaining how White communities have successfully fended off “unwanted industrial encroachment,” which causes those sites to end up in Black communities). Scholar Robert Bullard says this “not-in-my-backyard” (NIMBY) movement, “like white racism, creates and perpetuates privileges for whites at the expense of people of color.” *Id.* at 131.

12. David Monsma, *Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility*, 33 ECOLOGY L.Q. 443, 451 (2006).

13. See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001); Lisa S. Core, Note, *Alexander v. Sandoval: Why a Supreme Court Case About Driver’s Licenses Matters to Environmental Justice Advocates*, 30 B.C. ENV’T AFFS. L. REV. 191, 193–94 (2002). Title VI prohibits discrimination on the basis of race, color, or national origin in any program or activity that receives federal funds or other federal financial assistance. 42 U.S.C. § 2000d.

14. *Sandoval*, 532 U.S. at 275.

15. Core, *supra* note 13, at 196.

16. *Id.*

17. *Id.* at 201.

Almost two decades after *Sandoval*, a new bill—the Environmental Justice for All Act—proposes to amend Title VI to cover discrimination based on disparate impact and create a private right of action.¹⁸ This bill, were it to become law, could breathe new life into the environmental justice movement because plaintiffs could file claims of both disparate impact and discriminatory intent.¹⁹

Environmental justice advocates should not rely on the passage of this bill, however. Even if the bill does become law, courts question the disparate impact theory, and the theory remains difficult to prove.²⁰ Instead, this Note proposes that courts should adopt a more comprehensive understanding of intent that would reflect the realities of racism and allow environmental racism plaintiffs to succeed on claims of discriminatory intent.²¹ To do so, courts can implement a burden-shifting foreseeability test, as proposed in Justice Thurgood Marshall's dissent in *Personnel Administrator v. Feeney*.²² Incorporating foreseeability into the intent standard would allow environmental racism litigants greater success in court because rather than plaintiffs having to demonstrate an intent to discriminate, governmental actors would have to shoulder the burden of showing discrimination did not play a role in the challenged action.²³

Part II of this Note will provide a case example of environmental racism, describe the history of the environmental justice movement, and explain *Sandoval's* impact on Title VI. Part III will discuss various legal methods available to environmental racism plaintiffs. Part III will also focus on attempts to amend Title VI to allow disparate impact claims, but it will ultimately conclude that environmental justice advocates should not rely on the disparate impact theory because of its many shortcomings. Part IV will propose altering the discriminatory intent standard

18. Environmental Justice for All Act, S. 872, 117th Cong. §§ 4–5 (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/872> [<https://perma.cc/4ZBA-WKX8>].

19. See Julius M. Redd & Hilary Jacobs, *The Evolving Landscape of Environmental Justice in 2020 and Beyond*, NAT'L L. REV. (Oct. 30, 2020), <https://www.natlawreview.com/article/evolving-landscape-environmental-justice-2020-and-beyond> [<https://perma.cc/EPD9-CKAD>].

20. See discussion *infra* Part III.

21. Scholars contend that current notions of intent do not adequately capture the pervasive nature of racism in society. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330–31 (1987) (“Racism’s ubiquity underscores the importance of incorporating our knowledge of the unconscious into the legal theory of equal protection”).

22. See *Pers. Adm’r v. Feeney*, 442 U.S. 256, 284 (1979) (Marshall, J., dissenting).

23. See *id.*

to incorporate foreseeability of adverse consequences to minorities. It will suggest adopting a burden-shifting foreseeability test, as proposed by Justice Marshall in *Feeney*.²⁴

II. ENVIRONMENTAL RACISM: THE CONCEPT IN PRACTICE, ITS ORIGINS, AND THE RISE AND FALL OF TITLE VI AS A REMEDY

A. *Environmental Racism in Practice: Houston's Whispering Pines Landfill*

In the 1970s, approximately 25% of Houston residents were Black, while 80% of city-owned landfills or incinerators were located in Black neighborhoods.²⁵ In the same decade, the city of Houston closed its waste-disposal facilities and began contracting with private entities for waste-disposal services.²⁶ Three of the four private landfills were placed in predominantly Black neighborhoods.²⁷ Notably, the racial makeup of these communities predated the siting of the landfills.²⁸ In 1979, the plaintiffs in *Bean v. Southwestern Waste Management Corp.* moved for a preliminary injunction against the Texas Department of Health for its decision to grant a permit to defendant Southwestern Waste Management to open a landfill in Northwood Manor, a Houston neighborhood composed of 70% minority residents.²⁹ Ultimately, the district court held that while the plaintiffs established that the siting decision was “unfortunate and insensitive” because of its proximity to a school and a residential neighborhood, the claim failed to rise to the necessary showing of discriminatory intent.³⁰ This holding likely surprised those who followed the case, given that the state rejected a landfill siting proposal for the same area just nine years earlier, citing the site’s proximity to schools,

24. *See id.*

25. Robert D. Bullard, *The Mountains of Houston*, CITE: ARCHITECTURE & DESIGN REV. HOUS., Winter 2014, at 28–29. At the time, the city operated ten landfills and incinerators in Houston. *Id.*

26. Robert D. Bullard, *Environmental Racism and “Invisible” Communities*, 96 W. VA. L. REV. 1037, 1040 (1994).

27. *Id.*

28. *Id.* (“The historical record is clear, Black Houstonians did not follow the garbage dumps and incinerators—the waste facilities moved into Houston’s African-American neighborhoods of Fourth Ward/Freedmen’s Town, West End-Cottage Grove, Kashmere Gardens, Sunnyside, Carverdale, Trinity Gardens, Acre Homes, Almeda Plaza, and Northwood Manor.”).

29. *Id.*; *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673, 674–75, 677 (S.D. Tex. 1979).

30. *Bean*, 482 F. Supp. at 679–80.

detrimental effect on property values, and health hazards caused by rodents.³¹ At that time, the community was predominantly White.³²

B. History and Current Status of the Environmental Racism Movement

While racial disparities in locations of hazardous waste and industrial facilities have been evident since the post-World War II boom years,³³ the environmental racism movement arguably did not gain traction until 1982.³⁴ That year, protests broke out in Warren County, a predominantly Black, rural area in North Carolina, to prevent the opening of a polychlorinated biphenyl landfill.³⁵ While the protests did not result in the desired outcome, they led to the release of a breakthrough study by the United Church of Christ's Commission for Racial Justice that analyzed the disproportionate impact of environmental hazards on minority communities.³⁶ The study found that “[a]lthough socio-economic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be [the] more significant [variable].”³⁷

Since then, communities and activists have worked to fend off the siting of locally undesirable land uses (LULUs) near minority communities.³⁸ But, for several reasons, success has been hard to come by. First, advocates have been slow to pragmatically combine the goals of both the civil rights and environmental protection movements to bolster the environmental justice movement.³⁹ The modern environmental movement arose out of a concern for environmental degradation, spurred by Rachel Carson in her

31. Bullard, *supra* note 26, at 1039.

32. *Id.*

33. See Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219, 1222–28 (1998).

34. See Scott Michael Edson, Note, *Title VI or Bust? A Practical Evaluation of Title VI of the 1964 Civil Rights Act as an Environmental Justice Remedy*, 16 FORDHAM ENV'T L. REV. 141, 146 (2004).

35. DUMPING IN DIXIE, *supra* note 1, at 30.

36. See Edson, *supra* note 34, at 146–47.

37. COMM'N FOR RACIAL JUST., UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES xiii (1987).

38. See, e.g., Juhasz, *supra* note 5 (describing efforts to prevent the opening of more petrochemical plants in Cancer Alley, including one complex that would double the amount of pollution in the air of St. James, Louisiana).

39. See Richard J. Lazarus, *Pursuing “Environmental Justice”: The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 855 (1993).

seminal book, *Silent Spring*.⁴⁰ Civil rights laws, on the other hand, focus on discrimination issues.⁴¹ Moreover, primarily White and middle-to-upper-class voices dominated the environmental movement at its inception, inhibiting minority issues from being addressed.⁴²

Second, the lack of a precise goal for the environmental racism movement has inhibited the movement's success. Robert Bullard, a professor of urban planning and environmental policy at Texas Southern University and one of the movement's leaders, has said that the movement seeks to eliminate "unequal enforcement of environmental, civil rights, and public health laws."⁴³ This broad goal fails to provide environmental advocates with a clear objective. Even distinctions in the name of the movement present distinct ideological goals.⁴⁴ For example, the term "environmental racism" seeks to convey that racism is at the root of disparate allocation of environmental hazards.⁴⁵ Some scholars refer more broadly to the concept of environmental justice, which averts the racial issue by seeking to "relieve *all* communities of the burden of emissions by curtailing waste generation and preventing all pollution."⁴⁶ Others use the term "environmental equity" to describe the goal of all communities bearing a proportionate share of environmentally hazardous facilities.⁴⁷

Critics of the environmental racism movement suggest that hazardous waste facilities tend to predate the communities that choose to live by them, which presents the chicken and the egg debate: What came first: the facilities or the disproportionate

40. Evans, *supra* note 33, at 1228–29.

41. *Legal Highlight: The Civil Rights Act of 1964*, U.S. DEPT LABOR, <https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964> [<https://perma.cc/F7T6-EP7U>] (last visited Mar. 14, 2021).

42. Evans, *supra* note 33, at 1230. The White voices heading mainstream environmental groups tended to focus on conservation and preservation issues, *see id.* at 1230–31, while minority communities suffered the effects of environmental degradation. ROBERT D. BULLARD, *INVISIBLE HOUSTON: THE BLACK EXPERIENCE IN BOOM AND BUST* 60 (1987).

43. Sara Hoffman Jurand, 'Environmental Justice' Movement Looks to Pivotal New Jersey Cases, *TRIAL*, July 2003, at 12, 14, 16; Dr. Robert Bullard, TEX. S.U., <http://www.tsu.edu/academics/colleges-and-schools/bjml-school-public-affairs/departments/urban-planning-and-environmental-policy/faculty/dr.-robert-bullard.html> [<https://perma.cc/Z848-APYR>] (last visited Mar. 13, 2022).

44. *See* Evans, *supra* note 33, at 1266–68.

45. *Id.* at 1266–67.

46. Charles J. McDermott, *Balancing the Scales of Environmental Justice*, 21 *FORDHAM URB. L.J.* 689 (1994) (emphasis added).

47. Evans, *supra* note 33, at 1267.

numbers of poor people and minorities?⁴⁸ While more research in this area is needed, current research suggests that the racial composition of a community is a stronger indicator of where LULUs are sited than are socioeconomic characteristics.⁴⁹ Additionally, city ordinances affect LULU siting, often to the detriment of Black communities.⁵⁰ For example, the city of St. Louis zoned areas containing multi-family housing—predominantly inhabited by Black families—to permit commercial and polluting industries.⁵¹

Third, and pertinent to the following section, significant obstacles stand in the way of a plaintiff's ability to establish sufficient legal claims.⁵²

C. Sandoval's Impact on Title VI as a Remedy⁵³

Historically, environmental racism litigants relied on Title VI to claim discrimination by programs receiving federal financial assistance because it allowed disparate impact claims, while the Equal Protection Clause of the Fourteenth Amendment does not.⁵⁴ The first relevant section of Title VI establishes the anti-discriminatory purpose of the title: § 601 states, “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁵⁵ The second relevant section, § 602, allows federal agencies “to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability”⁵⁶

48. Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, in ENV'T RSCH. LETTERS 15–16 (2015).

49. *Id.* at 13–16.

50. *See, e.g.*, RICHARD ROTHSTEIN, *THE COLOR OF LAW* 50 (2017).

51. *Id.*

52. *See* discussion *infra* Section II.C.

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

54. *See* Core, *supra* note 15, at 197; *Washington v. Davis*, 426 U.S. 229, 247–48 (1976) (rejecting the disparate impact test for constitutional claims); *Lau v. Nichols*, 414 U.S. 563, 568–69 (1974) (allowing disparate impact claims under Title VI), *abrogated by Alexander v. Sandoval*, 532 U.S. 275 (2001). For a full discussion of *Lau* and how the Supreme Court came to recognize disparate impact under Title VI, see Charles F. Abernathy, *Legal Realism and the Failure of the “Effects” Test for Discrimination*, 94. GEO. L.J. 267, 277–81 (2006).

55. 42 U.S.C. § 2000d.

56. *Id.* § 2000d-1.

In 1983, the Supreme Court reaffirmed that Title VI reaches disparate impact discrimination.⁵⁷ Discriminatory impact, distinct from discriminatory intent, requires a showing of a causal relationship between a facially neutral policy and a disproportionate, adverse impact on a classified group.⁵⁸ But approximately two decades later, in a blowback to environmental racism litigants, the Supreme Court ruled in *Alexander v. Sandoval* that Title VI limits causes of action to victims of intentional discrimination.⁵⁹

In *Sandoval*, Alabama amended its constitution to designate English as the official language of the state.⁶⁰ As a result, the Alabama Department of Public Safety (Department) decided to offer driver's license examinations only in English.⁶¹ The Department was required to adhere to the anti-discriminatory provisions of Title VI because it received federal financial grants.⁶² Martha Sandoval—a native Spanish speaker from Mexico with limited proficiency in English—sued, arguing that the Department violated a Department of Justice (DOJ) regulation promulgated in accordance with § 602 by discriminating against non-English speakers based on their national origin.⁶³ The DOJ regulation forbid federal funding recipients from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin”⁶⁴ The U.S. District Court for the Middle District of Alabama ruled for Sandoval, and the Court of

57. *Guardians Ass'n v. Civ. Serv. Comm'n*, 463 U.S. 582, 592–93 (1983) (“Title [VI] . . . has been consistently administered [to recognize the disparate impact standard] for almost two decades without interference by Congress. Under these circumstances, it must be concluded that Title VI reaches unintentional, disparate-impact discrimination as well as deliberate racial discrimination.”). The *Guardians* decision brought Title VI's disparate impact test in line with that of Title VII by allowing a business-necessity defense, *id.* at 598, which some scholars have argued led to the demise of the effectiveness of disparate impact claims under Title VI. See, e.g., Abernathy, *supra* note 54, at 286–87; Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 769 (2006).

58. See discussion *infra* Section III.C.

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

60. *Id.* at 278–79.

61. *Id.* at 279.

62. *Id.* at 278.

63. *Id.* at 279; Brief for Respondents, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (No. 99-1908), 2000 WL 1846068, at *2–3. Critically, Sandoval sued solely on claims of disparate impact. *Sandoval v. Hagan*, 7 F. Supp. 2d 1234, 1277 (M.D. Ala. 1998), *aff'd*, 197 F.3d 484 (11th Cir. 1999), *rev'd sub nom.* *Alexander v. Sandoval*, 532 U.S. 275 (2001).

64. 28 C.F.R. § 42.104(b)(2) (1999).

Appeals for the Eleventh Circuit affirmed.⁶⁵ The Supreme Court granted certiorari to determine whether § 602 contains a private cause of action to enforce the DOJ regulation.⁶⁶

It is undisputed that § 601 prohibits only intentional discrimination.⁶⁷ For the purposes of the *Sandoval* decision, the Supreme Court assumed that regulations promulgated under § 602 could prohibit actions *with disparate impacts*—proscribing a broader range of activity than under § 601.⁶⁸ The essential question, however, was whether § 602 contained a *private right of action*.⁶⁹ Bound by its job to determine whether Congress intended to create a private right of action, the Supreme Court examined the text and structure of Title VI, determining the statute does not “create a freestanding private right of action to enforce regulations” generated under § 602.⁷⁰

Without a private right of action under § 602, environmental racism litigants could bring only discriminatory intent claims under Title VI. Considering the limited scope of intent under the legal understanding of discriminatory intent, *Sandoval* constituted a setback to the environmental justice movement, which relied on disparate impact claims to remedy the unequal treatment suffered by minorities.⁷¹

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

66. *Id.* Before *Sandoval*, the Supreme Court implicitly recognized a private right of action under Title VI in a decision conferring the same right under Title IX. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–96 (1979).

67. *Sandoval*, 532 U.S. at 280. Moreover, the *Sandoval* Court explicitly stated that “private individuals may sue to enforce § 601 of Title VI.” *Id.* at 279.

68. *Id.* at 281. While the Court has never determined whether § 602 regulations may prohibit activities that disparately impact racial groups, the *Sandoval* Court found it notable that five Justices on the *Guardians* Court, as an alternative ground for their decision, found § 602 regulations to validly reach disparate impacts. *Id.* at 281–82.

69. *Id.* at 279.

70. *Id.* at 286, 288, 293. Central to the Court’s holding was that § 602 did not contain the “rights-creating” language that was critical to the analysis of § 601 in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). *Id.* at 288. Rather, the Court found that “§ 602 limits agencies to ‘effectuating’ rights already created by § 601.” *Id.* at 289.

71. See discussion *infra* Section IV.A.

III. DESPITE FEW ALTERNATIVE OPTIONS,
THE DISPARATE IMPACT
THEORY FAILS TO HOLD
PROMISE FOR ENVIRONMENTAL
RACISM LITIGANTS

A. *Legal Tools Available to Environmental Racism Litigants*

In the wake of *Sandoval*, environmental racism litigants have few viable options. This section will describe the legal paths available to environmental racism litigants and explain why each option fails to hold promise.

1. *Section 601 of Title VI.* As established in *Guardians Ass'n v. Civil Service Commission*, plaintiffs can file discriminatory intent claims under § 601 of Title VI against actors receiving federal funding.⁷² Proving discriminatory intent, however, requires showing that the act in question departed from usual procedure or that the events leading up to the act indicated a discriminatory purpose.⁷³ When minorities are routinely subjected to environmental hazards, however, litigants have no change in procedure to point to when trying to prove discriminatory intent.⁷⁴ Without an understanding of “intent” that accounts for actions with foreseeable adverse consequences for minorities, the current discriminatory intent test frequently precludes remedies for plaintiffs.⁷⁵

2. *Constitutional Causes of Action Under § 1983.* Plaintiffs may also bring a discriminatory intent claim against a state actor under the Equal Protection Clause of the Fourteenth Amendment.⁷⁶ But similar to claims under Title VI, environmental

72. See *Guardians Ass'n v. Civ. Serv. Comm'n*, 463 U.S. 582, 602–03 (1983).

73. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977).

74. See ROTHSTEIN, *supra* note 50, at 56 (“For the most part, courts have refused to reject toxic siting decisions without proof of explicit, stated intent to harm African Americans because of their race.”).

75. See discussion *infra* Section IV.A.

76. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239 (1976).

racism plaintiffs rarely succeed in overcoming the burden of proving intent.⁷⁷

3. *Section 602 of Title VI.* The *Sandoval* majority assumed, for the purposes of its decision, that § 602 of Title VI authorizes the creation of regulations that proscribe disparate impacts on minorities.⁷⁸ If § 602 does in fact allow agencies to promulgate rules that prohibit disparate impacts on minorities, and if agencies do so, environmental racism litigants can file administrative complaints with the Environmental Protection Agency (EPA) as a method of encouraging the agency to enforce its disparate impact regulations.⁷⁹ For example, an EPA rule promulgated in accordance with Title VI prohibits a recipient of EPA assistance from “us[ing] criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex”⁸⁰ The EPA’s External Civil Rights Compliance Office enforces Title VI by investigating complaints.⁸¹

While these regulations and enforcement options sound promising, in practice their effect has been almost negligible. Despite hundreds of complaints filed with the EPA, only one has resulted in a finding of discrimination.⁸² Further, although the EPA must issue preliminary findings within 180 days of launching an investigation into a complaint,⁸³ resolution of a complaint can

77. See *supra* notes 73–75 and accompanying text; Henry L. Chambers, Jr., *Retooling the Intent Requirement Under the Fourteenth Amendment*, 13 TEMP. POL. & C.R. L. REV. 611, 615–16 (2004).

78. *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001).

79. Kyle W. La Londe, *Who Wants To Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of Alexander v. Sandoval*, 31 B.C. ENV’T AFFS. L. REV. 27, 36 (2004).

80. See 40 C.F.R. § 7.35(b) (2020).

81. *External Civil Rights Compliance Office (Title VI)*, U.S. ENV’T PROT. AGENCY, <http://www.epa.gov/ogc/external-civil-rights-compliance-office-title-vi> [https://perma.cc/AJ6G-VMV6] (last visited Feb. 9, 2022).

82. Travis Loller, *Biden Administration Promises Focus on Environmental Justice*, ASSOCIATED PRESS, Feb. 28, 2021, <https://apnews.com/article/joe-biden-race-and-ethnicity-biden-cabinet-industrial-pollution-discrimination-cb3aa847ed4c5a6a5c188a6ff9a0062c> [https://perma.cc/8F7T-YFQY]. On January 19, 2017—the Obama Administration’s last day—the EPA’s External Civil Rights Compliance Office found that the Michigan Department of Environmental Quality discriminated against Black residents in the public participation process for the permitting of the Genesee Power Station, which burned waste. Talia Buford, *Rare Discrimination Finding by EPA Civil-Rights Office*, CTR. FOR PUB. INTEGRITY (Jan. 25, 2017), <https://publicintegrity.org/environment/rare-discrimination-finding-by-epa-civil-rights-office/> [https://perma.cc/ATU9-KGC6].

83. See 40 C.F.R. § 7.115(e) (2020).

take years or decades.⁸⁴ At greater issue, however, is whether agencies may even promulgate disparate impact regulations in the first place. The Supreme Court has not squarely determined whether agencies have this power, and Justices have expressed differing opinions on the issue.⁸⁵ The Congressional Research Service suggests that even if the Supreme Court decides § 602 only permits regulations prohibiting intentional discrimination, “it might still be argued that Title VI allows agencies to promulgate regulations addressing disparate impact in at least some circumstances.”⁸⁶ Even so, unless President Biden successfully revamps the EPA’s External Civil Rights Compliance Office, complaints filed by environmental justice advocates will be added to the agency’s case backlog.⁸⁷

4. *Common Law Actions.* Fourth, the common law provides several options to environmental plaintiffs.⁸⁸ Among the common law actions used in environmental litigation, plaintiffs often rely on private nuisance because the tort does not require plaintiffs to establish a direct physical invasion of property.⁸⁹ A private nuisance occurs when an entity unreasonably and substantially interferes with a plaintiff’s enjoyment and use of her land.⁹⁰

84. For example, the complainants originally filed a complaint against the permitting of the Genesee Power Station in 1992. Letter from Lilian S. Dorka, Director, External C.R. Compliance Off., U.S. Env’t Prot. Agency, to Heidi Grether, Director, Michigan Dep’t of Env’t Quality (Jan. 19, 2017), <https://www.epa.gov/sites/production/files/2017-01/documents/final-genesee-complaint-letter-to-director-grether-1-19-2017.pdf> [<https://perma.cc/VVG5M-VL6H>].

85. JARED P. COLE, CONG. RSCH. SERV., R45665, CIVIL RIGHTS AT SCHOOL: AGENCY ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 10–15 (2019). In his concurring opinion in *Lau v. Nichols*, Justice Stewart argued that a regulation promulgated under § 602 to effectuate the provisions of § 601 will be upheld as long as it is “reasonably related to the purposes of the enabling legislation.” *Lau v. Nichols*, 414 U.S. 563, 571 (1974) (Stewart, J., concurring) (quoting *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268 (1969)), *abrogated by* *Alexander v. Sandoval*, 532 U.S. 275 (2001).

86. COLE, *supra* note 85, at 15. On the other hand, Justice Scalia, writing for the majority in *Sandoval*, noted that it would be “strange” if a regulation promulgated under § 602 prohibits disparate impact while § 601 “permits the very behavior that the regulations forbid.” *Alexander v. Sandoval*, 532 U.S. 275, 286 n.6 (2001).

87. Loller, *supra* note 82 (noting that President Biden “made environmental protection a key element of his campaign” and “promised to overhaul” the EPA’s External Civil Rights Compliance Office); see Talia Buford & Kristen Lombardi, *Report Slams EPA Civil Rights Compliance*, CTR. FOR PUB. INTEGRITY (Sept. 23, 2016), <https://publicintegrity.org/environment/report-slams-epa-civil-rights-compliance/> [<https://perma.cc/4JM7-MGA6>].

88. La Londe, *supra* note 79, at 42–46.

89. *Id.* at 43.

90. *Environmental Law*, JRANK, <https://law.jrank.org/pages/6513/Environmental-Law-Common-Law.html> [<https://perma.cc/EBG9-NHVN>] (last visited Feb. 9, 2022). This discussion of nuisance claims is limited to private nuisances because state or federal

Private nuisance claims face significant challenges, however. First, courts use a balancing test to weigh the usefulness of a nuisance versus its harmfulness.⁹¹ Some scholars argue that more activities should be regarded as nuisances in developed economies than in developing economies.⁹² Still, plaintiffs may not obtain the desired remedy in court: injunction. For example, in *Boomer v. Atlantic Cement Co.*, a New York court allowed the plaintiffs to recover permanent damages rather than granting an injunction against the operation of a cement plant.⁹³ In doing so, the court recognized the harm caused by the waste-emitting cement plant but found the economic value of the plant significantly outweighed the harm to the plaintiffs.⁹⁴ Second, some courts still consider the chicken and the egg debate when addressing private nuisance claims: whether the landowner or the polluter came first to the area.⁹⁵ If the polluter predated the landowner, then the landowner

environmental agencies typically bring public nuisance claims, while only private plaintiffs can bring private nuisance claims. *Id.*

91. *Id.*

92. *E.g.*, Keith N. Hylton, *The Economic Theory of Nuisance Law and Implications for Environmental Regulation*, 58 CASE W. RESV. L. REV. 673, 690–91 (2008) (“For economically advanced economies, the ratio of externalized costs to externalized benefits increases sharply for the environmental interferences associated with common industrial activities.”).

93. *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 873 (N.Y. 1970).

94. *Id.* at 873–75. A court cited *Boomer* as recently as September 2020 for the proposition that “permanent injunctive relief [i]s an appropriate remedy” in nuisance cases. *See Inc. Vill. of Lindenhurst v. One World Recycling, L.L.C.*, 131 N.Y.S.3d 365, 368 (App. Div. 2020).

95. *Environmental Law*, *supra* note 90.

presumably paid less for the land and should therefore not incur a “windfall” by obtaining an injunction against the polluter.⁹⁶

Environmental plaintiffs may also file trespass and strict liability actions.⁹⁷ The tort of trespass requires showing that an entity physically invaded the plaintiff’s property and covers actions that nuisance claims do not, such as a polluter dumping oil or chemicals on a neighboring property.⁹⁸ Trespass is limited in application, however, because plaintiffs must prove that toxins *on their property* caused their harm.⁹⁹ Thus, trespass claims fail to remedy general exposure to toxins.¹⁰⁰ Lastly, strict liability claims apply to abnormally dangerous activities that create a risk of harm to plaintiffs.¹⁰¹ These claims allow plaintiffs to recover only

96. *Id.* The characterization of a successful nuisance claim in this type of situation as a windfall is a misnomer. It implies that Black property owners had a choice to not live by a polluter. In reality, the lingering effects of decades of state and federal policies have prevented Black people from building the wealth necessary to move into middle-class communities, which polluters avoid. See ROTHSTEIN, *supra* note 50, at 153–54. For example, the first federal housing policy that led to segregated communities was the 1933 Home Owners’ Loan Act, passed by Congress under President Franklin Delano Roosevelt’s New Deal Administration to prevent foreclosures and make renting and home buying more affordable. See HOME OWNERS’ LOAN ACT OF 1933, Pub. L. No. 43 (1933), <https://fraser.stlouisfed.org/title/home-owners-loan-act-1933-850> [<https://perma.cc/YRF5-8EDS>]; Terry Gross, *A ‘Forgotten History’ of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america> [<https://perma.cc/8C49-TVQ6>] (describing how the 1933 federal government’s efforts to increase America’s housing supply furthered segregation). To carry out provisions of the Act, the Roosevelt administration established the Home Owners’ Loan Corporation, which created color-coded maps that classified neighborhoods by lending risk. BRUCE MITCHELL & JUAN FRANCO, NAT’L CMTY REINVESTMENT COAL., HOLC “REDLINING” MAPS: THE PERSISTENT STRUCTURE OF SEGREGATION AND ECONOMIC INEQUALITY 5–7 (2018). In a practice that became known as “redlining,” the Home Owners’ Loan Corporation consistently coded Black neighborhoods in red—indicating financial riskiness—even in middle-class neighborhoods with single-family homes. ROTHSTEIN, *supra* note 50, at 64. Redlining’s immediate effect prevented Black people from accessing mortgage refinancing, and its long-term effect perpetuated the notion that Black people “were financially risky and a threat to local property values.” DANYELLE SOLOMON ET AL., CTR. FOR AM. PROGRESS, SYSTEMIC INEQUALITY: DISPLACEMENT, EXCLUSION, AND SEGREGATION 6–7 (2019). As recently as 2018, 74% of neighborhoods coded red by the Home Owners’ Loan Corporation are low-to-moderate income, and more than 60% are minority neighborhoods. MITCHELL & FRANCO, *supra*, at 20.

97. *Environmental Law*, *supra* note 90.

98. Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENV’T L. & POL’Y REV. 485, 544 (1997). Nuisance law is primarily concerned with continual interferences with the enjoyment of private property, whereas trespass law can capture isolated incidents. *Environmental Law*, *supra* note 90.

99. Northern, *supra* note 98, at 545.

100. *Id.*

101. La Londe, *supra* note 79, at 45.

damages, which precludes using strict liability to enjoin the siting of LULUs.¹⁰²

5. *Federal and State Environmental Laws.* State and federal environmental laws also provide options for environmental racism claims.¹⁰³ On the federal level, the National Environmental Policy Act (NEPA) requires federal agencies to consider and disclose environmental issues that may result from “actions significantly affecting the quality of the human environment.”¹⁰⁴ Generally, a successful environmental racism claim by way of NEPA involves delaying projects and increasing the costs of siting, which could ultimately force permit recipients to find another site.¹⁰⁵ NEPA is not intended, however, to prevent projects just because they may result in harm to the environment.¹⁰⁶

Plaintiffs may also turn to their own respective state’s environmental laws. California, for example, requires local governments to identify disadvantaged communities within their jurisdiction and make plans to “reduce the unique or compounded health risks” in those communities by limiting exposure to pollution and improving air quality.¹⁰⁷ In the same vein, the Fourth Circuit ruled in January 2020 that Virginia law foreclosed the permitting of a compressor station for a natural gas pipeline in Union Hill, a predominantly Black neighborhood in Buckingham County, Virginia.¹⁰⁸ Moreover, beginning in 2017, the Trump Administration’s efforts to deregulate the environmental industry spurred states to implement their own robust environmental agendas.¹⁰⁹ For example, in September 2020, New Jersey passed a landmark environmental justice bill that grants or renews permits for a facility only after it shows that

102. *Id.* at 45–46.

103. *Id.* at 46–49.

104. See National Environmental Policy Act of 1969, 42 U.S.C. § 4332(C).

105. La Londe, *supra* note 79, at 48.

106. *Id.* at 47–48.

107. CAL. GOV’T CODE § 65302(h)(1)(A); Rob Bonta Att’y Gen., *SB 1000—Environmental Justice in Local Land Use Planning*, ST. OF CAL. DEPT OF JUST., <https://oag.ca.gov/environment/sb1000> [<https://perma.cc/9X2Y-FXE7>] (last visited Mar. 14, 2021).

108. *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 85–87 (4th Cir. 2020). The Commonwealth Energy Policy requires “that development of new, or expansion of existing, energy resources or facilities does not have a disproportionate adverse impact on economically disadvantaged or minority communities.” *Id.* at 75.

109. Julius M. Redd & Hilary Jacobs, *The Evolving Landscape of Environmental Justice in 2020 and Beyond*, NAT’L L. REV. (Oct. 30, 2020), <https://www.natlawreview.com/article/evolving-landscape-environmental-justice-2020-and-beyond> [<https://perma.cc/CU9A-5FHP>].

“overburdened communities” will not bear a disproportionate share of the environmental effects of the facility’s output.¹¹⁰ The law defines an “overburdened community” as one where at least 35% of households are low-income, at least 40% of residents identify as minorities, and at least 40% of households have limited English proficiency.¹¹¹

Not all states have environmental justice laws, however. Even if they do, few demand as much as New Jersey’s.¹¹² The state in which one lives, therefore, determines how much environmental racism plaintiffs can depend on state environmental laws.

B. Current Attempt to Amend Title VI to Allow Disparate Impact Claims

Without another strong avenue to pursue environmental racism claims, advocates rely on the disparate impact theory, which is generally viewed as easier to establish than an intent to discriminate.¹¹³ As of 2021, members of Congress are attempting to amend Title VI to support disparate impact claims. In February and August 2020, House and Senate Democrats, respectively,¹¹⁴ introduced a bill that, in part, provides a private right of action to plaintiffs who experience discrimination based on disparate impact—effectively overruling *Sandoval*.¹¹⁵ The bill, titled the Environmental Justice for All Act, would amend § 601 of Title VI

110. Julius M. Redd et al., *New Jersey Governor Signs Landmark Environmental Justice Legislation into Law*, NAT’L L. REV. (Sept. 23, 2020), <https://www.natlawreview.com/article/new-jersey-governor-signs-landmark-environmental-justice-legislation-law> [https://perma.cc/S3ZY-DKXP].

111. N.J. STAT. ANN. § 13:1D-158.

112. Redd & Jacobs, *supra* note 109. For example, in 2018 Maryland passed a bill that created a commission to report to the state legislature on environmental justice issues facing Prince George’s County. *Id.*; *Maryland at a Glance, Population*, MD. MANUAL ON-LINE (Mar. 11, 2022), <https://msa.maryland.gov/msa/mdmanual/01glance/html/pop.html> [https://perma.cc/PH6D-4ZEX]. While a step in the right direction, this law fails to help victims pursue legal claims.

113. See Selmi, *supra* note 57, at 768. *But see* discussion *infra* Section III.C.

114. See generally *H.R. 5986 – Environmental Justice for All Act*, CONGRESS, <https://www.congress.gov/bill/116th-congress/house-bill/5986> [https://perma.cc/U8FX-FYUA] (last visited Mar. 2, 2021); *S. 4401 – Environmental Justice for All Act*, CONGRESS, <https://www.congress.gov/bill/116th-congress/senate-bill/4401> [https://perma.cc/B2WF-38YE] (last visited Mar. 2, 2021). The bill was reintroduced in both chambers in early 2021. See generally *H.R. 2021 – Environmental Justice for All Act*, CONGRESS, <https://www.congress.gov/bill/117th-congress/house-bill/2021> [https://perma.cc/B9LQ-PJDA] (last visited Dec. 20, 2021); *S. 872 – Environmental Justice for All Act*, CONGRESS, <https://www.congress.gov/bill/117th-congress/senate-bill/872> [https://perma.cc/4ZBA-WKX8] (last visited Dec. 20, 2021).

115. Environmental Justice for All Act, S. 872, 117th Cong. §§ 4–5 (2021).

by establishing discrimination based on disparate impact if a covered agency:

has a program, policy, practice, or activity that causes a disparate impact on the basis of race, color, or national origin and the covered entity fails to demonstrate that the challenged program, policy, practice, or activity is related to and necessary to achieve the nondiscriminatory goal of the program, policy, practice, or activity alleged to have been operated in a discriminatory manner; or

. . . a less discriminatory alternative program, policy, practice, or activity exists, and the covered entity refuses to adopt such alternative program, policy, practice, or activity.¹¹⁶

If the Environmental Justice for All Act is passed into law, defendants will likely challenge the amended Title VI because of skepticism surrounding the disparate impact theory.¹¹⁷ While some federal statutes allow disparate impact claims,¹¹⁸ conservatives are generally wary of the theory because it punishes lawful conduct.¹¹⁹ In 2015, the Supreme Court recognized disparate impact claims under the Fair Housing Act (FHA) in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*¹²⁰ Justices Alito, Roberts, Scalia, and Thomas vigorously dissented, using an Eighth Circuit case decided on the basis of disparate impact liability to demonstrate the theory's implications.¹²¹ In *Gallagher v. Magner*, the Eighth

116. *Id.* § 4.

117. See, e.g., John Fund, *The Supreme Court's Disparate-Impact Decision Is a Disaster*, NAT'L REV. (June 26, 2015, 8:00 AM), <https://www.nationalreview.com/2015/06/supreme-courts-disparate-impact-decision-disaster-john-fund/> [<https://perma.cc/K94F-XAT8>] (describing how the theory “can lead to cases of discrimination under the guise of fighting discrimination”).

118. See *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 545–46 (2015) (holding that disparate impact claims may be brought under the Fair Housing Act); *Smith v. City of Jackson*, 544 U.S. 228, 242–43 (2005) (holding that disparate-impact claims are available under the Age Discrimination in Employment Act); *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (holding that disparate impact claims are recognized under Title VII).

119. See, e.g., *Inclusive Cmty. Project, Inc.*, 576 U.S. at 555 (Thomas, J., dissenting) (“[I]f disparate-impact liability is . . . simply a way to correct for imbalances that do not result from any unlawful conduct, it is even less justifiable. This Court has repeatedly reaffirmed that ‘racial balancing’ by state actors is ‘patently unconstitutional,’ even when it supposedly springs from good intentions.” (citing *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311 (2013))).

120. *Id.* at 545–46 (majority opinion).

121. *Id.* at 557–58 (Alito, J., dissenting).

Circuit upheld a disparate impact claim under the FHA.¹²² The claim alleged discrimination by the city of St. Paul, Minnesota, for its “aggressive enforcement of the Housing Code.”¹²³ The plaintiffs argued that requiring landlords to address “rodent infestation, missing dead-bolt locks, inadequate sanitation facilities, inadequate heat, inoperable smoke detectors, [and] broken or missing doors” increased the price of rent, which disproportionately affected Black residents because they were more likely to earn lower incomes.¹²⁴ In *Inclusive Communities Project*, the dissent disparaged the *Gallagher* decision, noting “[s]omething has gone badly awry when a city can’t even make slumlords kill rats without fear of a lawsuit.”¹²⁵ Justice Alito argued that the ordinary meaning of the FHA’s text limited its application to intentional discrimination.¹²⁶

Inclusive Communities Project was a 5–4 decision. The changes in the Court’s composition since 2015 could signal trouble for attempts to expand the disparate impact theory.¹²⁷ Justices Gorsuch, Kavanaugh, and Barrett may join Justices Alito, Roberts, and Thomas’s skepticism in future litigation involving the theory. Thus, relying on the disparate impact theory as a sustainable means of advancing equity is short-sighted.

C. *The Shortcomings of the Disparate Impact Theory*

At first blush, the disparate impact test appeals to plaintiffs because it does not require proving discriminatory intent. The

122. *Gallagher v. Magner*, 619 F.3d 823, 830, 835 (8th Cir. 2010).

123. *Id.* at 833.

124. *Id.* at 830, 836.

125. *Inclusive Cmty. Project, Inc.*, 576 U.S. at 558 (Alito, J., dissenting). The Supreme Court granted certiorari in *Magner v. Gallagher*, 565 U.S. 1013 (2011), but the parties settled before oral argument. *Inclusive Cmty. Project, Inc.*, 576 U.S. at 558 n.1.

126. *Inclusive Cmty. Project, Inc.*, 576 U.S. at 561–62 (Alito, J., dissenting). The FHA makes it unlawful to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person *because of* race, color, religion, sex, familial status, or national origin.” 42 U.S.C. § 3604(a) (emphasis added). Justice Alito argued that the “because of” language in the FHA clearly encompassed only intentional acts: “When English speakers say that someone did something ‘because of’ a factor, what they mean is that the factor was a reason for what was done . . . Without torturing the English language, the meaning of these provisions of the FHA cannot be denied.” *Inclusive Cmty. Project, Inc.*, 576 U.S. at 558–61 (Alito, J., dissenting).

127. *See Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx [<https://perma.cc/3WZQ-RH8L>] (last visited Jan. 5, 2021). President Trump appointed Justices Gorsuch, Kavanaugh, and Barrett in 2017, 2018, and 2020, respectively. *Id.*

disparate impact analysis contains three parts.¹²⁸ First, a plaintiff must show a “significantly discriminatory impact” caused by a facially neutral practice.¹²⁹ Second, the defendant may rebut the finding of discrimination by offering a “sufficient nondiscriminatory justification” for the policy.¹³⁰ This justification is commonly referred to as a “business necessity.”¹³¹ Third, the plaintiff may still prevail if he can demonstrate a less discriminatory means that would serve the same purpose or show that the defendant’s justification is just pretext for discrimination.¹³² As described in the following section, the disparate impact test works well and fits easily into the framework it was originally created to address: workplace discrimination claims under Title VII of the Civil Rights Act of 1964 (Title VII).¹³³ When applied in the context of environmental racism claims, however, the strict contours of the test are more difficult to prove.

1. *Origins of the Disparate Impact Theory.* The disparate impact theory emerged in stages but came to force in the early 1970s in litigation over employment tests that resulted in fewer Black employees advancing in a power company.¹³⁴ In *Griggs v. Duke Power Co.*, Black employees of Duke Power Company in North Carolina challenged the company’s requirements that in order to transfer out of the lowest-paying department, employees must have graduated from high school and passed an intelligence test.¹³⁵ The Supreme Court determined that Title VII “proscribes not only overt discrimination but also practices that are fair in

128. *Connecticut v. Teal*, 457 U.S. 440, 446–47 (1982).

129. *Id.* at 446.

130. *Id.* at 446–47; *see also* *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 623 n.15 (1983) (Marshall, J., dissenting) (“Proof of the disproportionate racial impact of a program or activity is, of course, not the end of the case. Rather a prima facie showing of discriminatory impact shifts the burden to the recipient of federal funds to demonstrate a sufficient nondiscriminatory justification for the program or activity.”).

131. *See Selmi*, *supra* note 57, at 711 (noting the business necessity concept originated in *Whitfield v. United Steelworkers of America, Local 2708*, 263 F.2d 546 (5th Cir. 1959), *cert. denied*, 360 U.S. 902 (1959), where the Fifth Circuit held that requiring Black employees to take a test to determine whether they qualify for positions exclusively held by White employees at the time was a system “conceived out of business necessity, not out of racial discrimination”).

132. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

133. *See infra* Section III.C.1.

134. *Selmi*, *supra* note 57, at 708, 717.

135. *Griggs v. Duke Power Co.*, 401 U.S. 424, 426–28 (1971). Census statistics from 1960 in North Carolina show that only 12% of Black males graduated from high school, compared with 34% of White males. *Id.* at 430 n.6. Further, the Court observed that 58% of White people passed a sample of standardized tests, including two used by Duke Power Company, compared with just 6% of Black people. *Id.*

form, but discriminatory in operation.”¹³⁶ The Court proceeded to establish the business necessity test: “If an employment practice which operates to exclude [members of a protected group] cannot be shown to be related to job performance, the practice is prohibited” under Title VII.¹³⁷ The Court held Duke Power Company’s policies were not sufficiently related to job performance.¹³⁸ Notably, the Court did not make a finding that the company intended to prevent Black employees from transferring departments.¹³⁹ Instead, the Court found the impermissible effect of the policies was to restrict Black employees to the lowest-paying department.¹⁴⁰

In contexts such as *Griggs*, the causal relationship between the employment tests and the resulting discriminatory effects was readily apparent.¹⁴¹ To counter claims of disparate impact, the employer either had an easily identifiable rationale for the policy or it did not, which at that point could lead to a finding of discrimination on the basis of race.¹⁴² Professor Michael Selmi hypothesized that early adherents to the theory thought judges would take well to disparate impact claims because they did not carry with them the same stigma as did findings of intentional discrimination by employers.¹⁴³ Moreover, the theory seemed to address the palatable goal of remedying the lasting effects of previous intentional discrimination.¹⁴⁴ Therefore, applying the disparate impact theory in Title VII claims generally succeeded. When plaintiffs began to test the bounds of the theory, however, the theory’s limitations were quickly exposed.

136. *Id.* at 431.

137. *Id.*

138. *Id.* An amicus brief filed by the United Steelworkers of America called the questions posed by the intelligence tests “ludicrous.” Brief for United Steelworkers of America, AFL-CIO as Amicus Curiae Supporting Petitioners at 4, *Griggs*, 401 U.S. 424 (No. 70-124). The questions addressed the meanings of proverbs and various sayings, as well as definitions: “Does B.C. mean ‘before Christ?’” *Id.* at 3–4.

139. *Griggs*, 401 U.S. at 432. Rather, the Court accepted the company’s explanation for the policies as a means to “improve the overall quality of the work force.” *Id.* at 431–32.

140. *Id.* at 432. In so finding, the Court underscored the irrelevance of a lack of intent: “[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.” *Id.*

141. Selmi, *supra* note 57, at 716.

142. *Id.*

143. *Id.*

144. *See* Local 189, *United Papermakers v. United States*, 416 F.2d 980, 982–83 (5th Cir. 1969). As the disparate impact theory was developing, one Fifth Circuit judge addressed the matter as “how to reconcile equal employment opportunity *today* with seniority expectations based on *yesterday’s* built-in racial discrimination.” *Id.*

2. *Problems Applying the Disparate Impact Test to a Broader Range of Conduct.* When plaintiffs apply the disparate impact theory beyond Title VII claims, the clear lines drawn in employment contexts quickly blur, and courts hesitate to put the label of discrimination on a practice that is far removed from remedying past intentional discrimination.¹⁴⁵ Even before *Sandoval* precluded litigants from filing disparate impact litigation under Title VI, plaintiffs often failed to make sufficient showings of significantly discriminatory impacts because they struggled to show causation using “appropriate measures” of disparate impact.¹⁴⁶

For example, in *New York City Environmental Justice Alliance v. Giuliani*, plaintiffs alleged that New York City’s proposed sale of lots containing community gardens would disproportionately affect the city’s Black, Asian-American, and Hispanic residents in violation of EPA regulations promulgated in accordance with Title VI.¹⁴⁷ The district court denied the plaintiffs’ motion for a preliminary injunction, and the Second Circuit affirmed.¹⁴⁸ The Second Circuit determined the plaintiffs failed to establish causation because they did not allege sufficient facts to show the defendants’ actions would impact “similarly situated members of protected and nonprotected groups.”¹⁴⁹ Moreover, the court warned that government programs benefiting minorities would suffer if disparate impact could be established by a simple showing that selling lots containing community gardens would eliminate many community gardens in minority neighborhoods: “[O]nce a program aimed at improving a minority community was begun, its curtailment, the impact of which would be confined to the minority community, would, without more, establish a prima

145. See Abernathy, *supra* note 54, at 288; see also Selmi, *supra* note 57, at 771 (“Unless there is a focus on intentional discrimination, the disparate impact theory appears to seek to remedy societal discrimination, which runs up against the Supreme Court’s consistent reluctance to permit, let alone require, efforts designed to tackle societal discrimination.”).

146. See *N.Y.C. Env’t Just. All. v. Giuliani*, 214 F.3d 65, 70 (2d Cir. 2000) (noting that a showing of a significantly discriminatory impact “requires that plaintiffs employ an ‘appropriate measure’ for assessing disparate impact” (quoting *N.Y. Urb. League, Inc. v. New York*, 71 F.3d 1031, 1038 (1995))).

147. *Id.* at 67.

148. *Id.* at 68.

149. *Id.* at 70. The court took issue with the conclusory statements contained in the factual assertions. *Id.* One declaration asserted, “The sale of 115 gardens . . . will disproportionately impact [specified minority] neighborhoods” and “[t]he City’s plan to sell off the gardens will have a disparate and adverse impact on both residents and property owners in communities of color.” *Id.*

facie case of disparate impact. This would provide a powerful disincentive to government initiatives designed to benefit minority communities.”¹⁵⁰

Notably, the method the plaintiffs used to measure discriminatory impact proved fatal to the case. The plaintiffs chose to measure the impact of the lot sales by comparing the amount of “open space” available to minority and White communities.¹⁵¹ They contended that White communities have more access to open space than do minority communities and the sale of community gardens would “perpetuate and exacerbate this disparity.”¹⁵² The court rejected this chosen measure, pointing out that the plaintiffs neglected to account for large, regional parks, which inflated the plaintiffs’ impact findings.¹⁵³ To appropriately use open space as a measure, the court determined, the plaintiffs needed to establish that the lot sales impacted minority communities in a racial pattern significantly different from the whole pool of community gardens.¹⁵⁴

In another Second Circuit case, the court similarly rejected a “farebox recovery ratio” as a measure of disparate impact.¹⁵⁵ In *New York Urban League, Inc. v. New York*, the plaintiffs alleged that U.S. Department of Transportation regulations implemented under Title VI forced the Metropolitan Transportation Authority to impose fare increases in a way that would disproportionately burden subway and bus riders, who are predominantly minorities, compared to commuter line passengers, who are predominantly White.¹⁵⁶ The farebox recovery ratio used by the plaintiffs measured the percentage of operating costs recovered through fare revenues from both the New York City Transit Authority system and the commuter line.¹⁵⁷ The Second Circuit found that this ratio inadequately compared the two systems, noting “[t]here is no reason to assume that the expenses of each system would bear any sort of proportionate relationship, particularly when those

150. *Id.* at 71.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* (“We appreciate the generalized notion that outdoor recreational space—‘open space’—is precious in minority communities and that its loss is therefore troubling. But in using ‘open space’ as a measure, the plaintiffs needed to establish that its reduction in minority communities determines the impact of the City’s actions on those communities compared with the impact of those actions on nonminority communities.”).

155. *N.Y. Urb. League, Inc. v. New York*, 71 F.3d 1031, 1038 (2d Cir. 1995).

156. *Id.* at 1033.

157. *Id.* at 1037.

systems are fundamentally different in terms of how they carry passengers, frequency of stops, and operating schedules.”¹⁵⁸

These two Second Circuit cases demonstrate the difficulty plaintiffs face in finding adequate measures to determine causation—the first essential step of the disparate impact test. Professor Selmi argues this step is the easiest for plaintiffs to satisfy, but he acknowledges that is so only when there is a “sufficiently large and diverse population that is affected by the challenged practice.”¹⁵⁹ As described earlier in this section, plaintiffs struggle to find sufficient comparison measures that affect a diverse population outside of the contexts of employment tests and seniority systems.

Even if plaintiffs successfully demonstrate causation, they subsequently face the uphill battle in rebutting a claim of business necessity.¹⁶⁰ Courts can make subjective determinations concerning the sufficiency of the necessity defense because they balance not factual evidence but “separate and distinct social values—a balancing of apples and oranges.”¹⁶¹ Judges’ opinions of the sufficiency of a business necessity defense often depend on the lens through which they see the world. Professor Selmi offers examples of instances of potential discrimination and asks whether a court could make an objective determination on the issue: for example, whether women struggle to advance in the workplace because they prefer to stay at home with the kids or because employers treat them differently, or whether police officers stop Black drivers more often because of racial stereotypes or because of distinct traffic patterns.¹⁶² The publicity of recent murders of Black people by police—especially in the wake of George Floyd’s death—awoke many to systemic racism and could lead to a more uniform position by judges on the existence of ubiquitous discrimination.¹⁶³ Still, the threshold for establishing a sufficient business necessity defense is low, so plaintiffs’ claims

158. *Id.* at 1038.

159. Selmi, *supra* note 57, at 769.

160. *Id.*

161. Abernathy, *supra* note 54, at 287; Selmi, *supra* note 57, at 769.

162. Selmi, *supra* note 57, at 769–70.

163. See Justin Worland, *America’s Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), <https://time.com/5851855/systemic-racism-america/> [<https://perma.cc/EL97-27VF>].

are easily defeated on this prong.¹⁶⁴ While this outcome may suggest to some that discriminatory impact is not a large concern, that conclusion would be short-sighted. In the environmental context, society overwhelmingly burdens Black communities with the impacts of hazardous waste.¹⁶⁵ Instead of relying on the expansion of a failing theory, environmental justice advocates should push for the expansion of our understanding of discriminatory intent.

IV. EXPANDING DISCRIMINATORY INTENT TO ENCOMPASS FORESEEABILITY

Environmental racism plaintiffs should have promising avenues available to them to remedy environmental inequities. Due to the numerous failures experienced by these types of litigants in court, however, environmental racism litigation has declined over the past four decades.¹⁶⁶ To foster a rebirth of environmental racism litigation, litigants should abandon the disparate impact test and encourage courts to adopt a burden-shifting foreseeability test in the discriminatory intent standard.

A. *Tests for Discriminatory Intent*

The discriminatory intent standard requires a showing that invidious discrimination was a motivating factor behind an act.¹⁶⁷ In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court developed five objective factors to determine whether an action was committed with a

164. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 598 (1983) (“In the typical case where deliberate discrimination on racial grounds is not shown, the recipient will have at least colorable defenses to charges of illegal disparate-impact discrimination, and it often will be the case that, prior to judgment, the grantee will not have known or have had compelling reason to know that it had been violating the federal standards.”).

165. Vann R. Newkirk II, *Trump’s EPA Concludes Environmental Racism Is Real*, ATLANTIC (Feb. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/> [https://perma.cc/NE6Y-PDR6].

166. See generally Sean-Patrick Wilson, Note, *Fighting the Good Fight: The Role of Environmental Civil Rights Litigators Going Forward and the Need for a Continuance of the Litigation Tool in the Environmental Justice Movement*, 28 W. NEW ENG. L. REV. 293, 294–300 (2006). Notably, President Biden published Executive Order 14008 on February 1, 2021, which encourages the federal government, through a series of policies, to take a more proactive approach to preventing environmental racism. Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Feb. 1, 2021). The effect of these policies, however, is outside the scope of this Note.

167. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977).

discriminatory purpose: (1) the decision's historical background; (2) the "specific sequence of events" preceding the action in question; (3) failing to follow the "normal procedural sequence"; (4) "[s]ubstantive departures" from the normal course of action; and (5) the legislative and administrative history of a body, including meeting minutes and reports.¹⁶⁸

The Supreme Court also developed a subjective test for discriminatory purpose in *Personnel Administrator v. Feeney*, requiring a governmental body to have "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."¹⁶⁹ Of consequence to this Note, this subjective test, while at once imposing a higher burden on a plaintiff, also inserted the idea of foreseeability into the discriminatory intent analysis.¹⁷⁰ The *Feeney* Court noted that "inevitability" and "foreseeability" can be used as methods to infer an intent to create "adverse consequences."¹⁷¹ Yet the court concluded these methods were only tools, not evidence of proof, and declined to add foreseeability to the *Arlington Heights* factors.¹⁷²

B. The Burden-Shifting Foreseeability Test

To remedy the disparities in the discriminatory intent standard and to release plaintiffs from the burden of proving disparate impact, courts should adopt the foreseeability test suggested by Justice Marshall in his *Feeney* dissent.¹⁷³ There, Justice Marshall proposed a burden-shifting test: "Where the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the [government actor] to establish that [discriminatory] considerations played no part in the choice of the particular [action]."¹⁷⁴ The practical effect of Justice Marshall's test is to allow plaintiffs "to make a prima facie case of discriminatory intent when they can show the

168. *Id.* at 267–68. The Court noted its identified factors were not exhaustive, in effect opening the door to providing future guidance on how to uncover discriminatory intent. *Id.* at 268.

169. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

170. *Id.* at 279 n.25. The objective/subjective dichotomy created by the Supreme Court has led to an inconsistent approach by courts when determining the existence of a discriminatory purpose. See Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1085 (1998).

171. *Feeney*, 442 U.S. at 279 n.25.

172. *Id.* at 279 nn.24–25.

173. *Id.* at 284 (Marshall, J., dissenting).

174. *Id.*

foreseeability of a disparate impact.”¹⁷⁵ The burden of proof, normally placed on the plaintiff, then shifts to the government to show it did not act with discriminatory intent.¹⁷⁶ If the government meets this burden, then plaintiffs can turn to the other *Arlington Heights* indicators of intent to meet their burden of persuasion.¹⁷⁷

In *Feeney*, the plaintiffs would have been successful in proving discriminatory intent under Justice Marshall’s test.¹⁷⁸ There, a female job applicant challenged a Massachusetts statute requiring veterans to be considered for appointment to state civil service positions before nonveterans.¹⁷⁹ The requirement strongly favored male applicants, so the female applicant argued that the statute discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁸⁰ Justice Stewart, in the majority opinion, wrote that it would be “disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.”¹⁸¹ For the majority, however, foreseeability was not sufficient to constitute a prima facie case of discriminatory intent because the test requires “more than intent as volition or intent as awareness of consequences.”¹⁸² For Justice Marshall, however, the “inexorabl[e]” consequence of the statute was to retain women in low-level jobs, to which the state could not establish that “sex-based considerations” were absent from the statute’s making.¹⁸³ As a result, application of Justice Marshall’s foreseeability test would have invalidated the Massachusetts statute with a finding of discriminatory purpose.

Some scholars have suggested other tests similar to Justice Marshall’s. For example, Jill E. Evans incorporates the idea of foreseeability from tort law into her proposal for a discriminatory intent test.¹⁸⁴ Under Evans’s test, in an environmental racism claim the court would determine whether the actor was

175. Julia Kobick, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence*, 45 HARV. C.R.-C.L. L. REV. 517, 560 (2010).

176. *Id.*

177. *Id.*

178. *Feeney*, 442 U.S. at 284 (Marshall, J., dissenting).

179. *Id.* at 259 (majority opinion).

180. *Id.*

181. *Id.* at 278.

182. *Id.* at 279.

183. *Id.* at 283–84 (Marshall, J., dissenting).

184. Evans, *supra* note 33, at 1295–96.

“substantially certain” a disparate impact would occur.¹⁸⁵ If the plaintiff sustains this burden, then discriminatory intent is presumed, and the burden shifts to the governmental actor to justify its actions by proof of “permissible racially neutral selection criteria and procedures.”¹⁸⁶ Environmental justice advocates should push for adoption of Justice Marshall’s test, however, because the evidentiary bar for substantial certainty is higher than that of foreseeability, making Evans’s proposed test more difficult to prove.

*C. Application of Burden-Shifting Foreseeability Test to Bean*¹⁸⁷

Turning back to the case discussed in Part II, the *Bean* plaintiffs could have established a prima facie case of discriminatory intent under the foreseeability test. At the time the Texas Department of Health issued a permit for the Whispering Pines landfill in Northwood Manor, the three other privately owned landfills also sat in minority council districts,¹⁸⁸ three of which were also in predominantly Black neighborhoods.¹⁸⁹ Because the Black community in Houston at the time made up just one-fourth of the city’s population,¹⁹⁰ the Texas Department of Health must have foreseen the disproportionate impact yet another landfill would have on the city’s Black population. Under Justice Marshall’s test, the Texas Department of Health would have the burden to show the racial makeup of the community had no part in the choice of where to place the landfill.¹⁹¹ Given that the state rejected a permit for the same area when the neighborhood was primarily White, the state would likely struggle to show that discrimination played no part in its siting decision.¹⁹²

185. *Id.* at 1296–97. The “substantial certainty” test incorporates the idea of foreseeability. *See id.* at 1295–96 (“The better approach [to the discriminatory intent standard] recognizes not simply the creation of an inference of discriminatory intent, but rather allows for a presumption of such, where government action carries with it inevitable and foreseeable adverse consequences to a protected class.”).

186. *Id.* at 1301 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

187. *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979).

188. Bullard, *supra* note 25, at 30.

189. Bullard, *supra* note 26, at 1040.

190. *Id.*

191. *See supra* text accompanying note 174.

192. *See supra* text accompanying note 31. Jill E. Evans suggests that the state’s decision to allow a landfill in Northwood Manor when the racial makeup of the neighborhood changed constitutes a substantive departure from normal siting criteria, which supports a finding of discriminatory intent under the *Arlington Heights* test. *See Evans, supra* note 33, at 1284. While plausible that the *Bean* decision was incorrectly

D. Allowing Discriminatory Intent to Capture Subtle Forms of Racism

Current notions of intent punish only the most flagrant instances of racism. We know, however, that policies, both social and political, have sewn racism into the fabric of the United States.¹⁹³ These policies depict covert racism, which is defined as the “subtle and subversive institutional or societal practices, policies, and norms utilized to mask structural racial apparatus.”¹⁹⁴

Justice Marshall’s foreseeability test opens the door to punishing covert racism. Under this test, entities would have to address the possibility that covert racism played a role in the siting of LULUs; for instance, the possibility that a local government permitted a hazardous waste facility in a Black neighborhood because it knew the community did not have the resources to fight the siting decision.¹⁹⁵ It remains unclear what level of evidence courts would accept to allow defendants to overcome their burden. Yet, the burden under Justice Marshall’s test appears significantly more difficult to overcome than the business necessity defense under the disparate impact test. Under the disparate impact test, defendants could offer a sufficient business necessity explanation *despite* the presence of discrimination. Under Justice Marshall’s test, courts do not excuse discrimination even if it was allegedly necessary. Rather, Justice Marshall’s test identifies and swiftly punishes discrimination. This test would allow the health and safety concerns of Black communities to be seen, heard, and—finally—remedied.

V. CONCLUSION

It may not be impossible for environmental racism plaintiffs to prevail on a disparate impact theory, were it available to them. These successes, however, would be too few and far between to adequately address the vast inequities faced by Black

decided, *see id.*, the burden-shifting foreseeability test provides a stronger standard on which environmental justice plaintiffs can rely.

193. *See, e.g., supra* note 96 (describing the creation of the practice of redlining).

194. Rodney D. Coates, *Covert Racism in the USA and Globally*, SOCIO. COMPASS 208, 212 (2008).

195. *See supra* notes 10–11 and accompanying text.

communities with the siting of LULUs.¹⁹⁶ Instead, incorporating the element of foreseeability into the intentional discrimination standard would likely lead to one of two possible outcomes. First, at the forefront of LULU siting decisions, permit-approvers would consider whether it is foreseeable that the LULU would disproportionately impact the residents of nearby neighborhoods. If it would disproportionately impact the particular community, then the permit-approver would likely deny the permit for that site. Second, if a LULU is nevertheless sited in a location that disproportionately impacts the neighboring community, the residents can claim that the permit-approver discriminated against them because the disproportionate impact was foreseeable.¹⁹⁷ The burden-shifting foreseeability test can, therefore, serve as both a deterrent to permit-approvers and as a viable remedy for environmental racism litigants. As the country faces a racial reckoning in the wake of George Floyd's murder—and all the deaths that came before and after his—environmental justice advocates should seize this moment to encourage courts to develop a broader understanding of discriminatory intent.

Kirsten Williams

196. See Viktoriia De Las Casas et al., *Private Civil Rights Suits Not Enough for Enviro Justice*, LAW 360 (Jan. 4, 2021, 5:39 PM), <https://www.law360.com/articles/1340405/private-civil-rights-suits-not-enough-for-enviro-justice> [<https://perma.cc/LTS3-FU2K>].

197. See Newkirk, *supra* note 165 (“[The EPA’s] finding that the magnitude of pollution seems to be higher in communities of color than the number of polluters suggests indicates that regulations and business decisions are strongly dependent on whether people of color are around. In other words, they might be discriminatory.”).