NO MORE EXCUSES: BUILDING A NEW VISION OF CIVIL RIGHTS ENFORCEMENT IN THE CONTEXT OF ENVIRONMENTAL JUSTICE

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INTRODUCTION

This article explores why the Environmental Protection Agency (EPA), the lead federal agency in the environmental sector,[1] has failed to enforce Title VI of the Civil Rights Act of 1964 and calls for reforms to remedy the continuing environmental effects of discrimination on the basis of race and ethnicity. More than 50 years after the passage of Title VI, 30 years after the United Church of Christ published *Toxic Wastes and Race*,[2] which brought racial disparities in the distribution of hazardous waste facilities to the nation's attention, and more than 25 years after the First National People of Color Environmental Summit, when community members convened from across the country and effectively launched the Environmental Justice Movement, the article asks why civil rights enforcement in the environmental context has languished.[3]

Environmental justice scholars have long wrestled with a chicken and egg problem: do noxious facilities encroach on low-income communities and communities of color or do low-income populations and people of color move into areas with unwanted land uses?[4] In 2015, environmental scientists Paul Mohai and Robin Saha published two groundbreaking articles

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[1] EPA is one of a family of federal agencies charged with civil rights enforcement in the environmental sector, including the U.S. Departments of Agriculture ("USDA"), Energy ("DOE"), Interior ("DOI"), and Commerce ("Commerce"). The actions of the U.S. Department of Housing and Urban Development ("HUD") and Transportation ("DOT") also have clear implications for environmental justice. This article focuses on EPA as a significant player in environmental decision-making and as the lead agency for environmental justice. *See* Exec. Order No. 12,898, 32 C.F.R. § 651.17 (1994) (EPA designated to convene an Interagency Working Group on Environmental Justice to coordinate strategy).

[2] COMM'N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987) [hereinafter TOXIC WASTES AND RACE].

[3] From its founding, including, for example, the publication of the seminal study TOXICS WASTES AND RACE by the United Church of Christ in 1987, the Environmental Justice Movement has interrogated and emphasized the role of race and ethnicity in both environmental decision-making and the distribution of environmental burdens and benefits. *See* TOXIC WASTES AND RACE, *supra* note 2; FIRST NAT'L PEOPLE OF COLOR ENVTL. LEADERSHIP SUMMIT, PRINCIPLES OF ENVIRONMENTAL JUSTICE (1991), http://www.ejnet.org/ej/principles.pdf [https://perma.cc/RJG2-6UMR] (promoting the idea of building "a national and international movement of all peoples of color to fight the destruction and taking of our lands and communities."). At the same time, the Environmental Justice Movement is concerned with procedural, distributive, and substantive issues across both racial and class lines. *See* Errol Schweitzer, *Environmental Justice: An Interview with Robert Bullard*, ENVTL. JUST. / ENVTL. RACISM (July 1999), https://www.ejnet.org/ej/bullard.html [https://perma.cc/C5FL-Q98P] ("[T]he issues of environmental racism and environmental justice don't just deal with people of color. We are just as much concerned with inequities in Appalachia, for example, where the whites are basically dumped on because of lack of economic and political clout and lack of having a voice to say 'no' and that's environmental injustice."). This article focuses on issues of race and ethnicity, which have predictive value and salience in the environmental justice context and lend themselves to remedy under Title VI of the Civil Rights Act of 1964.

[4] *See* Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1014–15 (1993) (discussing the need for more research on the question of which came first). *See also* Paul Mohai & Robin Saha, *Which Came First, People or Pollution? A Review of Theory and Evidence from Longitudinal Environmental Justice Studies*, 10 ENVTL. RES. LETTERS, no. 12, at 7 (Dec. 22, 2015), https://iopscience.iop.org/article/10.1088/1748-9326/10/12/125011/pdf [https://perma.cc/4G3B-6QCU] [hereinafter Mohai & Saha I]; Paul Mohai, & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, 10 ENVTL. RES. LETTERS, no. 11, at 1 (Nov. 18, 2015), https://iopscience.iop.org/article/10.1088/1748-9326/10/11/115008/pdf [https://perma.cc/HZ3V-VUVU] [hereinafter Mohai & Saha II].

exploring the relationship between the location of polluting sources, on the one hand, and race and class on the other.[5] One article reviewed the significant body of research documenting racial and economic disparities in the distribution of environmental hazards and discussed the need for longitudinal research to evaluate the chicken and egg issue.[6] The other article responded to that call, reporting on a national study designed to evaluate whether distributional inequities are caused by siting decisions, post-siting demographic change, or a combination of both. The authors analyzed longitudinal data on commercial hazardous waste facilities, which allowed for comparison of the demographic makeup of neighborhoods over time, and found "strong evidence of disparate siting" of facilities—that is, support for the proposition that facilities move to communities of color. Ultimately, Mohai and Saha conclude that "racial discrimination and sociopolitical explanations (i.e., the proposition that siting decisions follow the 'path of least resistance') best explain present-day inequities."[7]

This finding should not be surprising to readers of either Richard Rothstein's recent book *The Color of Law: A Forgotten History of How Our Government Segregated America*[8] or Dorceta Taylor's *Toxic Communities: Environmental Racism, Industrial Pollution, and Residential Mobility*.[9] Rothstein and Taylor both trace the role of racially explicit federal, state, and local government policies in creating racial segregation, which set the stage for the concentration of polluting sites in communities of color across the country.[10] Their books examine the impact of zoning ordinances, which designated land adjacent to neighborhoods with substantial African American populations and other communities of color as industrial and, therefore, appropriate for the siting of machine shops, waste dumps, and other polluting sources.[11] Rothstein attributes inequities in zoning and other racially discriminatory government actions[12] and the location of toxic waste facilities to a desire by white decision-makers "to avoid the deterioration of white neighborhoods when African American sites were available as alternatives."[13] Based on this record of state action creating and contributing to racial segregation, Rothstein argues that government has "a constitutional obligation to remedy the effects of government-sponsored segregation."[14] These effects include disparities in the distribution of toxic sources.

As Dr. Robert Bullard, one of the founders of the Environmental Justice Movement, wrote, "White racism . . . has made it easier for black residential areas to become the dumping grounds for

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5 *See* Mohai & Saha II, *supra* note 4.

6 Mohai & Saha I, *supra* note 4, at 7.

7 Mohai & Saha II, *supra* note 4, at 1.

8 RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

9 DORCETA TAYLOR, TOXIC COMMUNITIES: ENVIRONMENTAL RACISM, INDUSTRIAL POLLUTION, AND RESIDENTIAL MOBILITY (2014).

10 *See* ROTHSTEIN, *supra* note 8, at vii-viii, 48-57; TAYLOR, *supra* note 9.

11 *See* ROTHSTEIN, *supra* note 8, at 49; TAYLOR, *supra* note 9, at 150.

12 The phrase "zoning and other racially discriminatory government actions" is a stand-in for the of array of federal, state, and local policies that established, contributed to, and maintained racial discrimination, including not only zoning at the local level but explicit racial restrictions on Federal Housing Administration and Veterans Administration insurance, for example. *See id.* at 13.

13 *Id.* at 55.

14 *Id.* at xv.

all types of health-threatening toxins and industrial pollution."[15] Rothstein and Taylor confirm Bullard's observation, connecting state actions with "the frequent existence of polluting industry and toxic waste plants in African American communities. . . ."[16] The academic literature, in short, has largely coalesced around the view that environmental hazards are foisted on disadvantaged communities, and often on communities of color. This recent scholarship, however, has failed to revisit the use of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race and ethnicity by recipients of federal funds, though Title VI is one of the most salient tools available to remedy the environmental impacts of the constitutional violations they describe.

After eight years of an administration that professed commitment to environmental justice,[17] and with the forced pause created by the 2016 election and installation of the Trump Administration, it is time to evaluate why EPA has failed to develop a forceful civil rights compliance and enforcement program and what can be done. EPA's failures—even during the Obama Administration—are well documented,[18] as is the need for civil rights enforcement in the environmental space.[19] Analysis of the causes of administrative failure and possible solutions, though, has not received similar scholarly attention: with so many environmental decision-makers receiving federal funds—particularly from EPA—why hasn't EPA enforced civil rights, and is there any hope for change? These are the central questions of this article. Over time, insufficient attention has been paid to the structure, history, and culture of the civil rights program at EPA. This article delves into greater detail to provide the raw material for the long-term work of shaping a new, more effective approach to civil rights enforcement to remedy environmental injustices.[20]

Three brief initial sections of the article provide background for the analysis and recommendations. Part I touches on the core problem of racial inequality in the environmental context. Documentation of disparities on the basis of race and ethnicity in exposure to environmental health hazards over the last few decades serves as the factual predicate for this article. Part II provides a primer on Title VI and explains how Title VI can and should be used to redress these disparities. Part II also explains the legal context that creates reliance on agency compliance

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15 ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 7 (3d ed. 2000).

16 ROTHSTEIN, *supra* note 8, at 56. *See* TAYLOR, *supra* note 9, at 33-46.

17 *See, e.g.*, Nancy Sutley, *A Promise of Environmental Justice for All Americans*, WHITE HOUSE BLOG (Dec. 20, 2010, 7:55 PM), https://obamawhitehouse.archives.gov/blog/2010/12/20/a-promise-environmental-justice-all-americans [https://perma.cc/ZQP5-MCLE] (describing the Obama Administration's "first of its kind" White House Forum on Environmental Justice).

18 *See infra* Parts I & II.

19 *See infra* Part III.

20 This article focuses on discrimination on the basis of race and ethnicity by programs and activities receiving financial assistance from EPA and thus subject to Title VI and EPA's Title VI regulations. EPA's External Civil Rights Compliance Office is also charged with administering and enforcing other anti-discrimination provisions, including under Section 504 of the Rehabilitation Act of 1973 and Section 13 of the Federal Water Pollution Control Act Amendments of 1972, prohibiting discrimination on the basis of disability by programs or activities receiving federal funds and discrimination based on sex by programs or activities receiving funds under the Clean Water Act, respectively. Over the years few complaints have been filed pursuant to these statutes and EPA's record of enforcement has received scant attention. *See* Yue Qiu & Talia Buford, *Decades of Inaction*, CENTER FOR PUB. INTEGRITY (Aug. 3, 2015), https://www.publicintegrity.org/2015/08/03/17726/decades-inaction [https://perma.cc/3NMA-4UGG] (featuring a data base with race, sex, and disability discrimination complaints filed with EPA between 1996 and 2014, with the category of complaint identified with the code R, D, or S in the location of the third digit).

and enforcement activities. Part III evaluates EPA's record in this area.

Part IV addresses theories and explanations for the failure of EPA's compliance and enforcement program: (1) that historically, EPA failed to build expertise in enforcing the Civil Rights Act; (2) exceptionalism—the claim that EPA runs delegated programs and thus has a unique relationship with the states and other recipients of federal funds; (3) a variation on exceptionalism—that as an agency populated by scientists, engineers, and lawyers, the EPA is less committed to civil rights; and (4) that the structural characteristics of EPA's civil rights office have undermined its effectiveness. The article ultimately argues that all of these factors have contributed to a now deeply seated agency culture. In this context, EPA has not developed the will to spend political chits on civil rights enforcement.[21] This Part reframes the conventional account of *why* EPA has failed to serve as a meaningful bulwark against environmental injustice, raising questions about EPA's capacity for change and whether responsibility for Title VI compliance and enforcement should be transferred to a different governmental actor.

Part V answers the question what can be done. Residents of environmentally overburdened communities can and should continue to use a range of legal strategies in their struggle to be heard and to address the concentration of polluting sources in their neighborhoods. At the same time, Part V argues for long awaited improvements in EPA's civil rights enforcement program as well as legislative action to restore the private right of action to enforce agency regulations in court.[22] These changes would improve the current state of civil rights enforcement in the environmental justice context. In addition, the article argues that the scale and intractability of the problem call for wholesale reconceptualization of federal civil rights enforcement to create greater accountability and standardization across agencies. Two approaches meriting further exploration include a strengthened coordination role at the Department of Justice and the creation of an independent agency modeled after the Equal Employment Opportunity Commission ("EEOC"), which is charged with enforcement of the nation's laws prohibiting employment discrimination.[23] Either approach would centralize civil rights enforcement responsibility in order to build capacity and decrease reliance on often underequipped offices of civil rights in dispersed agencies.

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[21] The argument that EPA lacks the political will to enforce civil rights law is not intended to suggest that Lisa Jackson, Gina McCarthy, or any other Administrator or member of EPA's leadership opposed civil rights enforcement or otherwise did not favor strong action against discrimination. To the contrary, both Jackson and McCarthy, in particular, have strong personal commitments to civil rights enforcement. The terms "political will" and "culture" are used with trepidation, in recognition of the fact that they can be vague and slippery. Their use here relies on concept of political will described in Lori Ann Post, Amber Raile & Eric Rail, *Defining Political Will*, 38 POL. & POL'Y 653 (2010), which focuses on having a sufficient set of key decisionmakers with authority, capacity, and legitimacy to achieve an outcome, developing a common understanding of the initiative to achieve that outcome, and commitment of support for the effort. The term culture is used here to mean a system of shared values, assumptions, and beliefs that guide how people behave in an organization. This article argues that explanations that are often given to justify EPA's failure to enforce civil rights—particularly, its relationship with the states, the characteristics of personnel, or structural issues—are each inadequate. Each has, instead, contributed to an acceptance of the status quo and a failure to prioritize reform of the civil rights program, which this article describes as a lack of political will.

[22] *See, e.g.,* Environmental Justice Act of 2017, S. 1996, 115th Cong. § 2 (2017) (establishing "a private right of action under title VI of the Civil Rights Act . . . to challenge discriminatory practices").

[23] 42 U.S.C. § 2000e-4 (2012) (creating the Equal Employment Opportunity Commission).

I. RACIAL INEQUALITY IN EXPOSURE TO HEALTH HAZARDS

Scientific study of racial, ethnic, and class disparities[24] in the distribution of environmental hazards has exploded in the years since the publication of *Toxics Waste and Race*.[25] As Mohai and Saha wrote in the preface to their 2015 review of the literature:

> Environmental justice has become firmly established in the academic literature. In the past two decades, hundreds of journal articles and books have been published on this topic across multiple disciplines. Systematic reviews of quantitative studies confirm the existence of racial and socioeconomic disparities in the distribution of a wide variety of pollution and environmental hazards.[26]

Although scholarship in the 1990s raised questions about the findings of *Toxics Wastes and Race* and, particularly, the relationship between race or ethnicity and the location of toxic facilities,[27] today scholars widely accept that exposure to pollution from hazardous waste facilities and a range of other toxic sources vary with race, ethnicity, and class.[28] A review paper published in 2002 in the *Annual Review of Public Health* by Cornell University researchers Gary Evans and Elyse Kantrowitz examined evidence of the relationship between socioeconomic factors and exposure. The authors found "that the poor and especially the non-white poor bear a disproportionate burden of exposure to suboptimal, unhealthy environmental conditions in the United States."[29] They continued:

> Moreover, the more researchers scrutinize environmental exposure and health data for racial and income inequalities, the stronger the evidence becomes that grave and widespread environmental injustices have occurred throughout the

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[24] Title VI prohibits discrimination, exclusion, and the denial of benefits on the basis of "race, color, or national origin." 42 U.S.C. § 2000d (2012). Each concept—race, color, and national origin—has its own complex and problematic history in the United States. For purposes of brevity, this paper will at times take the liberty of using the terms "race" and "racial discrimination" to refer to all three classifications (race, color, and national origin) and discrimination on all three bases.

[25] *See, e.g.*, Mohai & Saha I, *supra* note 4, at 1; LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT, 167-83 (2001) (containing an annotated bibliography of studies and articles that document and describe the disproportionate impact of environmental hazards by race and income).

[26] Mohai & Saha I, *supra* note 4, at 1.

[27] *See, e.g.*, Douglas L. Anderton et al., *Environmental Equity: The Demographics of Dumping*, 31 DEMOGRAPHY 229, 229 (1994); Been, *supra* note 4, at 1014 (confirming evidence of disparate siting but arguing that such evidence is flawed and that market forces rather than race may explain disparities).

[28] *See, e.g.,* Mohai & Saha I, *supra* note 4, at 1; Robert J. Brulle & David N. Pellow, *Environmental Justice: Human Health and Environmental Inequalities*, 27 ANN. REV. PUB. HEALTH 103, 106 (2006); Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480, 481-82 (2018) (finding significant disparities in the distribution of particulate matter emitting facilities on the bases of race and poverty status, though more pronounced on the basis of race).

[29] Gary W Evans & Elyse Kantrowitz, *Socioeconomic Status and Health: The Potential Role of Environmental Risk Exposure*, 23 ANN. REV. OF PUB. HEALTH 303, 323 (2002).

United States.[30]

Research has found regional variations in the strength of associations between race or ethnicity, class, the location of toxic sources, and exposure, though there remain gaps in the scientific literature.[31]

Evans and Kantrowitz's review highlights that race and income are predictors of exposure to environmental pollutants through a range of pathways (that is, air, water, dust), locations (for example, home, work and school) and, also, from a variety of polluting sources.[32] Additional research examines the connection between exposure and adverse health outcomes. In 2006, for example, Rachel Morello-Frosch and Bill Jesdale, from the University of California at Berkeley, examined the relationship between ambient air toxics and estimated cancer risks and found "a persistent relationship between increasing levels of racial/ethnic segregation and increased estimated cancer risk associated with ambient air toxics."[33] Case studies, such as Steve Lerner's depictions of Port Arthur and Corpus Christi, Texas and other areas that have experienced severe contamination problems, offer additional insight into the role of race and class in the creation of what Lerner calls "Sacrifice Zones."[34] Lerner provides a close-up look into how environmental inequities evolved in places such as Ocala and Pensacola, Florida, and how they stubbornly persisted even after Jim Crow residential segregation was declared illegal.[35]

This body of research from multiple fields—including epidemiology, toxicology, and sociology, to name but a few—provides the backdrop for the author's work with an Environmental Justice Clinic at Yale Law School and Capstone at the Yale School of Forestry and Environmental Studies. The Clinic served as counsel, for example, to the North Carolina Environmental Justice Network, Rural Empowerment Association for Community Help (REACH), a community-based organization in the eastern portion of North Carolina, and Waterkeeper Alliance, Inc., on a civil rights complaint challenging a decision by the state Department of Environmental Quality ("DEQ") to allow more than 2,100 hog facilities to operate without adequate protections for the health and welfare of community residents.[36] After detailing the adverse effects of swine facilities on people

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30 *Id.*

31 *See* Klara Zwickl et al., *Regional Variation in Environmental Inequality: Industrial Air Toxics Exposure in US Cities*, 107 ECOLOGICAL ECON. 494, 494 (2014). Notably, also, various research aims to examine the relative contribution of community race and class as competing explanations for the unequal distribution of environmental hazards, but as sociologist Robert Brulle and environmental studies scholar David Pellow wrote, "[T]he distribution of environmental harm does involve, and has always involved, both race and class." Brulle & Pellow, *supra* note 28, at 3.15.

32 Evans & Katrowitz, *supra* note 29, at 303.

33 Rachel Morello-Frosch & Bill M. Jesdale, *Separate and Unequal: Residential Segregation and Estimated Cancer Risks Associated with Ambient Air Toxics in U.S. Metropolitan Areas*, 114 ENVTL. HEALTH PERSP. 386, 390 (2006); *see also* Rachel Morello-Frosch et al., *Understanding the Cumulative Impacts of Inequalities in Environmental Health: Implications for Policy*, 30 HEALTH AFF. 879, 880 (2011) ("Greater exposure to environmental hazards is one driver of health disparities found among communities of racial or ethnic minorities and those of low socioeconomic status.").

34 STEVE LERNER, SACRIFICE ZONES 73-118 (2010).

35 *Id.* at 38–39.

36 Letter from Marianne Engelman Lado, Earthjustice, & Jocelyn D'Ambrosio, Earthjustice, to Gina McCarthy, EPA, & Velveta Golightly-Howell, EPA, at 1 (Sept. 3, 2014) (complaint, EPA OCR File No. 11R-14-R4, filed on behalf of the North Carolina Environmental Justice Network, REACH) [hereinafter North Carolina Swine Facility Complaint]. Both Earthjustice and the Julius L. Chambers Center for Civil Rights serve as co-counsel on behalf of the

living, recreating, attending church, and going to school in nearby communities,[37] the complaint alleged that in North Carolina, "permitted swine facilities adversely affect a disproportionate number of African Americans, Latinos, and Native Americans as compared to the general population."[38] The foundation for this claim had been laid by more than a decade of research by epidemiologists Steve Wing and Maria C. Mirabelli, then at the School of Public Health at the University of North Carolina, and their colleagues, who conducted multiple studies and published peer-reviewed papers on the disproportionate impacts of the industry on people of color and economically disadvantages residents and school children.[39]

II. THE APPLICABILITY OF CIVIL RIGHTS LAW TO THE ENVIRONMENTAL JUSTICE CONTEXT

Even if the salience of race is a legacy of the country's history of discrimination and, today, race remains a significant predictor of exposure to sources of environmental pollutants, what is the added value of civil rights enforcement to remedy racial disparities? This section addresses two sets of questions. First, on a nuts and bolts level, how does Title VI of the Civil Rights Act of 1964 apply in the environmental context? Second, even if civil rights law applies, are environmental laws sufficiently protective of human health and the environment for all people? Why even invoke civil rights laws in the environmental justice context?

A. Enforcement of Title VI of the Civil Rights Act of 1964

Briefly, Title VI broadly prohibits discrimination, exclusion, or the denial of benefits on the basis of race, color or national origin by recipients of federal funds, including state and local governments as well as private entities.[40] The statute authorizes each federal department or agency[41] that gives financial assistance to issue rules and regulations.[42] Each agency is further authorized to effectuate compliance by terminating or refusing to grant funding or "by any other means authorized by law."[43]

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complainants.

37 *Id.* at ¶¶ 74-128.

38 *Id.* at ¶ 129.

39 *See, e.g.,* Maria C. Mirabelli et al., *Race, Poverty, and Potential Exposure of Middle-School Students to Air Emissions from Confined Swine Feeding Operations*, 114 ENVTL. HEALTH PERSP. 591, 595 (2006), (finding that North Carolina's swine facilities are located closer to schools enrolling higher percentages of non-white and economically disadvantaged students); Steve Wing et al., *Environmental Injustice in North Carolina's Hog Industry*, 108 ENVTL. HEALTH PERSP. 225, 229 (2000) (finding that North Carolina's intensive hog confinement operations are located disproportionately in communities with higher levels of poverty, higher proportions of non-white persons, and higher dependence on wells for household water supply).

40 42 U.S.C. § 2000d (1964) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

41 Departments and agencies will be referred to as agencies.

42 42 U.S.C. § 2000d-1 (1964) (empowering each department and agency, subject to the approval of the president, to effectuate the provisions of the law "by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute . . . .").

43 *Id.*

From the earliest years of civil rights enforcement under Title VI, federal agencies used the threat of withholding funding and their powers of persuasion to change discriminatory practices.[44] In *Health Care Divided: Race and Healing a Nation*, David Barton Smith recounted the decision by John W. Gardner, then Secretary of the U.S. Department of Health, Education and Welfare ("HEW"), to assign 750 staff from all areas of the Department to the Office of Equal Health Opportunity to ensure that all hospitals participating in Medicare comply with Title VI.[45] Gardner assembled a "ragtag [] army" of scientists, veterinarians, researchers and other staff from across HEW to identify hospitals with racially discriminatory practices and pressure them to comply with the law.[46] Staff traveled to the hospitals, asked for compliance information, filed reports, and demanded that hospitals replace "white" and "colored" signs with new labels, such as "exit" and "entrance."[47] While the effort could not and did not root out the many forms of discriminatory practices that contribute to racial disparities in access to health care,[48] HEW communicated its intent to use its leverage to integrate hospitals. As a result of the pressure, and without litigation or even withholding federal funds, "[m]ore than one thousand hospitals had been quietly, uneventfully, and successfully desegregated."[49]

Communicating the will and intent to enforce the law continues to be the hallmark of federal civil rights enforcement.[50] For example, during the period 2009-2016, the Office for Civil Rights ("OCR") at the U.S. Department of Education resolved more than 66,000 civil rights cases, including 16,899 Title VI claims, and initiated more than 200 affirmative compliance reviews.[51] Working with the Department of Justice, OCR has historically and continues to litigate to enforce Title VI and other civil rights laws.[52] OCR's willingness to go to court no doubt reinforces the message to recipients that the Department of Education is serious about civil rights compliance. At the same time, OCR resolves thousands of cases without resorting to litigation through resolution agreements and other forms of voluntary compliance agreements.[53]

Pursuant to their statutory authority, federal agencies promulgated largely consistent

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44 DAVID BARTON SMITH, HEALTH CARE DIVIDED: RACE AND HEALING A NATION 134–42 (1999) (stating that hospitals changed explicitly segregatory practices in 1966 in response to pressure from the U.S. Department of Health, Education & Welfare).

45 *Id.* at 132.

46 *Id.* at 133–34.

47 *Id.* at 137.

48 *See* INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE 1 (2003); Marianne Engelman Lado, *Unfinished Agenda: The Need for Civil Rights Litigation to Address Race Discrimination and Inequalities in Health Care Delivery*, 6 TEX. F. ON C.L. & C.R. 1, 1 (2001).

49 SMITH, *supra* note 44, at 141.

50 Statutory language requires that agencies notify recipients of federal funds before taking action to withhold federal funds and attempt to secure compliance by voluntary means. 42 U.S.C. § 2000d-1 (1964).

51 U.S. DEPARTMENT OF EDUCATION, ACHIEVING SIMPLE JUSTICE: HIGHLIGHTS OF ACTIVITIES, OFFICE FOR CIVIL RIGHTS, 2009-2016, at 2, 3 fig.2 (2017), https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf [https://perma.cc/DHX9-9DUR]. The greatest number of claims handled by OCR are brought for discrimination on the basis of disability under the Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act. *Id.* at 3 fig.2.

52 *See* U.S. DEPARTMENT OF JUSTICE, EDUCATIONAL OPPORTUNITIES CASES, https://www.justice.gov/crt/educational-opportunities-cases [https://perma.cc/Z5M7-ENLS].

53 U.S. DEPARTMENT OF EDUCATION, ACHIEVING SIMPLE JUSTICE, *supra* note 51, at 2, 3.

regulations that define terms, provide a non-exclusive list of prohibited activities, outline what assurances of compliance and record-keeping recipients are required to file or maintain, and outline both how agencies will conduct investigations and what procedures they will follow to effect compliance.[54] Substantively, each agency's regulations prohibited recipients from taking actions with the purpose or effect of subjecting individuals to discrimination.[55] *Lau v. Nichols* and its progeny made clear that Title VI also requires recipients of federal funds to provide access to programs and activities to people who are limited English proficient (LEP) through translation and interpretation services.[56]

Although Title VI prohibits discrimination by recipients of federal funds, whether public or private entities, the vast majority of claims filed pursuant to Title VI and EPA implementing regulations have claimed that state, regional and local agencies have discriminated.[57] Complainants frequently assert that these agencies approved permits for polluting facilities in already environmentally overburdened communities of color that will have an adverse disproportionate impact on the basis of race and that recipients failed to ensure compliance by conducting an analysis of whether the permit would have a disparate impact.[58] Complainants also file claims alleging that

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[54] *See, e.g.,* 28 C.F.R. Part 42 (2000) (DOJ); 40 C.F.R. Part 7 (1984) (EPA); 34 C.F.R. Part 100 (1980) (Education).

[55] *See, e.g.,* 28 C.F.R. § 42.104(b)(2)&(3) (2003) (DOJ); 40 C.F.R. § 7.35(b)&(c) (2003) (EPA); 34 C.F.R. § 100.3(b)(2)&(3) (1980) (Education). Notably, HEW regulations promulgated in 1965 prohibited proscribed methods of administration with a disparate impact. *See* Part 80 – Nondiscrimination in Federally-Assisted Programs of the Department of Health, Education, and Welfare – Effectuation of Title VI of the Civil Rights Act of 1964, 30 Fed. Reg. 35, 84 (Jan. 5, 1965) (recipients "may not directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination . . . ."). As discussed below, *infra* notes 104–106, in Alexander v. Sandoval, 532 U.S. 275 (2001), the Supreme Court held that Title VI afforded no cause of action to enforce agency regulations in court. Justice Scalia's opinion raised questions about the validity of the regulations promulgated under Title VI that prohibited actions with an unjustified disparate impact. *Id.* at 279. The Court's subsequent 5-4 decision in Tex. Dep't of Housing and Community Affairs v. Inclusive Communities Project, 135 S. Ct 2507, 2525 (2015), ruled that disparate impact claims were cognizable under the Fair Housing Act, at least temporarily alleviating uncertainty surrounding the validity of the disparate impact standard, albeit in the context of a parallel statute.

[56] *See* Lau v. Nichols, 414 U.S. 563, 568 (1974); *see also* Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,457 (June 18, 2002).

[57] *See* Qiu & Buford, *supra* note 20 (cataloguing disposition of complaints over seventeen year period between 1996 and 2013). Claims against private entities are typically dismissed for jurisdictional reasons. *See, e.g.*, Closure Letter from Velveta Golightly-Howell, EPA, to Patricia A. Woertz, Archer Daniels Midland Company, at 1 (March 7, 2014), https://www.documentcloud.org/documents/2162670-epa_16r-13-r5.html [https://perma.cc/BYH9-VFC8] (rejecting allegations on grounds that Archer Daniels Midland was not a recipient of federal funds).

[58] The docket of the Environmental Justice Capstone at Yale includes cases raising disparate impact claims, for example. *See, e.g.*, North Carolina Swine Facility Complaint, *supra* note 36, at 11 (alleging permit approved by the North Carolina Department of Environmental Quality will have a disparate impact and that DEQ failed to conduct a disparate impact analysis); Letter from David A. Ludder to Vicki Simons, EPA, at 1 (May 30, 2013) (alleging, on behalf of residents of Uniontown, that permit approved by Alabama Department of Environmental Management (ADEM) will have a disparate impact and that ADEM failed to conduct a disparate impact analysis); Letter from Deborah Reade 4 (Sept. 12, 2002) (alleging on behalf of Citizens Against Radioactive Dumping disparate impact, intentional discrimination, and failure to provide language assistance).

recipients intentionally discriminate,[59] engage in retaliatory or intimidating activities,[60] or fail to provide language assistance.[61]

B. Why Environmental Laws Are Inadequate to Address Racial Disparities

Over time, EPA has struggled with the question whether environmental health standards under the Clean Air Act or other environmental laws are sufficiently protective of human health as to serve as a defense to a claim that a permit for a polluting facility has an adverse impact on the basis of race or ethnicity.[62] If a recipient is not violating an environmental health standard set by EPA, how can EPA find that its action has an adverse impact? Isn't stronger environmental enforcement across the board sufficient? Don't environmental laws guarantee clean water, clean air? Does civil rights enforcement just distract from the goal of EPA, "to protect human health and the environment"?[63]

The argument that civil rights enforcement is not necessary or, worse, is a distraction of needed resources, relies on a belief that if fully implemented and enforced, environmental laws are sufficiently protective. Most broadly, though, environmental laws have failed to eliminate the adverse and disparate impacts on communities of color that Title VI and its implementing regulations seek to forbid. To use an analogy, many states have a constitutional obligation to provide

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[59] *See* Letter from Deborah Reade, *supra* note 58; Letter from Fr. Phil Schmitter & Sr. Joanne Chiaverini, St. Francis Prayer Center, to William Rosenberg, EPA (Dec. 15, 1992) (on file with author) (alleging intentional discrimination and discriminatory impact).

[60] *See, e.g.,* Letter from Marianne Engelman Lado, Earthjustice, to Lilian Dorka, EPA (Aug. 19, 2016) (intimidation complaint on behalf of individuals against the Alabama Department of Environmental Management) [hereinafter ADEM intimidation complaint]; Letter from Marianne Engelman Lado, Earthjustice, to Lilian Dorka, EPA (July 11, 2016) (intimidation complaint filed on behalf of the North Carolina Environmental Justice Network, REACH, & Waterkeeper Alliance, Inc. against the North Carolina Department of Environmental Quality) [hereinafter *NC intimidation complaint*].

[61] *See, e.g.,* Letter from Deborah Reade, *supra* note 58, at 20-22.

[62] Letter from Ann E. Goode, EPA, to Father Phil Schmitter & Sister Joanne Chiaverini, St. Francis Prayer Center, at 3-5 (Oct. 30, 1998), https://www.documentcloud.org/documents/2162464-epa_05r-98-r5.html [https://perma.cc/2NKA-8LRH]; *see also* Order Denying Review, at 12-13, *In re* Select Steel Corporation of America Permit No. 579-97, Docket No. PSD 98-21 (Sept. 11, 1998), https://yosemite.epa.gov/oa/eab_web_docket.nsf/Unpublished~Final~Orders/1890AA3427C194748525706C0053DB75/$File/select.pdf [https://perma.cc/5W9T-2CTT]; Draft Policy Paper: Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Thresholds, and Role of Complainants and Recipients in the Title VI Complaints and Resolution Process, 78 Fed. Reg. 24,739, 24,739 (Apr. 26, 2013) (proposing to "change the way EPA assesses 'adversity' by having the Agency refrain from applying a 'rebuttable presumption' in certain Title VI investigations"); *but see* CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION ET AL., Comment Letter on U.S. Environmental Protection Agency Draft Policy Papers, Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Standards (Released Jan. 24, 2013); Title VI of the Civil Rights Act of 1964: Draft Role of Complainants and Recipients in the Title VI Complaint and Resolution Process (Released Jan. 25, 2013), at 4 (Mar. 20, 2013) (welcoming EPA's move away from a rebuttable presumption, but noting that—even with EPA's proposed changes—the agency "continues to relate a finding of adversity under Title VI to the question whether a recipient has complied with other statutory or regulatory standards") [hereinafter *California Rural Legal Assistance Foundation Comment*]; Luke W. Cole, *"Wrong on the Facts, Wrong on the Law:" Civil Rights Advocates Excoriate EPA's Most Recent Title VI Misstep*, 29 ENVTL L. REP. 10,775–6 (1999).

[63] EPA, *Our Mission and What We Do*, https://www.epa.gov/aboutepa/our-mission-and-what-we-do [https://perma.cc/6WGJ-AUAV].

all children with a thorough and effective or sound basic education. Yet in reality, state and local educational programs may reinforce rather than ameliorate, or perhaps just insufficiently mitigate inequality in education. We recognize that despite across-the-board responsibilities, inequalities on the basis of race and ethnicity in educational opportunities continue. Given the power of the argument that enforcement of environmental laws precludes the need for attention to civil rights in this context,[64] this section will address the inadequacy of reliance on environmental laws as a means of ensuring racial equality and, particularly, achieving procedural and distributional justice in the environmental context.

As a starting point, environmental laws do not address whether people are treated differently on the basis of race in environmental decision-making processes. One of the first Title VI complaints filed with the EPA alleged that Michigan's environmental agency engaged in exclusionary practices "making it difficult for people of color . . . to be heard."[65] EPA agreed to investigate whether (a) the state's decision to hold a hearing 65 miles away from Flint, where the new facility would be located, and (b) state decisions as to who would be allowed to speak at a public hearing violated anti-discrimination law.[66] Though the EPA allowed the complaint to languish for more than two decades, it ultimately found that the Michigan Department of Environmental Quality ("MDEQ") discriminated in its treatment of African Americans during the public participation process for the permit.[67] Among other things, the EPA found that African Americans were denied requests to speak while similar requests by whites were granted, and that MDEQ deviated from stated policy by placing armed guards at a later hearing in Flint.[68] Fundamentally, Title VI provides a mechanism for intervention when state and local governments fail to treat people equally on the basis of race or national origin.[69]

Not only does reliance on enforcement of environmental laws fail to address disparate treatment, but, as in the educational context, significant gaps in environmental protection create the space for exacerbating racial inequalities in the distribution of environmental benefits and burdens, especially when layered on top of geographic patterns of racial segregation created by racially explicit federal, state, and local government policies.[70] Significantly, environmental statutes, regulations, and standards are the outcome of political and administrative processes, which take into account statutory goals and an array of competing interests and criteria. The EPA has acknowledged that there is no safe exposure level for lead, for example: even small, discrete doses can cause adverse health impacts, particularly for children.[71] Indeed, the EPA has identified a "broad range of

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64 As described below, *infra* at note 73, the belief that enforcement of environmental laws will sufficiently address civil rights concerns led to the conflation of standards for assessing whether decisions have adverse impacts that are cognizable under the civil rights law with environmental standards.

65 Letter from Dan J. Rondeau, EPA, to Kary L. Moss, Sugar Law Center for Economic and Social Justice, at 2-3, EPA File No. 1R-94-R5, 2-3 (Jan. 31, 1995) (case acceptance letter).

66 *Id.*

67 Letter from Lilian S. Dorka, EPA, to Heidi Grether, MDEQ, at 3 (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/M7KT-FTAD] (closure letter for EPA File No. 01R-94-R5).

68 *Id.* at 3, 8-9, 15.

69 *See also* Tony LoPresti, *Realizing the Promise of Environmental Civil Rights: The Renewed Effort to Enforce Title VI of the Civil Rights Act of 1964*, 65 ADMIN. L. REV. 757, 770 (2013).

70 *See supra* notes 6–15 and accompanying text.

71 National Ambient Air Quality Standards for Lead, 73 Fed. Reg. 66,964, 66,972 (Nov. 12, 2008)

adverse health effects" from lead emissions, including "damage to the central nervous system, cardiovascular function, kidneys, immune system, and red blood cells."[72] Yet the National Ambient Air Quality Standard (NAAQS) for lead is not zero, and lack of evidence that emissions from a facility will violate the NAAQS standard does not mean that such emissions are safe, nor should it preclude a finding that a facility will have an adverse impact. [73]

To examine the adequacy of environmental statutes in addressing racial disparities in exposure to sources of environmental pollution, it is worth returning to the complaint filed by groups in North Carolina against DEQ claiming that its decision to allow more than 2,100 hog facilities to operate on North Carolina's coastal plain has an unjustified disparate impact on the basis of race. Surely the alphabet soup of federal environmental laws, including the Clean Water Act (CWA), Resource Conservation and Recovery Act (RCRA), the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Clean Air Act (CAA), the Comprehensive Environmental Response Compensation and Liability Act (CERCLA, otherwise known as the Superfund law), or the Emergency Planning and Community Right to Know Act (EPCRA), should provide ample protection, particularly when combined with state nuisance laws. Without delving into the inadequacies of each of these laws as applied to the disproportionate impact of the inordinate amount of swine waste on communities of color in eastern North Carolina, a few observations are in order. For years before filing their complaint, residents of the region complained to DEQ that the high concentration of swine facilities generated staggering quantities of feces and urine, which are stored in open-air cesspools, called lagoons, and sprayed on fields with high volume spreaders. Residents can live within three miles of upwards of ten facilities and, thus, ten such cesspools for facilities with 2,000 pigs or more. [74] Residents attest that the stench can be unbearable, and numerous studies over time have documented the adverse impacts of the industry on air and water.[75] The Clean Water Act prohibits discharge of a pollutant from a point source—explicitly including confined animal feeding operations such as the swine facilities in eastern North Carolina—into waters of the United States,[76] and residents and clean water advocates have, in fact, investigated and brought litigation to enforce the law.[77] Yet enforcement actions face significant

(recognizing that no safe threshold exists); Lead; Identification of Dangerous Levels of Lead, 66 Fed. Reg. 1206, 1215 (Jan. 5, 2001).

72 Air Quality Designations for the 2008 Lead (Pb) National Ambient Air Quality Standards, 75 Fed. Reg. 71,033, 71,035 (Nov. 22, 2010).

73 Indeed, EPA revisits and has tightened the air quality standard for lead over time. *See* 73 Fed. Reg. at 66,964. Notably, this is precisely the reasoning used by EPA in *Select Steel*, the 1998 decision establishing a rebuttable presumption that compliance with environmental laws is a defense to a disparate impact claim. *See* Letter from Goode to Schmitter, *supra* note 62, at 3–5. In *Select Steel*, EPA determined that lead emissions from the proposed facility would "not affect the area's compliance with the NAAQS for lead" and that since the NAAQS was set "at a level presumptively sufficient to protect public health," no affected population would suffer adverse impacts "within the meaning of Title VI." *Id.* at 4.

74 *See* Letter from North Carolina Swine Facility Complaint, *supra* note 36, at Exhs. 27, 35 (declarations of community residents with maps showing number of swine operations within 2 and 3 mile radius).

75 *Id.* at 2.

76 Clean Water Act, 33 U.S.C. § 1362(14) (2019).

77 John Deike, *Waterkeeper Alliance: Factory Farm Swine Operation Violates Clean Water Act*, ECOWATCH (Mar. 14, 2014), https://www.ecowatch.com/waterkeeper-alliance-factory-farm-swine-operation-violates-clean-water-1881877751.html [https://perma.cc/XHV2-2ETB] (notice of intent to sue under the CWA sent to facility); *see generally* Pure Farms, *Pure Waters: North Carolina*, WATERKEEPER ALLIANCE, https://waterkeeper.org/campaign/pure-farms-pure-

hurdles. Initially, although neighbors may be impacted by odors and the flow of waste from sprayfields to ditches and waterways, they lack access onto the property of nearby facilities to identify potential discharges. Even when advocates monitor pollutants such as fecal coliform and find high levels downstream from facilities, they must overcome a number of legal barriers to bringing claims under the Clean Water Act. To prove a discharge, for example, they must show that pollutants are entering jurisdictional "waters of the United States"[78] and that the discharge will not be considered "agricultural stormwater" and, thus allowed under the Clean Water Act.[79]

These barriers to Clean Water Act enforcement fail to capture the full scale of the gap between the promise of environmental protection and the reality. In theory, CERLA and EPCRA would require facility owners and operators to report releases from swine operations over certain threshold levels. However, a 2008 rule finalized in the closing hours of the Bush Administration largely exempted confined animal feeding operations from the rule.[80] Moreover, animal operations are all but exempted from coverage under the Clean Air Act. [81] Advocacy groups have filed a number of petitions with EPA to address issues of air pollution from animal operations under the CAA. One, for example, filed in 2009, asked EPA to list emissions from CAFOs—including hydrogen sulfide, ammonia, particulates, volatile organic compounds, methane, and nitrogen oxide—as air pollutants that endanger public health and welfare.[82] The listing would, in turn, require EPA to issue new regulatory standards for CAFOs.[83] The point here is not to debate the merits of additional regulation but, rather, to suggest that the current regime of environmental laws leaves significant gaps in protection and does not negate the potential for disparate impacts on the basis of race.[84]

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waters/north-carolina/ [https://perma.cc/8PBU-7VJ2].

[78] *See About Waters of the United States*, EPA, https://www.epa.gov/wotus-rule/about-waters-united-state [https://perma.cc/R9QG-HM9D] (EPA interpretation of jurisdictional waters under the Clean Water Act).

[79] Alt v. EPA, 979 F. Supp. 2d 701, 706–07 (N.D.W. Va. 2013); Alt v. EPA, No. 2:12-CV-42, 2013 WL 5744778, 712 (N.D.W. Va. Oct. 23, 2013) (The definition of point source excludes "agricultural stormwater discharges," even if the discharges are associated with a CAFO; thus, such discharges don't require a permit).

[80] CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. 76,952, 76,9960 (Dec. 18, 2008).

[81] *See* CLAUDIA COPELAND, CONG. RESEARCH SERV., RL32948, AIR QUALITY ISSUES AND ANIMAL AGRICULTURE: A PRIMER 7(2014).

[82] HUMANE SOCIETY OF THE UNITED STATES, PETITION TO LIST CONCENTRATED ANIMAL FEEDING OPERATIONS UNDER CLEAN AIR ACT SECTION 111(B)(1)(A) OF THE CLEAN AIR ACT, AND TO PROMULGATE STANDARDS OF PERFORMANCE UNDER THE CLEAN AIR ACT SECTIONS 111(B)(1)(B) AND 111(D) 4 (2009), http://www.humanesociety.org/assets/pdfs/litigation/hsus-et-al-v-epa-cafo-caa-petition.pdf [https://perma.cc/YL4M-7A57].

[83] *Id.*

[84] Environmental protection is limited by any number of other factors, including scarce resources for enforcement activities and the fact that many communities across the country host multiple polluting sources and thus experience the cumulative impacts of emissions and discharges. *See, e.g.,* Emily L. Dawson, *Lessons Learned from Flint, Michigan: Managing Multiple Source Pollution in Urban Communities*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 367, 367 (2001) (residents of Flint, Michigan, which hosted more than "227 environmentally noxious facilities," argued that regulators failed to consider the environmental health impacts of multiple facilities operating in the area). In a similar vein, in North Carolina, swine facilities are co-located with other polluting facilities, including poultry operations. *See* North Carolina Swine Facility Complaint, *supra* note 36, at 34.

III. A GAPING HOLE: EPA'S POOR RECORD OF CIVIL RIGHTS ENFORCEMENT

In contrast to the centralized structure established to enforce employment discrimination laws under Title VII of the Civil Rights Act of 1964,[85] Title VI empowers each federal department and agency that provides federal financial assistance to programs or activities to effectuate the provisions of the law.[86] Title VI authorizes EPA, along with its sister agencies, to issue rules, regulations and orders, subject to the approval of the President.[87] It is also charged with enforcing the law by terminating or refusing to grant or continue assistance after appropriate due process or by other means.[88]

This decentralized responsibility has given rise to variation in enforcement across agencies, and, indeed, as an independent report by Deloitte Consulting (Deloitte) found in 2011, EPA has a "record of poor performance" of civil rights enforcement.[89] For observers of EPA's role over time, Deloitte's assessment was hardly a surprise: at its founding in 1970, EPA failed to launch an effective civil rights compliance and enforcement program and has faced any number of withering evaluations over time. This section will provide a brief review of EPA's record before assessing theories to explain EPA's poor performance.[90]

A. Poor Performance by Any Measure: EPA's Failure to Enforce Title VI

During President Obama's first term in office, newly appointed Administrator Lisa Jackson contracted with Deloitte to conduct a comprehensive review of EPA's civil rights compliance and enforcement program—including both external and equal employment opportunity (EEO) components—to determine how effectively the agency was meeting its mission and regulatory responsibilities, and to make recommendations.[91] Deloitte's final report identified a number of problems limiting the effectiveness of OCR's external civil rights program, including (1) inadequate adjudication of Title VI complaints, (2) failure to complete compliance checks on recipients in a timely or effective manner, (3) difficulty in building a qualified and knowledgeable staff or defining clear job duties, (4) failure to define relevant competencies, to train staff to develop such competencies, or to track performance and hold staff accountable for effectively executing

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85 42 U.S.C. § 2000e-4 (1995) (establishing the Equal Employment Opportunity Commission); *see also* Fair Housing Act of 1968, Title VIII, 42 U.S.C. 3608 (1988) (vests authority for administering the Fair Housing Act in the U.S. Department of Housing and Urban Development) *see also* Californians for Renewable Energy v. EPA, 2018 WL 158211, *11 (N.D.CA, March 30, 2018) (distinguishing the question of whether or not individual facility operators are in compliance with the Clean Water Act or Clean Air Act from whether a decision to grant a permit has a discriminatory impact on affected communities).

86 42 U.S.C. § 2000d-1 (1964).

87 *Id.*

88 *Id.*

89 DELOITTE CONSULTING LLP, EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS 2 (2011).

90 A full comparison of EPA's civil rights record with the activities and outcomes of sister agencies is part of the author's project but subject for another day. Not surprisingly, responses to the author's Freedom of Information Act requests for case handling data and other materials suggest that record-keeping practices vary tremendously by agency and a comparative analysis requires reconciling distinct measures and types of documents, a process that is underway.

91 DELOITTE, *supra* note 89, at 1. This discussion focuses on EPA's external civil rights program, but the Deloitte report was equally critical of OCR's internal EEO program.

their responsibilities, (5) failure to put in place even the "rudiments of organizational infrastructure," including policies, standardized procedures, or systems, and (6) failure to collect and maintain information needed to meet statutory recordkeeping requirements.[92] Deloitte also faulted the agency for operating "in an insular fashion" that limited its ability to leverage resources in and out of the agency.[93] Deloitte further criticized EPA for failing to conduct outreach to state environmental agencies in order to raise awareness of Title VI obligations.[94] "This set of circumstances," Deloitte concluded, "resulted in a record of poor performance."[95] Among the outcome indicators of inadequate performance, Deloitte cited the small number of cases (6%) that EPA accepted or dismissed within the agency's regulatory 20-day time limit, its backlog of Title VI investigations, "poor investigative quality, and a lack of responsiveness."[96]

Overall, Deloitte found that EPA's record had "damaged its reputation internally and externally."[97] Indeed, as Deloitte noted, EPA's failure to meet its regulatory deadlines and delay in processing complaints has also been the focus of litigation. In *Rosemere Neighborhood Association v. EPA*, the Ninth Circuit lamented that EPA's lax enforcement was "sadly and unfortunately [] typical" in a regime in which OCR often "fail[s] to process a *single* complaint . . . in accordance with its regulatory deadlines."[98] More recently, in 2015, five organizations and one individual from California, Michigan, Texas, New Mexico and Alabama brought another suit against EPA for unreasonably delaying and unlawfully withholding agency action on five administrative cases that had languished at EPA, in each case for more than a decade.[99] In 2018, the presiding court held that EPA had violated regulatory timelines in each of their cases noting that "EPA often takes years to act on a complaint – and even then, acts only after a lawsuit has been filed."[100]

Based on its investigation, Deloitte ultimately concluded:

> OCR seemed to lose sight of its mission and priorities. It appeared to place too much emphasis on minor responsibilities, like executing heritage events, and not enough on the critical discrimination cases affecting employees and disadvantaged communities. In addition to not setting the right tone, past OCR leaders seemingly abdicated responsibility for crafting a vision, developing strategies, setting objectives, tracking performance and making critical decisions that would have improved OCR's effectiveness.[101]

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92 *Id.*

93 *Id.* at 2.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.*

98 Rosemere Neighborhood Association v. EPA, 581 F.3d 1169, 1175 (9th Cir. 2009). (emphasis in original); *see also* Padres Hacia Una Vida Mejor v. McCarthy, 614 F. App'x 895, 897 (9th Cir. 2015) (describing EPA's seventeen-year delay in processing a Title VI complaint as "simply deplorable").

99 Complaint for Injunctive and Declaratory Relief, Californians for Renewable Energy v. EPA, No. 3:15-CV-03292, 1–3 (N.D. Cal. July 15, 2015). The author serves as counsel for the plaintiffs with Earthjustice on this litigation.

100 Californians for Renewable Energy v. EPA, 2018 WL 158211 at *15.

101 DELOITTE, *supra* note 89, at 2–3.

Deloitte's findings echoed concerns raised in earlier years by the U.S. Commission on Civil Rights ("the Commission")[102] and also presaged a follow-up report issued by the Commission in 2016.[103]

The Commission's earlier report was issued soon after the Supreme Court 's decision in *Alexander v. Sandoval* restricting access to the courts to enforce agency regulations. [104] The Court based its decision on earlier rulings interpreting the statutory prohibition in Title VI as coterminous with the Equal Protection Clause and, thus, proscribing only intentional discrimination.[105] With this interpretation of the statutory language in hand, the Court held that Title VI afforded no cause of action to enforce agency regulations prohibiting a wider swath of conduct, specifically actions with an unjustified disparate impact on the basis of race.[106] As a result of the *Sandoval* decision, while individuals with evidence of intentional discrimination can continue to file litigation, courts can no longer consider the most common challenges in the environmental justice context—that is, claims that siting a facility in an already environmentally overburdened community of color has unjustified disparate adverse effects.[107] Communities of color struggling to address disparities in the siting of toxic sources and exposure to health hazards thus became more reliant on agency enforcement. The Commission commented, "Regardless of the perspective of Sandoval's value, environmental justice complainants have one less avenue of redress."[108] Thus, "[s]trong administrative enforcement of Title VI is required in light of court decisions limiting access to judicial recourse and remedies under Title VI."[109]

The Commission identified a number of critical areas for improvement at EPA,[110] including the need for a final guidance document setting forth clear standards and expectations[111] and specific concerns about the substantive standards EPA applied in disparate impact cases. The

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102 U.S. COMMISSION ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE (2003) [hereinafter NOT IN MY BACKYARD]; *see also* EPA, REPORT OF THE TITLE VI IMPLEMENTATION ADVISORY COMMITTEE (1999) (attempt to evaluate compliance of state and local permitting authorities with mandates of Title VI and make recommendations for improvement of EPA's Title VI program).

103 U.S. COMMISSION ON CIVIL RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY'S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898 (2016) [hereinafter 2016 EJ REPORT]. Notably, however, the scope of Deloitte's evaluation did not include a review of the substantive standards applied by EPA in Title VI cases, while both Commission reports identified the need for final guidance documents and called for specific changes to substantive standards.

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

105 *Id.* at 281 (relying on *Regents of Univ. of Cal.* v. *Bakke,* 438 U.S. 265 (1978), *Guardians Assn.* v. *Civil Serv. Comm'n of New York City,* 463 U.S. 582 (1983), *Alexander* v. *Choate,* 469 U.S. 28 (1985)).

106 *Id.* at 293. The Court assumed for purposes of deciding the case that agency regulations promulgated pursuant to Title VI were valid. *Id.* at 281–82.

107 Claims of intentional discrimination in this context are made more difficult because decisions to grant or deny permits are made in within the context of technical and ostensibly race neutral federal and state environmental regimes. *See generally* Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENVTL. L. REV. 51 (2017).

108 NOT IN MY BACKYARD, *supra* note 102, at 76.

109 *Id.* at iii.

110 The Commission focused primarily on civil rights enforcement at EPA but also evaluated civil rights programs at the Departments of Transportation, Interior and Housing and Urban Development, given their relevance to issues of environmental justice. *Id.* at 62–74.

111 *Id.* at 77.

Commission cautioned EPA, for example, not to limit cognizable impacts to those considered within a public agency's authority under state law rather than all effects of an action—such as declines in property value, noise, odor, and interference in the enjoyment of quality of life. The Commission advised, specifically, that narrowing cognizable effects to those authorized by state law allowed states to shield themselves from liability and marginalized the lived experience of impacted communities.[112] The Commission also recommended that EPA promptly investigate complaints, conduct substantive review of allegations, and issue final investigative findings;[113] conduct independent analyses of disparate impacts and not rely solely on materials submitted by the parties in a case;[114] institute affirmative compliance reviews;[115] pursue aggressive administrative enforcement and effective remedies, including the use of powers to revoke a permit or withhold money from recipients of federal funds;[116] impose penalties for willful noncompliance;[117] develop standards for reconsideration of an administrative decision; improve transparency;[118] and coordinate with sister agencies, particularly in cases involving more than one federal agency.[119]

At the time that the Commission released its report in 2003, EPA represented that it was taking steps to create a more effective program, including "moving toward finalizing its Title VI guidance."[120] The Commission optimistically commented, "we look forward to its release."[121] As of the date of publication of this article, nearly 15 years later, EPA has still not published the promised final guidance document.[122]

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112 *Id.*

113 *Id.* at 77–78. The Commission noted, "Between September 1993 and July 1998, EPA did not uphold a single Title VI complaint. During this period, 58 Title VI complaints were filed with the agency, including 50 challenging state or local permitting decisions. As of July 1998, 31 of these complaints had been rejected, 15 were accepted for investigation, and 12 were still pending acceptance." *Id.* at 31–32 (citations omitted).

114 *Id.* at 77.

115 *Id.* at 78.

116 *Id.* at 77.

117 *Id.* at 78.

118 *Id.* at 77.

119 *Id.*

120 *Id.* at iii.

121 *Id.*

122 EPA published only a public involvement guidance, EPA, "Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance)," 71 Fed. Reg. 14207 (March 21, 2006), and failed to finalize the draft guidance published for comment in 2000 delineating standards to be applied in investigations. *See* Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39,650 (June 27, 2000). On January 18, 2017, in lieu of a final guidance document, EPA issued Chapter 1 of its External Civil Rights Compliance Office Toolkit, which highlights legal standards applicable to disparate treatment and disparate impact claims. *See* EPA, CHAPTER 1, U.S. EPA'S EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE TOOLKIT (2017), https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf [https://perma.cc/D9U9-Y4DE] [hereinafter EPA TOOLKIT]. As discussed below, EPA lacks a comprehensive programmatic guidance clarifying the obligations of recipients of EPA funding. For comparison, *see* Title VI Requirements and Guidelines for Federal Transit Administration Recipients, FTA Circular 4702.1B (Oct. 1, 2012), https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/FTA_Title_VI_FINAL.pdf [https://perma.cc/PN2N-RHD3] [hereinafter FTA Circular 4702.1B].

Indeed, little had changed when Administrator Jackson commissioned the Deloitte Report, and reform continued to be slow going during Jackson's tenure.[123] Throughout the Obama Administration, the author participated in a loose alliance of environmental justice and environmental organizations and advocates urging reform of EPA's civil rights compliance and enforcement program. In November 2013, the alliance emphasized the need for progress in a letter to the newly appointed Administrator, Gina McCarthy,[124] reiterating a familiar litany of key priorities:

> - Legal Standards: that EPA revise standards and finalize improved guidance documents;
>
> - The Backlog: that EPA complete delayed investigations with the involvement of complainants and their attorneys;
>
> - Capacity & Infrastructure: that EPA address issues outlined in the Deloitte report;
>
> - Process: that EPA modify policies and practices governing communications with complainants and community-based stakeholders to encourage meaningful participation in decisions affecting their future;
>
> - Transparency: that EPA make information on Title VI enforcement more readily available to complainants and to the public;
>
> - Interagency Coordination: that EPA improve coordination of compliance and enforcement efforts with delegated programs, regions, and other federal agencies; and
>
> - Effective Remedies: that EPA ensure that when it enters a voluntary compliance agreement, remedial measures are sufficiently protective.[125]

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123 *See generally* Letter from Marianne Engelman Lado, Earthjustice, et al., to Lisa Jackson, EPA (July 3, 2012) (comments on *Plan EJ 2014 Supplement: Advancing Environmental Justice Through Title VI* urging EPA to impose meaningful remedies, finalize guidelines incorporating improved legal standards, and improve transparency, among other reforms).

124 Letter from Marianne Engelman Lado, Earthjustice, to Gina McCarthy, EPA, and Gwendolyn Keyes Fleming, EPA, (Nov. 5, 2013) (submitted on behalf of the Center on Race, Poverty & the Environment, The City Project, Conservation Law Foundation, Earthjustice, Environmental Justice League of Rhode Island, Humansyergyworks.org, New Mexico Environmental Law Center, NRDC, Sierra Club, West End Revitalization Association, and individuals).

125 *Id.* at 2-3; *see also* Comments on External Compliance and Complaints Program Strategic Plan: Fiscal Year 2015-2020 from Marianne Engelman Lado to Gina McCarthy, 3-4 (October 27, 2015), on behalf of 21 organizations and 3 individuals; *see generally* THE CENTER ON RACE, POVERTY & THE ENVIRONMENT, A RIGHT WITHOUT A REMEDY: HOW THE EPA FAILED TO PROTECT THE CIVIL RIGHTS OF LATINO SCHOOLCHILDREN, (2016), http://earthjustice.org/sites/default/files/Right%20without%20a%20Remedy%20FINAL_optimized.pdf [https://perma.cc/8M8E-8FX3] (critiquing OCR's failure to engage complainants and agreement to remedies with no teeth in voluntary

In 2015, these calls were reinforced by a report issued by the Center for Public Integrity ("CPI"), an investigative journalism non-profit, which received copies of all Title VI complaints filed with EPA from 1996 to mid-2013 pursuant to requests filed under the Freedom of Information Act.[126] CPI reported a "striking pattern" of delay and ineffectiveness:

> More than nine of every 10 times communities have turned to [EPA] for help, the civil-rights office has either rejected or dismissed their Title VI complaints. In the majority, the office rejected claims without pursuing investigations. On the few occasions that it did, it dismissed cases more often than it proposed sanctions or remedies. Records show the office has failed to execute its authority to investigate claims even when it has reason to believe discrimination could be occurring . . . [127]

CPI found that the agency's delays in processing and prosecuting complaints affected the disposition of claims and, particularly, that EPA even found allegations "'moot' precisely because of its own inaction."[128]

This was, and during the Obama Administration continued to be, a dysfunctional office by any measure: ability to finalize clear standards, training, competence, timeliness of action, or ability to translate statutory and regulatory mandates into action. Without beating a dead horse, it is at least worth mentioning that the 2016 report of the U.S. Commission on Civil Rights was also scathing. In his Letter of Transmittal to President Obama, Commission Chair Martin Castro noted that people of color and low-income communities are "disproportionately affected by the siting of waste disposal facilities and often lack political and financial clout to properly bargain with polluters when fighting a decision or seeking redress."[129] Nonetheless EPA still had not developed an effective civil rights program: instead, the Chair noted, the agency "has a history of being unable to meet its regulatory deadlines and experiences extreme delays."[130] Perhaps most telling, EPA's OCR had "never made a formal finding of discrimination and has never denied or withdrawn financial assistance from a recipient in its entire history, and has no mandate to demand accountability within the EPA."[131]

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compliance agreement) [hereinafter A RIGHT WITHOUT A REMEDY].

126 Kristin Lombardi et al., *Environmental Racism Persists, and the EPA is One Reason Why*, CENTER FOR PUBLIC INTEGRITY (Sept. 4, 2015), https://www.publicintegrity.org/2015/08/03/17668/environmental-racism-persists-and-epa-one-reason-why [https://perma.cc/N2BP-W74C].

127 *Id.*

128 *Id.*

129 Letter of Transmittal from Martin R. Castro to Barack Obama, at 1, *in* U.S. COMMISSION ON CIVIL RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY'S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,898 (2016).

130 *Id.*

131 *Id.* Although the Commission stated that EPA had never made a formal finding of discrimination, the agency has made preliminary findings of discrimination in two cases, *Angelita C.*, Letter from Rafael DeLeon, EPA, to Christopher Reardon, California Department of Pesticide Regulation, at 1 (April 22, 2011), https://www.epa.gov/sites/production/files/2016-04/documents/title6-c42211-preliminary-finding.pdf [https://perma.cc/7LTE-7AXR], and, subsequently, the *St. Francis Prayer Center* case, Letter from Dorka to Grether, *supra* note 67, at 2. For a critique of EPA's handling of *Angelita C.*, *see generally* A RIGHT WITHOUT A REMEDY, *supra* note 125.

B. Measured Steps Forward During the Obama Administration: Too Little, Too Late

The critiques did not go unnoticed at EPA, and Administrators Lisa Jackson and Gina McCarthy took steps to clean house. Their efforts can be evaluated as an example of an incremental approach to reform.

In response to the Deloitte Report, EPA convened a Civil Rights Executive Committee chaired by then-Deputy Administrator Robert (Bob) Perciacepe. In 2012, the Committee issued recommendations to strengthen EPA's civil rights program,[132] and over the next few years, EPA implemented many of the steps the Committee had outlined. Taken together, however, they fell far short of fundamental reform. Given the importance of data collection by recipients of federal funds, for example, the Committee dedicated EPA to updating EPA's pre-award review process to "clarify when additional reporting as a grant condition may be appropriate."[133] One of the first measures touted as an accomplishment, then, was modification of the Preaward Compliance Review Report, EPA Form 4700-4. Before EPA modified the form in June of 2014, an asterisk had appeared next to a number of questions seeking information from applicants for EPA funding about their compliance with Title VI. These questions included whether the grant applicant or recipient posts a non-discrimination notice, maintains demographic data on the population it serves, or has a language access policy, a non-discrimination coordinator, or grievance procedure to ensure prompt and fair resolution of civil rights complaints.[134] The asterisk indicated that questions were "for informational use only" and would not bear on the grant status of the applicant for federal funds.[135] Although the fact that responding to these questions was optional in the first place reflected the deep-seated need for change at the agency,[136] EPA leadership argued that removing the asterisk—and successfully moving the change through the Office of Management and Budget—was a significant accomplishment.[137]

In a letter dated April 14, 2014, Gina McCarthy outlined additional changes at OCR. EPA hired a new OCR Director, Velveta Golightly-Howell, heralded as a former trial attorney whose career included 14 years as regional manager of the OCR at HHS in Denver.[138] Deloitte had identified "challenges at the leadership levels" as a key problem and recommended that EPA "fill OCR's leadership positions expeditiously with qualified, experienced, and motivated civil rights professionals", hoping that "[a] competent leadership team" would help reform the office and build

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132 CIVIL RIGHTS EXECUTIVE COMMITTEE, EPA, DEVELOPING A MODEL CIVIL RIGHTS PROGRAM FOR THE ENVIRONMENTAL PROTECTION AGENCY 6 (2012), https://archive.epa.gov/epahome/ocrstatement/web/pdf/executive_committee_final_report.pdf [https://perma.cc/775S-W47W].

133 *Id.* at 14.

134 EPA Form 4700-4 Preaward Compliance Review Report for All Applicants and Recipients Requesting EPA Financial Assistance, at 1 (approved by OMB: No. 2030-0020, expired 04-30-2012), https://www.in.gov/ifa/srf/files/EPA_4700-4_Pre-award_Compliance_Review_Report.pdf [https://perma.cc/LV22-8GLQ].

135 *Id.* at 2.

136 EPA encouraged applicants for funds to answer all questions despite signaling that such information would not affect the applicant's grant status. *Id.*

137 Telephone Interview with Velveta Golightly-Howell, EPA (Sept. 11, 2014) (notes of phone conversation on file with author).

138 Letter from Gina McCarthy, EPA, to Marianne Engelman Lado, Earthjustice, at 1 (April 14, 2014) (on file with author).

its credibility.[139] Unfortunately, within two years, leadership had turned over yet again, and Golightly-Howell was placed on detail.

EPA also temporarily committed to uploading a web-based docket of all Title VI cases, including links to "milestone documents, such as redacted complaints and agency decisions."[140] This initiative was short-lived, however, and EPA's docket of cases was last updated in 2014.[141]

A number of EPA's actions had more lasting power, though their effects have been modest at best. In 2013, in response to the Deloitte report, EPA adopted a "One EPA" approach, affirming that the external civil rights program should draw upon the expertise and resources of the entire agency and establishing point people, called Deputy Civil Rights Officers (DCROs), to work with and assist OCR in carrying out its responsibilities.[142] DCROs were intended to improve accountability and coordination of civil rights policies and initiatives in each of EPAs regional offices.[143] A contemporaneous EPA blog described the DCROs in EPA's ten regions as intended to serve "as liaisons to communities and states, to leverage OCR resources with EPA program expertise, and to help OCR collect the evidence and documentation needed for case investigations."[144] From the get-go, however, DCROs were a designation with responsibility, not a new hire or additional position within each region.[145] In almost all cases, DCROs were deputy regional administrators or assistant regional administrators, with the additional responsibilities attendant to these titles. In 2015, Acting OCR Director Lilian Dorka cited the appointment of DCROs as a major step forward but when advocates from across the country requested a call with DCROs to learn more about their role and begin to utilize DCROs as a resource, Dorka delayed, indicating that the office wasn't ready and that the responsibilities of the DCROs was still under discussion.[146] Despite repeated requests, OCR leadership never arranged the call.

Perhaps the greatest accomplishment of the Obama Administration was the publication of a procedural guidance to case managers and stakeholders, initially presented in December, 2015 as

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139 DELOITTE, *supra* note 89, at 2–3.

140 Letter from McCarthy to Engelman Lado, *supra* note 138, at 2.

141 EPA, Complaints Filed with EPA Under Title VI of the Civil Rights Act of 1964, https://drive.google.com/drive/folders/0B__743UjVspgQU1hQnNpclBkclU [https://perma.cc/QJV9-YWHG] (website last updated March 2, 2016).

142 *See* CIVIL RIGHTS EXECUTIVE COMMITTEE, *supra* note 132, at 7–8 (calling for the creation of DCROs); EPA Order 4700, at 1–2 (May 1, 2013) (on file with author). "One EPA" is reminiscent of HEW's decision to spread civil rights functions throughout the department's operating divisions during the initial phase of certifying hospitals for civil rights compliance. In that case, HEW leadership aimed to avoid hostile oversight and budgetary restrictions from Congress by hiding staff and money for civil rights compliance in the budgets of various offices. *See* SMITH, *supra* note 44, at 125. Though spreading functions throughout the agency might risk clear accountability, Secretary John Gardner explicitly held the heads of each operating agency responsible for Title VI enforcement. *Id.* at 126.

143 Letter from McCarthy to Engelman Lado, *supra* note 138, at 1.

144 Stan Meiberg, *EPA's Office of Civil Rights: Improving Our Procedures, Education, and Expertise to Prevent Discriminatory Injustice*, EPA BLOG (Aug. 17, 2015), https://blog.epa.gov/blog/2015/08/epas-office-of-civil-rights-improving-our-procedures-education-and-expertise-to-prevent-discriminatory-injustice/ [https://perma.cc/F5B2-XL46].

145 CIVIL RIGHTS EXECUTIVE COMMITTEE, *supra* note 132, at 8 ("The Executive Committee proposes that the DCRO responsibility be incorporated into the duties" of senior managers in the regions and at headquarters).

146 Telephone Interview with Lilian Dorka, EPA (December 4, 2014) (notes of phone conversation on file with author).

a living or "Interim" Case Resolution Manual,[147] and subsequently reissued without temporal qualification as the Case Resolution Manual (CRM) in January 2017.[148] The CRM includes information about the processes followed for investigating and resolving complaints and helped to fill the need for greater uniformity, clarity, and transparency related to EPA's handling of complaints filed under civil rights laws. Despite multiple calls over time by the U.S. Commission on Civil Rights and other stakeholders,[149] EPA was not able to produce a final guidance document for investigators, recipients, or complainants on the substantive standards applied by EPA when investigating EPA cases or programmatic guidance for recipients. In lieu of a final guidance document, in January 2017 EPA issued Chapter 1 of what it called an External Civil Rights Compliance Office Toolkit ("Toolkit"). The Toolkit highlights legal standards applicable to disparate treatment and disparate impact claims,[150] but falls far short of a comprehensive programmatic guidance clarifying the obligations of recipients of EPA funding.[151] On this score, the agency has an unfinished agenda.

During the eight years of the Obama Administration, EPA issued the first preliminary findings of discrimination in the history of the agency.[152] These might have been heralded as demonstrations that EPA was finally prepared to hold recipients of federal funds accountable, but any message of commitment was undercut by EPA's failure to require effective remedies.[153] In 2011, EPA issued its first finding in *Angelita C.*, finally resolving a complaint filed in 1999 on behalf of children and the parents of children attending schools near locations where methyl bromide and other fumigants were applied. The complaint alleged that California's Department of Pesticide Regulations ("CDPR") discriminated against Latino children by allowing the use of methyl bromide and other toxic fumigants without considering whether spraying these pesticides

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147 EPA, INTERIM CASE RESOLUTION MANUAL iii (2015), https://www.epa.gov/sites/production/files/2015-12/documents/ocr_crm_final.pdf [https://perma.cc/7P3N-K4YR] ("The CRM will be evaluated, updated, and revised periodically to ensure that it remains a dynamic, interactive and effective tool.").

148 EPA, CASE RESOLUTION MANUAL (2017), https://www.epa.gov/sites/production/files/2017-01/documents/final_epa_ogc_ecrco_crm_january_11_2017.pdf [https://perma.cc/6QP7-9CYW].

149 *See, e.g.,* Comments on U.S. Environmental Protection Agency Draft Policy Papers, *Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Standards* (Released Jan. 24, 2013); *Title VI of the Civil Rights Act of 1964: Draft Role of Complainants and Recipients in the Title VI Complaint and Resolution Process* (Released Jan. 25, 2013), at 2 (March 20, 2013) (strongly recommending that EPA "develop and finalize a comprehensive guidance for implementing Title VI and its regulations").

150 *See* EPA TOOLKIT, *supra* note 122, at 1. The Toolkit aimed to resolve at least one longstanding controversy over whether EPA employed a rebuttable presumption that, absent non-compliance with environmental or health standards established under the nation's environmental laws, EPA would not make a finding of adverse impact. The Toolkit clarified that EPA will evaluate site specific data on adverse impacts for pollutants regulated under the Clean Air Act, for example, even though the area is in attainment with the law. *See* EPA, FREQUENTLY ASKED QUESTIONS (FAQS) FOR CHAPTER 1 OF THE U.S. EPA'S EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE COMPLIANCE TOOLKIT, at 3–4 (January 18, 2017).

151 For an example of more comprehensive programmatic guidance, see FTA Circular 4702.1B, *supra* note 122.

152 Press release, EPA, EPA Reaches Title VI Civil Rights Agreement with the California Department of Pesticide Regulation (Aug. 25, 2011), https://www.epa.gov/sites/production/files/2016-04/documents/title6-c-press-release-english.pdf [https://perma.cc/K9RD-DRKS]. Technically, EPA issued preliminary findings in these cases. EPA regulations distinguish between preliminary findings, which trigger the opportunity for recipients of federal funds to respond and enter into voluntary compliance negotiations, and final determinations of noncompliance. *See* 40 C.F.R. § 7.115(c) & (d) (2002).

153 *See* A RIGHT WITHOUT A REMEDY, *supra* note 125, at 20.

had a disparate impact on Latino schoolchildren, that in fact the application of methyl bromide and other fumigants did have a disparate impact, and that greater amounts of the pesticides were applied in areas in proximity to schools with Latino schoolchildren than near other schools.[154] In 2011, EPA was understandably proud to announce that it had issued its first finding of discrimination and had begun to dig out from its substantial backlog of cases, calling the voluntary compliance agreement it reached with CDPR "an important step in protecting civil rights and working for environmental justice" in a press release.[155] EPA leaders were perhaps unprepared, then, for the uproar the announcement created among environmental justice advocates. As a starting point, they argued that after the many years the complaint had languished at EPA, the agency should have contacted the complainants or their lawyers before coming to agreement with CDPR. Given the passage of time since the complaint had been filed, the lack of notice to complainants was not only inconsistent with principles of environmental justice calling for the meaningful participation of community members in decisions affecting their future,[156] but it also denied EPA the opportunity to hear about significant changes in facts that were relevant to the resolution of the complaint. As a result of the Montreal Protocol on Substances that Deplete the Ozone Layer,[157] CDPR was phasing out methyl bromide and sprayers were now applying methyl iodide, another fumigant. Although the original complaint alleged that the use of methyl bromide and other fumigants were discriminatory, EPA investigated only allegations related to methyl bromide and the terms of the voluntary agreement sought CDPR's cooperation "in confirming that long term exposure exceedances of methyl bromide do not recur."[158] The settlement contained no provisions governing methyl iodide or ensuring that Latino schoolchildren would be protected against discriminatory applications of methyl iodide or any other fumigant.[159] Environmental justice leaders called for EPA to rescind its agreement with CDPR[160] and ultimately the complainants sued to challenge EPA's decisions to enter into the compliance agreement with CDPR and close the case.[161]

EPA also failed to demonstrate a will to hold recipients of federal funds accountable when

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154 Letter from DeLeon to Reardon, *supra* note 131, at 2.

155 Press release, EPA, EPA Reaches Title VI Civil Rights Agreement with the California Department of Pesticide Regulation (Aug. 25, 2011), https://www.epa.gov/sites/production/files/2016-04/documents/title6-c-press-release-english.pdf [https://perma.cc/Y3HN-9RLL].

156 FIRST NATIONAL PEOPLE OF COLOR LEADERSHIP SUMMIT, *supra* note 3 ("Environmental Justice demands the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation."); *Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice [https://perma.cc/UQF8-UFZW] ("Environmental justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.").

157 *See Methyl Bromide*, EPA, https://www.epa.gov/ods-phaseout/methyl-bromide [https://perma.cc/W7V5-V6FX].

158 Letter from DeLeon to Reardon, *supra* note 131, at 4.

159 *See* Press Release, Center on Race, Poverty & the Environment, EPA Fails to Enforce Civil Rights Act (Aug. 25, 2011), https://www.ejnet.org/ej/angelitac-crpe-pr.pdf [https://perma.cc/54ZB-T6UG].

160 ADVOCATES FOR ENVIRONMENTAL HUMAN RIGHTS ET AL., THE EPA DENIES CIVIL RIGHTS PROTECTION FOR COMMUNITIES OF COLOR, https://www.ejnet.org/ej/tvifactsheet.pdf [https://perma.cc/CH3H-3U28].

161 *See* Complaint at 2, *Garcia v. McCarthy*, 649 F. App'x 589 (9th Cir. 2016) (Docket No. 3:13-CV-03939); *see Garcia v. McCarthy*, 649 F. App'x 589, 591 (9th Cir. 2016) (unpublished opinion upholding the district court's dismissal of the case).

it issued its second preliminary finding of discrimination during the Obama Administration.[162] As described above, in January, 2017, EPA wrapped up its longstanding investigation of claims filed by the St. Francis Prayer Center in 1992 against the Michigan Department of Environmental Quality ("MDEQ") stemming from its approval of the Genesee Power Station in Flint.[163] EPA found that MDEQ treated African Americans "less favorably" in the public participation process leading to approval of the permit and expressed "significant concerns" about whether MDEQ could ensure that discriminatory treatment would not continue to occur today.[164] Nonetheless, after making its preliminary findings, EPA did not initiate the process for withholding federal funds. Instead, it closed the case and kicked the can down the road on enforcement, stating that it was examining ongoing policies and practices in the context of another complaint filed against MDEQ in the wake of the Flint Water Crisis.[165]

The Obama Administration's highest profile and most controversial step taken in the name of reform was an attempt to revise its Title VI regulations to, among other things, remove regulatory deadlines for investigating and processing Title VI complaints.[166] In an announcement on its website and in its Notice of Proposed Rulemaking issued on December 14, 2015, EPA stated that its goals were to strengthen its civil rights enforcement program by reaffirming its discretion to initiate compliance reviews, determine how to resolve cases, and "tailor its approach to complaints to match their complexity, scope and nature."[167] Arguably, at least, EPA failed to make a case for why regulatory action was necessary to clarify that EPA had the power to conduct compliance reviews and gather data given that the agency already had such authority under existing regulations.[168] The proposal to remove regulatory deadlines seemed to be at the heart of the effort, and it met with near unanimous opposition. EPA argued that removing regulatory deadlines would provide flexibility and discretion to OCR.[169] To community advocates, however, the proposal seemed like a thinly veiled attempt to evade responsibility in the face of legal action for unreasonable delay.[170] Community residents, environmental justice advocates, civil rights organizations, and environmental groups opposed the proposal, arguing that it would weaken, not strengthen EPA's civil rights enforcement program: they suggested that replacing mandatory deadlines with greater discretion "can only be interpreted as an effort to evade accountability rather than improve the

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162 Letter from Lilian Dorka to Grether, *supra* note 67.

163 *Id.* at 1-2.

164 *Id.* at 17.

165 *Id.* at 2, 30.

166 Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 77,284, 77,285 (Dec. 14, 2015). EPA regulations require EPA to acknowledge receipt of complaints within 5 days, 40 C.F.R. § 7.120(c) (2010), accept, reject, or refer complaints within another 20 days, 40 C.F.R. § 7.120(d)(1)(i) (2010), and then issue preliminary findings in investigations resulting from either a complaint or compliance review within an additional 180 days. 40 C.F.R. § 7.115(c) (2002).

167 *External Civil Rights Compliance Office—New Developments!*, EPA, https://www.epa.gov/ocr/external-civil-rights-compliance-office-new-developments [https://perma.cc/U5FH-QAMK]; Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 77,284, 77,285 (Dec. 14, 2015).

168 40 C.F.R. §§ 7.85 (2010), 7.110 (2010), 7.115 (2002).

169 80 Fed. Reg. at 77, 285.

170 *See supra* notes 99–100 and accompanying text.

timeliness of the agency's responsiveness to complaints."[171] The Environmental Council of the States ("ECOS"), a non-profit association representing the interests of state environmental departments, also criticized EPA's proposal to remove deadlines. ECOS argued that substituting "promptly" for concrete timeframes, as EPA proposed, "provides no expectation of when information should be provided and may add to uncertainty and less visibility about the process . . . . States believe that deadlines contribute to certainty and contribute to timely accountability."[172] On January 9, 2017, the EPA withdrew the proposed rule.[173] The Obama Administration came to a close a long way from achieving an effective civil rights program.

IV. EPA'S EXCEPTIONALISM THEORY AND THE LACK OF POLITICAL WILL

Why has EPA been so spectacularly unsuccessful at ensuring that recipients of EPA funding comply with the non-discrimination provisions of Title VI and EPA regulations? During the Obama Administration, the author heard arguments from high ranking officials at EPA that the agency's civil rights enforcement was uniquely constrained by what might be called EPA exceptionalism: that EPA is limited by its relationship with the states because it delegates permitting authority to the states, localities, and tribes under the Clean Water Act,[174] Clean Air Act,[175] and other environmental statutes. Moreover, given its statutory responsibilities, EPA's decisions on civil rights enforcement cannot deviate from scientific standards developed under environmental laws and subject to peer review. Where EPA has expressly approved state standards for approving permits, the agency is loathe to second guess the application of those standards to a particular permit in a specific context. Similarly, where EPA has set regulatory standards for emissions of a chemical that are supposed to be protective of public health, the agency is, again, concerned about acknowledging that exposure may, nonetheless, create health risks in a particular location.[176]

No doubt, provisions delegating authority to the states and the development of scientific standards are significant factors shaping and curbing civil rights enforcement at EPA.[177] Moreover,

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171 ACLU of Wisconsin et al., Comments on Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, EPA-HQ-OA-2013-0031, at 5 (March 14, 2016) (comments submitted by the author on behalf of fifty-nine groups and ten individuals).

172 ECOS, Comments on Non Discrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency; Proposed Rule: Docket ID No. EPA-HQ-OA-2013-0031, at 4 (March 11, 2016), https://www.ecos.org/wp-content/uploads/2016/03/Title-VI-non-discrimination-rule-making-letterhead-3-2016-final-draft.pdf [https://perma.cc/B7H6-FJ2F].

173 Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 82 Fed. Reg. 2,294, 2,294 (Jan. 9, 2017).

174 Clean Water Act, 33 U.S.C. § 1342(b) (2012) (delegation of authority to permit under National Pollutant Discharge Elimination System).

175 Clean Air Act, 42 U.S.C. § 7410 *et seq.* (2012); 40 C.F.R. Part 70 (1992) (state operating permit program).

176 *See, e.g.,* A RIGHT WITHOUT A REMEDY, *supra* note 125, at 12-13 (materials disclosed as a result of FOIA request revealed that EPA was concerned that a finding of harm in the *Angelita C.* case and requiring increased buffers and other mitigation would undermine previous decisions by the Office of Pesticide Programs authorizing higher short-term exposure levels and establishing thresholds for exposure to methyl bromide).

177 Moreover, the EPA exceptionalism argument touches on fundamental issues of federalism that are perhaps even more salient in the era of the Trump Administration and merit additional attention. In a *New York Times* interview aired on February 2, 2018, for example, Scott Pruitt emphasized his view that environmental thresholds and standards set by previous administrations constituted federal overreach and tread on state autonomy. Interview by Coral Davenport with Scott

pressure on EPA from business officials, state and local officials, and representatives in Congress has been significant.[178] ECOS, for example, argued in the 1990s that enforcement of disparate impact standards conflicted with current state and local land-use laws and that EPA had failed to provide sufficiently precise definitions, methodologies, and standards based on sound, peer-reviewed science.[179] This section argues, however, that these agency characteristics contributed to and fostered a lack of political will to prevent and remedy racial disparities. As an agency that was established after the height of the civil rights movement, EPA failed to develop either the experience or commitment to civil rights enforcement, and, worse, from its initial years its leadership viewed its responsibility under Title VI in tension with its mission to protect human health and the environment.[180] Any meaningful effort to address race discrimination in the environmental sector by the federal government will require willingness to spend political capital by EPA or for leadership outside of the agency to assume responsibility for civil rights enforcement in the context of environmental justice.[181]

A. History, Leadership, and Culture

Established in response to the environmental movement on December 2, 1970, EPA consolidated research, monitoring, regulatory and enforcement functions to protect public health

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Pruitt, Administrator, EPA (Feb. 2, 2018) (New York Times interview), *available at* https://www.nytimes.com/2018/02/02/podcasts/the-daily/scott-pruitt-epa.html [https://perma.cc/DL59-ZXV2]. Although Pruitt focused on EPA's interpretations of environmental statutes, his position echoes the argument that federal regulations prohibiting actions with a disparate impact are similarly the product of executive overreach and inappropriately tilt the balance of power away from the states. *See, e.g.*, Keith E. Eastland, *Environmental Justice and the Spending Power: Limits on Using Title VI and 1983*, 77 NOTRE DAME L. REV. 1601, 1604 (2002) (enforcement of disparate impact regulations described as "an attempt to interfere with traditional state sovereignty by discounting state autonomy in favor of the will of federal agencies . . . "). This article takes seriously the goals of eradicating the vestiges of a racialized distribution of environmental benefits and burdens and treating all people as equal members of the polity, with equal opportunities to participate in environmental decision-making regardless of race. Although the argument for EPA exceptionalism overlaps with questions of the distribution of power between federal, state and local government, the starting point here is that Civil Rights Act of 1964 affords the federal government authority to ensure compliance.

178 *See* NOT IN MY BACKYARD, *supra* note 102, at 34.

179 *Id.* at 34.

180 *Our Mission and What We Do*, EPA, https://www.epa.gov/aboutepa/our-mission-and-what-we-do [https://perma.cc/YEC8-S7WH].

181 Each agency has its own origin story, functions, and blend of characteristics. The discussion in this Part invokes the term exceptionalism to describe claims by EPA staff that its mission, relationship with the states, and adherence to technical rigor not only create unique challenges for its civil rights program but also justifies deviation from practices engaged in by other agencies that would strengthen civil rights enforcement. Such practices include, for example, conducting affirmative compliance reviews, developing clear standards for evaluating and recognizing adverse impacts, and using its authority to require effective remedies. Closer scrutiny suggests that sister agencies also wrestle with federalism concerns and finds scant support for the idea that EPA's characteristics justify a unique set of expectations or legal norms for civil rights enforcement. The discussion thus borrows from the concept of exceptionalism as explored in doctrinal contexts but is used here to critique agency claims that its characteristics justify agency behavior. *Cf.* Michael J. Wishnie, *`A Boy Gets Into Trouble': Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 BOS. U. L. REV. 1709, 1709–1712 (2017) (criticizing isolation of veterans law cases in specialized courts); Heather Gerken, *Election Law Exceptionalism? A Bird's Eye View of the Symposium*, 82 BOS. U. L. REV. 737, 737–738 (2002) (exploring whether election law should be understood as requiring its own legal paradigms or benefits from development in the context of constitutional law).

and the environment.[182] Although EPA personnel moved to EPA from other agencies,[183] as an organization EPA missed the first few years of civil rights enforcement after the passage of Title VI. By contrast, HEW, the forerunner of the Departments of Education and Health & Human Services, gained significant experience exercising its authority under Title VI before EPA came into existence.[184] Even before the passage of Title VI, HEW staff had already begun to plan enforcement activities, forming task forces to prepare informal legal opinions on potential issues that might be raised by the new law and approaches to enforcement.[185] Soon after Lyndon Johnson signed the bill, HEW promulgated regulations and issued assurance forms and statements of compliance to recipients of federal funds, initiating the process of putting relevant programs and activities across the country on notice that they would be expected to comply.[186] In 1965, HEW created the Office for Civil Rights and allocated responsibility for policy development, staff leadership, training, and coordination with other agencies, among other functions.[187] Moreover, OCR's early Title VI enforcement activity had a significant impact, and not only on hospital care: "Working with the Department of Justice and charged with the desegregation of schools in the South, [HEW's OCR] carried out a transformation whose pace is hard to imagine today. In 1964, 98 percent of African American children in the South attended all-black schools. By 1972, fewer than 9 percent did."[188]

When EPA was finally established, civil rights took a back seat to other functions. Early leaders at EPA did not prioritize the struggle for racial justice. William Ruckelshaus, EPA's first administrator, who would return for a second term during the Reagan Administration, had distinguished himself as counsel to the Indiana Stream Pollution Control Board. While there he obtained court orders prohibiting industries and towns from polluting the state's waters and helped draft the 1961 Indiana Air Pollution Control Act, an early attempt to address air pollution.[189] Ruckleshaus, like Russell Train and Douglas Costle, the administrators who followed him, was a

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182 *The Origins of EPA*, EPA, https://www.epa.gov/history/origins-epa [https://perma.cc/CA3X-PQA5] (last visited Feb. 15, 2018).

183 EPA combined programs and personnel from the National Air Pollution Control Administration, the Bureaus of Water Hygiene and Solid Waste Management, and the Food and Drug Administration at HEW, the Water Quality Administration at the Department of Interior, and pesticides registration functions of the Agricultural Research Service at the USDA, among others. *See* Reorganization Plan No. 3 of 1970 (July 9, 1970), https://archive.epa.gov/epa/aboutepa/reorganization-plan-no-3-1970.html [https://perma.cc/9S7H-JGBA]; *see also* EDWARDO LAO RHODES, ENVIRONMENTAL JUSTICE IN AMERICA: A NEW PARADIGM 91 (2003).

184 *See supra* notes 44–49 and accompanying text.

185 U.S. COMMISSION ON CIVIL RIGHTS, HEW AND TITLE VI: A REPORT ON THE DEVELOPMENT OF THE ORGANIZATION, POLICIES, AND COMPLIANCE PROCEDURES OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, at 5–6 (1970).

186 *Id*. at 7. *See also* Part 80 – Nondiscrimination in Federally-Assisted Programs of the Department of Health, Education, and Welfare – Effectuation of Title VI of the Civil Rights Act of 1964, 30 Fed. Reg. 35, 84 (Oct. 1, 2017) (recipients "may not directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination . . . .").

187 U.S. Commission on Civil Rights, *supra* note 185, at 7–8.

188 James S. Murphy, *The Office for Civil Rights' Volatile Power*, THE ATLANTIC (March 13, 2017).

189 Interview by Dr. Michael Gorn with William D. Ruckelshaus, Administrator, EPA (Dec. 1970–April 1973), https://archive.epa.gov/epa/aboutepa/william-d-ruckelshaus-oral-history-interview.html [https://perma.cc/M2HE-YASP].

well-respected lawyer with environmental experience; notably, however, their official EPA biographies contain no reference to civil rights experience or a prior commitment to racial justice.[190]

Ruckelshaus and other EPA leaders expressed ambivalence about spending political chits on civil rights. Testimony by Ruckelshaus at a 1971 hearing before the U.S. Commission on Civil Rights reflects this tension.[191] On the one hand, Ruckelshaus expressed a commitment to enforce Title VI and suggested that during the first year of EPA's operation, its leverage had been limited by an initial lack of funding, a situation that had already changed with additional appropriations.[192] Congress had authorized a $1 billion sewage treatment program for fiscal year 1971 and EPA expected the grant program to double in 1972.[193] EPA had not yet promulgated its own Title VI regulations but was using regulations from the Department of Interior in the interim.[194] Although EPA had until then required that recipients of federal funds submit compliance forms only after their funding had been secured, Ruckelshaus reassured the Commission that EPA was planning on reviewing compliance before approving grants once new regulations were in place rather than afterward.[195]

Ruckelshaus argued, however, that EPA was in "a peculiar position" as a regulatory agency attempting to cajole communities into compliance with water quality standards established

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190 *Id.*; *Biography of William Ruckelshaus: First Term*, EPA, https://archive.epa.gov/epa/aboutepa/biography-william-d-ruckelshaus-first-term.html [https://perma.cc/YV55-EUJE] (last visited Feb. 15, 2018). Russell Train served as counsel and then minority advisor at the House Ways and Means Committee, a judge for the U.S. Tax Court, and then the founder of various environmental organizations. *See Biography of Russell E. Train*, EPA, https://archive.epa.gov/epa/aboutepa/biography-russell-e-train.html [https://perma.cc/4TYJ-7YYS] (last visited Feb. 15, 2018). At the time of his Senate confirmation, Douglas Costle was a 37-year old lawyer who had served as staff on the President's Advisory Council on Executive Organization, which recommended the creation of the EPA. *See Douglas M. Costle Biography*, EPA, https://archive.epa.gov/epa/aboutepa/douglas-m-costle-biography.html [https://perma.cc/AEC6-89BS] (last visited Feb. 15, 2018). *See generally* Jonathan Hiskes & Sara Barz, *A Look at EPA Administrators Since the Agency's Founding*, GRIST (Dec. 20, 2008).

191 *Hearing before the U.S. Commission on Civil Rights* (June 14–17, 1971), https://www2.law.umaryland.edu/marshall/usccr/documents/cr18w27971.pdf [https://perma.cc/2JWZ-VE52] [hereinafter *Commission Hearing*], at 144-157.

192 *Id.* at 155. The question whether the effectiveness of a department's civil rights program varies with the size of its federal funding or average grant is subject for further study. Logically, a department with more significant grants would have more leverage on recipients. Initial data, however, suggests a more complex story. For example, fiscal year 2016 funding patterns for EPA, with its poor record of civil rights enforcement, and the U.S. Department of Education, which has one of the strongest programs, reveal that though EPA disburses fewer grants, the average size may be comparable or even greater. EPA's pattern of spending included 23,968 transactions, which in turn included 15, 916 contracts and 8,052 grants, awarding a total of $5,282,639,566 to primary recipients and $3,181,541,851 to subawardees. The 8,052 grants to primary recipients totaled $3,919,519,298, for an average grant size of $48,678. In comparison, Education's spending included 605,010 transactions, including 3561 contracts, 115,148 grants, and 468,301 other forms of financial assistance, for a total of $76,759,763,309 to prime recipients and $79,003,690,559 to subawardees. The 115,148 grants to primary recipients totaled $44,271,860,621 for an average grant size of $3,845. USASPENDING.GOV (last visited Feb. 25, 2018).

193 *Commission Hearing*, *supra* note 191, at 145.

194 *Id.* EPA issued its Title VI regulations in 1973, *see* Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency—Effectuation of Title VI of the Civil Rights Act of 1964, 38 Fed. Reg. 17,968 (July 5, 1973); Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency, 49 Fed. Reg. 1,659 (Jan. 12, 1984) (revised regulations).

195 *Commission Hearing*, *supra* note 191, at 146.

by state and federal agencies.[196] If EPA threatened to withhold federal funds for sewage treatment to an all-white municipality, for example, that community might prefer to bow out of contributing money for the project.[197] In these circumstances, he argued, "our ability to achieve the purposes of the Civil Rights Act flies in the face of our mandate by Congress to insure that water quality standards are complied with."[198] The possibility that recipients of federal funds would prefer to opt out of a federal program rather than comply with non-discrimination mandates, however, was hardly peculiar; indeed, it was precisely the challenge that other federal agencies faced.[199] Commission members peppered Ruckelshaus with questions about whether he would use the courts to ensure compliance. By withholding federal funds or pursuing court action, he argued, EPA would be contributing, "or at least arguably contributing, to the fact that the water quality standards are continuing to be violated."[200] Ruckelshaus had a reputation for narrowly interpreting "property-protection clauses in the Constitution and [having] a broad reading of the government's constitutional duty to protect public health and security."[201] If so, Ruckelshaus may epitomize a distinction between those who focused on protecting the environment—even in recognition of "our interconnection with nature,"[202] and as a mechanism to protecting public health, and those concerned about racial disparities in exposure to contamination and inequality in access to environmental benefits.

Civil rights enforcement continued to take a back seat to other agency priorities through the remainder of the 1970s and throughout the 1980s. As the U.S. Commission on Civil Rights later wrote, "EPA considered itself as a monitor of pollution control, not an agency equally concerned with issues of environmental justice and public participation in the decision-making process."[203] Finally, in the 1990s, as a result of pressure from the nascent environmental justice movement, EPA initiated civil rights investigations in response to complaints[204] and issued an Interim Guidance for Investigating Title VI Administrative Complaints.[205] By October, 1998, these initial steps to develop a civil rights enforcement program were cut short: Congress attached a rider to an appropriations bill suspending EPA's authority to accept new Title VI complaints until EPA published a final guidance.[206] Congress continued to restrict EPA's complaint handling through the end of the Clinton Administration.[207]

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196 *Id.* at 147.

197 *Id.*

198 *Id.* at 151.

199 *See, e.g.,* SMITH, *supra* note 44, at 132 (HEW's concern that hospitals would organize a boycott of Medicare rather than comply with Title VI).

200 *Commission Hearing*, *supra* note 191, at 151.

201 WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 257 (2010).

202 *Id.*

203 NOT IN MY BACKYARD, *supra* note 102, at 31.

204 *Id.* (though EPA had promulgated regulations earlier, EPA did not commence investigations against state and local recipients until 1993).

205 EPA, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998), http://www.enviro-lawyer.com/InterimGuidance.pdf [https://perma.cc/YA5J-375X].

206 Department of Veterans Affairs and Housing and Urban Development and Independent Agencies Appropriations Act of 1999, Pub. L. No. 105-174, tit. III, 112 Stat. 92 (1998).

207 *See, e.g.,* Departments of Veterans Affairs and Housing and Urban Development and Independent

Years after his tenure at the EPA, Ruckelshaus suggested that establishing the credibility of the EPA was among the most important issues the EPA faced in his first term.[208] To the degree that leadership saw civil rights enforcement as a distraction or in tension with the central mission of the agency, the political will to exercise authority under Title VI waxed and waned as EPA came under attack. By the 1990s, EPA enforcement of the Clean Water Act permitting program had triggered a property rights rebellion, which posited that regulation of land by the federal government placed unfair costs on property owners and businesses and that "green thinking is a fundamental challenge to entrenched American values of individual free choice in managing and using one's land."[209] As time passed, civil rights enforcement languished. Although the history of civil rights enforcement in the Trump Administration has not yet been written, the records of Scott Pruitt and Andrew Wheeler as they came into office offered little reason for belief that they were likely to exercise the political will to enforce civil rights.[210]

B. Federalism

EPA's exceptionalism argument begs the question: to what degree is EPA's relationship with the states unique? Differences are a matter of degree, but the characteristics of EPA's relationship with recipients of federal funds are worth noting.

First, a significant percentage of recipients of EPA funds are public agencies and the majority of complaints filed under Title VI are against state and regional permitting authorities, triggering federalism concerns. Although the early days of civil rights enforcement in the health care context involved thousands of health care facilities, many of which were private entities,[211] civil rights enforcement at HHS extends to state, regional, and local agencies as well. Recent "enforcement success stories" posted on HHS's website, for example, include voluntary compliance agreements requiring that that the Wisconsin Department of Children and Families ensure that sanctions to welfare recipients are not applied in a racially discriminatory manner, the University of New Mexico Hospital improve language assistance services, and the South Carolina Department of Social Services ensure that placement of children into foster or adoptive homes is not delayed or denied based on race or national origin.[212] Civil rights enforcement at the U.S. Departments of Education and Transportation are even more analogous to EPA. Although the jurisdiction of OCR at the Department of Education extends to public and private recipients of Education funding, litigation, investigations, compliance reviews and data collection have focused primarily on public school districts.[213] The Federal Transit Administration has jurisdiction over civil rights compliance

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Agencies Appropriations Act, 2001, Pub. L. No. 106-377, tit. III, 114 Stat. 1441A42, 1441A44 (2000).

208 Interview by Gorn with Ruckelshaus, *supra* note 189.

209 ESKRIDGE & FEREJOHN, *supra* note 201, at 262.

210 Pruitt established what EPA now touts as "Oklahoma's first federalism unit to combat unwarranted regulation and overreach by the federal government," and seeks "to restore the proper balance between the states and federal government." *EPA's Administrator*: Scott Pruitt, EPA, https://archive.epa.gov/epa/aboutepa/administrator-scott-pruitt.html [https://perma.cc/7RZL-FBNA].

211 SMITH, *supra* note 44, at 134–41.

212 *Enforcement Success Stories Involving Race, Color, National Origin*, HHS, https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/examples/national-origin/index.html [https://perma.cc/FM62-URAQ].

213 *See, e.g.,* U.S. DEPARTMENT OF EDUCATION, 2013–14 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK: KEY DATA HIGHLIGHTS ON EQUITY AND OPPORTUNITY GAPS IN OUR NATION'S PUBLIC SCHOOLS 1 (2016),

by state, regional and local transit authorities.[214]

Second, while a detailed comparison of federal delegation of authority and federal-state partnerships is beyond the scope of this article, EPA's claim to a unique partnership with the states as result of its delegation of authority is overstated.[215] Environmental statutes such as the Clean Air Act often set national standards and then rely on the states for implementation,[216] and EPA has indeed committed to delegating the administration of environmental programs to state and local levels wherever possible.[217] Although EPA remains responsible and accountable for meeting national environmental goals and statutes, it has explicitly adopted policy based on the reasoning that states are best placed to address specific problems as they arise on a day-to-day basis.[218] At the same time, statutory regimes administered by EPA vary in oversight, length and specificity. For example, the Resource Conservation and Recovery Act ("RCRA") at least arguably requires an almost line-by-line review of state plans for congruence with federal regulations,[219] whereas the Clean Air Act allows for more flexibility in state implementation plans.[220]

Other federal agencies, however, also delegate authority and run statutory programs through federal-state partnerships. The Department of Transportation delegates responsibilities under the National Environmental Policy Act ("NEPA") to states,[221] and HHS works in partnership

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https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf [https://perma.cc/ET6W-LYVJ] (survey of all public schools and school districts in the United States).

214 *See, e.g., Title VI Compliance Final Reports*, FEDERAL TRANSIT ADMINISTRATION, https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/title-vi-compliance-review-final-reports [https://perma.cc/4367-9JWF] (with links to final reports of compliance reviews for the New Jersey Transit Corporation, County of Fairfax, Virginia, Los Angeles County Metropolitan Transportation Authority, Colorado Department of Transportation, and other public agencies).

215 *See* EPA, EPA POLICY CONCERNING DELEGATION TO STATE AND LOCAL GOVERNMENT 2 (1984) (defining delegation as "`authorization' or `approval': the assumption by a competent or willing state or local government of operational responsibilities which, in the absence of such action, would rest with the federal government.").

216 *See* Caroline Wick, *"Bell v. Cheswick Generating Station": Preserving the Cooperative Federalism Structure of the Clean Air Act*, 27 Tulane Env. L. J. 107 (2013); Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing Global Warming*, 50 Ariz. L.Rev. 799 (2008) (describing the Clean Air Act as "the first modern federal environmental statute to employ a `cooperative federalism framework'").

217 *See, e.g.,* EPA Policy, *supra* note 215. at 1.

218 *Id.*

219 *State Authorization Under the Resource Conservation and Recovery Act (RCRA)*, EPA, https://www.epa.gov/rcra/state-authorization-under-resource-conservation-and-recovery-act-rcra [https://perma.cc/6W4G-T5BH]; 42 U.S.C. § 6926 (1986) (providing for EPA authorization of state hazardous waste program).

220 *Government Partnerships to Reduce Air Pollution*, EPA, https://www.epa.gov/clean-air-act-overview/government-partnerships-reduce-air-pollution [https://perma.cc/7PYH-ELEW]; *see also* 42 U.S.C. § 7410 (1990) (outlining the requirements for state implementation plans).

221 23 U.S.C. §§ 326 (2012) & 327 (2011) (state assumption of responsibility for determinations under NEPA).

with states to run the Medicaid program, [222] albeit with significant tension.[223] One OCR officer at HEW described his discomfort with his role overseeing compliance by state and local recipients, stating, that when he arrived for a site visit, "`I'm already a bastard before I get there.'"[224] Even pre-Affordable Care Act, Medicaid has been analogous to EPA's programs: it is jointly funded by federal and state governments, and federal law requires that states submit state Medicaid plans to the Centers for Medicare and Medicaid for federal approval.[225] State plans provide assurances that states will comply with federal rules, identify which options states are exercising under federal law, and describe state standards for administration of the program, eligibility, and reimbursement.[226] Moreover, HHS relies on states to certify providers such as nursing homes and to enforce quality and safety standards.[227] The argument is not that relationships between federal agencies and the states are identical under environmental and analogous regimes, but rather that EPA is not alone in navigating complex relationships with the states, nor in relying on collaboration in order to accomplish agency goals.

C. Personnel, Race & Culture

Additional arguments for EPA exceptionalism rooted in characteristics of EPA personnel ultimately describe factors that may have contributed to a culture that has fostered neglect of civil rights rather than a wholly independent explanation or justification. In his 2003 book, *Environmental Justice in America: A New Paradigm*," for example, Eduardo Lao Rhodes compared the racial composition of the workforce at EPA and other agencies with jurisdiction over issues of the environment and natural resources (ENR) with the composition of the federal government as a whole.[228] Rhodes argues that the predominantly and disproportionately white staff at EPA, and particularly the leadership, brought perspectives and priorities that diverged from those of personnel of color and were less engaged in issues of social justice.[229] Rhodes examined 1982, 1988, and 1992

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[222] 42 U.S.C. § 1396-1 (2011) (appropriations); 42 U.S.C. § 1396a (2011) (requirements for state Medicaid plans); *see also* Abbe R. Gluck & Nicole Huberfeld, *What is Federalism in Healthcare for?* 170 Stan. L. Rev. 1689, 1722 (2018) ("[H]ealthcare statutes today squarely align in their structure with other federal laws like the Clean Air Act . . . which set[s] national baselines in the face of state regulatory failures but still preserve[s] key roles for states as thought leaders."); Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749, 1749 (2013) (federal statutes as the source of state power).

[223] Medicaid expansions pursuant to the Affordable Care Act are but one battleground of this tension. *See, e.g., Special Feature: Should States Expand Medicaid Under the ACA?*, RAND HEALTH, https://www.rand.org/health/feature/medicaid-expansion.html [https://perma.cc/JN59-4Z3E]; *see also* Gluck & Huberfeld, *supra* note 222 (variation in the expression of characteristics of federalism, including state autonomy and experimentation, for example, exist within the context of national statutory schemes).

[224] Gary E. Thompson, Administering Social Reform in a Federal System: The Case of the Office for Civil Rights 105 (Aug. 1974) (unpublished Ph.D. dissertation, North Texas State University) (on file with author).

[225] 42 C.F.R. § 431.10 (2011) (single state agency), 430.12 (2012) (submittal of state plans and plan amendments).

[226] 42 C.F.R. § 431.40 (2013).

[227] *See* Charlene Harrington et al., *State Nursing Home Enforcement Systems*, 29 J. OF HEALTH POL., POL'Y & L. 43, 44–45 (2004).

[228] RHODES, *supra* note 183, at 96.

[229] *Id.* at 92–98.

workforce data and found that EPA and other ENR agencies fell below the federal average in employment of non-white personnel, particularly among professional staff.[230] He also reviewed the results of a survey that asked EPA staff about their attitudes toward social policy and found significant racial and ethnic gaps on perceptions of whether people of color were treated fairly and what motivated employees to work at EPA.[231] A full 71 percent of Whites who responded answered "yes" to "To help the environment?" in comparison to 42% of African Americans.[232]

Over time, EPA has continued to have a disproportionately white staff relative to the federal government, though patterns are nuanced. By 2009, for example, EPA's total permanent workforce was 68.61% white as compared to 64.08% for the federal government as a whole.[233] EPA staff classified at the senior executive service (SES) level was 82.51% white,[234] which was comparable to 83.08% for SES employees in the federal government as a whole. The percentage of EPA's workforce classified as white, however, was significantly higher than at some of its sister agencies. HUD was more racially diverse at all levels: its permanent workforce was 48.21% white, and SES staff were 59.18% white.[235] By comparison, however, the racial composition at HHS was 51.11% white overall, but similar to EPA at upper levels, with 79.06% of SES staff classified as white.[236] In 2014, the racial composition of EPA's staff was still disproportionately white as compared to the federal government as a whole.[237]

EPA's staff has not only been disproportionately white, but has also reflected the predominant perspectives of the environmental movement,[238] which historically focused on wide

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230 *Id.* at 96.

231 *Id.* at 93–94.

232 *Id.* at 94-95.

233 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FY 2009 ANNUAL REPORT ON THE FEDERAL WORK FORCE, PROFILES FOR SELECTED FEDERAL AGENCIES, ENVIRONMENTAL PROTECTION AGENCY (2009), https://www.eeoc.gov/federal/reports/fsp2009/epa.cfm [https://perma.cc/L34F-FH9E] (EPA's workforce statistics) [hereinafter EPA EMPLOYMENT STATISTICS]; U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FY 2009 ANNUAL REPORT ON THE FEDERAL WORK FORCE, PROFILES FOR SELECTED FEDERAL AGENCIES, GOVERNMENT WIDE (2009), https://www.eeoc.gov/federal/reports/fsp2009/the-government.cfm [https://perma.cc/WPB9-YFQ8] (government-wide workforce statistics) [hereinafter GOVERNMENT WIDE EMPLOYMENT STATISTICS].

234 EPA EMPLOYMENT STATISTICS, *supra* note 233; GOVERNMENT WIDE EMPLOYMENT STATISTICS, *supra* note 233.

235 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FY 2009 ANNUAL REPORT ON THE FEDERAL WORK FORCE, PROFILES FOR SELECTED FEDERAL AGENCIES, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD) (2009), https://www.eeoc.gov/federal/reports/fsp2009/hud.cfm [https://perma.cc/MX5V-GDXQ] (providing HUD's workforce statistics).

236 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, FY 2009 ANNUAL REPORT ON THE FEDERAL WORK FORCE, PROFILES FOR SELECTED FEDERAL AGENCIES, DEPARTMENT OF HEALTH AND HUMAN SERVICES (2009), https://www.eeoc.gov/federal/reports/fsp2009/hhs.cfm [https://perma.cc/MX5V-GDXQ] (providing HHS' workforce statistics).

237 EPA's staff was 67.85% white in 2014. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ANNUAL REPORT ON THE FEDERAL WORK FORCE PART II WORK FORCE STATISTICS FISCAL YEAR 2014, Table A-1a (2014), https://www.eeoc.gov/federal/reports/fsp2014_2/appendix4.cfm [https://perma.cc/2HWC-KG9M]. In that same year, 63.50% for the workforce of the federal government as a whole was white. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ANNUAL REPORT ON THE FEDERAL WORK FORCE PART II WORK FORCE STATISTICS FISCAL YEAR 2014, Table A1 (2014), https://www.eeoc.gov/federal/reports/fsp2014_2/table_a_1.cfm [https://perma.cc/85UY-WDN4].

238 *See* Letter from Richard Moore, SouthWest Organizing Project, et al., to Jay D. Hair, National Wildlife

open spaces and species rather than the impacts of pollution on people,[239] and were disproportionately trained in science, engineering, or law. It would be difficult to argue that the racial composition or even professional backgrounds of personnel were the sole reasons for EPA's disinterest in civil rights. Instead, they can be seen as contributing factors—together with the late arrival of the agency, its lack of experience enforcing civil rights law, and resistance to environmental regulation by the regulated community, for example—leading to a culture that failed to prioritize issues of equality[240] and a lack of political will to enforce civil rights law.

D. Structure

The hypothesis that the structure of EPA's OCR is a cause of its dysfunction merits further scrutiny. In 2011, Deloitte Consulting recommended moving external civil rights compliance functions at EPA from the Office of the Administrator to the Office of Enforcement and Compliance Assurance. [241] Toward the end of her tenure, Administrator McCarthy separated external and internal civil rights functions and moved the external civil rights enforcement program from the Office of the Administrator to the Office of the General Council, creating ECRCO. Was the structure of civil rights enforcement at EPA unique, and do its characteristics explain its poor record when compared with higher functioning agencies such as the OCR at the U.S. Department of Education?

Between the creation of the OCR at EPA in 1972 and December 7, 2017, when McCarthy issued the order to reorganize the office, OCR was housed within the Office of the Administrator and was responsible for enforcing civil rights laws that prohibit discrimination on the basis of race, color, national origin, disability, sex and age by programs and activities receiving federal financial assistance from EPA as well as equal employment opportunity compliance within EPA. A team of lawyers within the General Counsel's office provided legal counsel to OCR but not supervision. The director of OCR reported up to the Administrator.

Although Title VI enforcement was clearly not thriving within the Office of the Administrator, a comparative analysis of the structure of external civil rights functions at various federal agencies reveals no clear correlation between location and effectiveness. External civil rights enforcement at HHS, Education, and DOT all report through a chain of command in the Office of the Secretary.[242] Indeed, placing civil rights functions within the Office of the Secretary might protect it from undue influence from programs with conflicting goals or adversarial relations.[243] Moreover, whether external and internal civil rights compliance functions are joined

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Federation, at 1 (March 16, 1990) https://www.eeoc.gov/federal/reports/fsp2014_2/appendix4.cfm [https://perma.cc/WGT6-QAJD], (criticizing environmental groups for their failure to include people of color in decision-making positions and for inaction on environmental justice issues).

239 *See generally* TAYLOR, *supra* note 9.

240 *See* RHODES, *supra* note 183, at 92.

241 DELOITTE, *supra* note 89, at 22–24.

242 *U.S. Department of Health and Human Services Organizational Chart—Text Version*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, https://www.hhs.gov/about/agencies/orgchart/text/index.html [https://perma.cc/T8DG-ZQEG]; *Office for Civil Rights*, U.S. DEPARTMENT OF EDUCATION, https://www2.ed.gov/about/offices/list/om/fs_po/ocr/intro.html [https://perma.cc/QQ5K-9FCJ]; *Office of Civil Rights*, U.S. DEPARTMENT OF TRANSPORTATION, https://www.transportation.gov/civil-rights [https://perma.cc/3GNL-QSR3].

243 Thompson, *supra* note 224, at 140.

seems to have no clear correlation with effectiveness: at Education, the two are independent,[244] while the opposite is true at DOT,[245] which was particularly effective during the Obama years. Other structural variables that may have significance include the rank of OCR directors, staff size, whether OCRs have regional offices, and, finally, whether the agency has one unified OCR versus various civil rights offices embedded in operational offices, an approach taken by both DOT and USDA.

Rank, staff size, and whether an agency has a regional office may be as much a function of the status of and commitment to civil rights enforcement as they are building blocks to more effective programs. Although EPA recently bestowed the title of DCRO to point people in each region, the external civil rights program does not otherwise have regional staff. By contrast, HHS's OCR has 8 regional offices across the country that are charged with conducting investigations and compliance reviews.[246] Each office has a regional manager who reports to the OCR Deputy Director, Enforcement and Regional Operations, and the regional offices work with both OCR headquarters and the Office of General Counsel to plan and implement investigations and draft letters of findings, with final approval by the OCR Director.[247] Similarly, most of Education's external civil rights activities are conducted by 12 regional enforcement offices. Each regional location is headed by an Associate Enforcement Director who oversees a complaint review and compliance team.[248]

Although EPA has its "One EPA" policy, it has not adopted a formal structure to distribute civil rights responsibilities among its programmatic divisions. DOT and USDA, two agencies that arguably showed the most improvement in civil rights enforcement during the Obama Administration, have both a centralized office of civil rights and, also, programmatic OCRs. At DOT, for example, the Federal Highway Administration, Federal Transit Administration, National Highway Traffic Safety Administration, and other operating sub-agencies each have an OCR that provides guidance and technical assistance to their funding recipients and conducts compliance and enforcement activities.[249]

Whether an agency can afford staff to maintain regional or programmatic offices may reflect resource constraints independent of the commitment of leadership to civil rights. Yet EPA staff have displayed a remarkable lack of interest in developing additional resources to strengthen its program. In 2016, for example, the U.S. Commission asked the Director of OCR about staffing and, particularly, whether EPA needed additional resources. Rather than asking for support for additional funds, the Director criticized the Commission for taking EPA time to respond to the

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244 *Compare Principal Office Functional Statements: Office of Management*, U.S. DEPARTMENT OF EDUCATION, https://www2.ed.gov/about/offices/list/om/fs_po/om/eeo.html [https://perma.cc/QY2C-3NN6] (internal equal employment) *with Office for Civil Rights*, U.S. DEPARTMENT OF EDUCATION, https://www2.ed.gov/about/offices/list/om/fs_po/ocr/intro.html [https://perma.cc/X24M-76WQ] (external compliance).

245 *DOT Discrimination Policy-Complaint Process*, DEPARTMENT OF EDUCATION, https://transportation.gov/civil-rights/complaint-resolution/complaint-process [https://perma.cc/5SJY-J9MY].

246 DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE FOR CIVIL RIGHTS (OCR) FISCAL YEAR 2018 CONGRESSIONAL JUSTIFICATION, at 19 (2017), https://www.hhs.gov/sites/default/files/combined-office-of-civil-rights_0.pdf [https://perma.cc/9THT-M5LH].

247 *Id.* at 3–4, 19–20.

248 *About OCR*, U.S. DEPARTMENT OF EDUCATION, https://www2.ed.gov/about/offices/list/ocr/aboutocr.html [https://perma.cc/G2A3-2N4R].

249 *Office of Civil Rights*, U.S. DEPARTMENT OF TRANSPORTATION, https://www.transportation.gov/civil-rights [https://perma.cc/2LJR-9NDA].

Commission's questions and diverting EPA's resources from its mission.[250]

A number of factors have been posited to explain EPA's poor record of civil rights enforcement. EPA staff have argued for a brand of exceptionalism and, indeed, its partnership with states, tribes, and regional authorities that receive federal funds creates a tension with enforcement activities. Such relationships, while now baked into the ethos of the agency, are not entirely unique. Instead, this article argues that EPA's history as a latecomer to civil rights enforcement, its brand of federalism, the composition of its staff, and its structural characteristics are best understood as contributing to a cultural brew. From the beginning, this brew contained at least skepticism that addressing racial inequality and discrimination in the environmental sector was a core responsibility of the agency. Another ingredient is a healthy dose of defeatism – a lack of confidence that the agency can ever enforce civil rights laws. Now imbibed by those in the agency, the mixture has given rise to a lack of political will.

To ground truth this hypothesis, the author conducted seven off-the-record interviews during June and July of 2018 with current and past managers of various federal agency civil rights offices with enforcement obligations. Each manager was asked to define what makes an effective civil rights office, to describe the greatest challenges and accomplishments of the relevant civil rights enforcement program during his or her term of office, and then to rate the significance of various explanatory factors on the effectiveness of the office, including the role of external political pressure; political will; structural characteristics, including where the civil rights enforcement program is situated within the department, whether external and internal civil rights enforcement are unified or run separately, and whether the program has regional offices; size of grants to federal recipients; resource limitations, training and other capacity issues; and any additional characteristics.[251] The interviews also provided opportunities for more general discussion.

A key takeaway from these interviews was that agency leadership matters. Where a Department Secretary includes civil rights personnel in decision-making at the front end, for example, that action sends a message to the rest of the department that civil rights implementation is a critical part of the agency's mission. One manager describes being told on her first day that she had the confidence of the secretary and president, which she took as a mandate to push for significant reforms. Interviewees indicated that political will was needed not only from the Secretary but also from leaders of various divisions of their agency. One interviewee volunteered, though the questions and answers had focused on her own agencyt, that EPA lacked capacity to be effective because of longstanding management problems and a lack of political will.

In general, structure was seen as less important, with one exception: the OCR at the Department of Education has authority to hire its own lawyers and is not required to seek approval from the Office of General Counsel to move forward with investigations or findings of discrimination. The OCR director at Education is an Assistant Secretary and has responsibility for advising the Secretary on civil rights broadly.[252] At Education, the Assistant Secretary for Civil

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[250] 2016 EJ REPORT, *supra* note 103, at 220. According to the Commission, the Director responded that "The time and effort that OCR has spent cooperating with the Commission in this process has diverted those limited resources from the very mission the Commission wants to promote . . ."). Notably, also, when asked to confirm that EPA's external civil rights program operates with nine staff members, the director said only that she would follow up with the information later. *Id.*

[251] Notes of all interviews on file with the author.

[252] U.S. Department of Education, Principal Office Functional Statements: Office for Civil Rights, https://www2.ed.gov/about/offices/list/om/fs_po/ocr/office.html [https://perma.cc/3MB6-YDK3] (Immediate Office of the

Rights can assess, interpret, and issue decisions of law. More than one interviewee noted the significance of this authority.

What about the size of agency grants? It seems intuitive that having larger grants would give agencies more leverage but the interviewees suggested otherwise. As one manager stated, the courts are clear that one dollar is sufficient for civil rights enforcement across programs.[253] On the other hand, one interviewee suggested that the larger grants may be a more significant factor when an agency is engaging a larger jurisdiction – for example, a big city that has other sources of funding as compared to a small town.

Sufficient resources for staffing and training were also deemed important, and at least one manager described the need to create accountability, especially if staff is dispersed among regions. At the Department of Education, the Assistant Secretary collected and regularly reviewed data on the status of dockets, and the agency issued annual reports with detailed statistical information about its work.[254]

The message came loud and clear that the political will of agency leaders is critical to developing an effective civil rights program and that with this backing, steps can be taken to clarify expectations, train and hold personnel accountable, and enforce the law. This article takes the normative posture that a failure to enforce civil rights in the environmental space – and the failure to address racial disparities in both the distribution of environmental benefits and burdens and opportunities to participate equally in decision-making – is unacceptable. Given the now deeply seated set of cultural expectations and resignation at EPA, but also with the hope that civil rights enforcement is possible, the article turns to what is to be done.

V. THE ROAD TO ENFORCEMENT

Over the last two years of the Obama Administration, as a staff attorney at the non-profit environmental organization Earthjustice, the author pursued a multi-pronged strategy in collaboration with an alliance of local, state and national partners to cajole, pressure, and compel EPA to transform its civil rights compliance and enforcement program. The alliance met regularly with leadership at EPA, including Administrators Lisa Jackson and Gina McCarthy, and submitted comments on proposed guidance documents and rulemaking.[255] Representation of community-based organizations on civil rights complaints filed with EPA[256] was primarily intended to address discriminatory practices in particular communities, but it simultaneously afforded the opportunity to monitor EPA's enforcement activities in real time. We also filed litigation to challenge EPA's

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Assistant Secretary) (last visited May 6, 2019).

253 *See generally* Howe v. Hull, 874 F. Supp. 779, 789 (N.D. Ohio 1994) (an entity has to have received federal financial assistance when the alleged discrimination occurred but the financial assistance does not have to relate to the specific activity in which the complainant participates).

254 *See, e.g.,* Office for Civil Rights, U.S. Dep't of Ed., Securing Equal Opportunity: Report to the President and Secretary of Education (2016), https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf [https://perma.cc/EX65-C3W7].

255 *See supra*, note 171, at 31.

256 *See, e.g.,* North Carolina Swine Facility Complaint, *supra* note 36, at 1; Kristen Lombardi, *Thirty Miles from Selma, A Different Kind of Civil Rights Struggle*, CENTER FOR PUBLIC INTEGRITY (Aug. 5, 2015) (discussing a complaint filed by residents of Uniontown, Alabama, alleging that "the Alabama Department of Environmental Management twice violated civil rights law when permitting the Arrowhead Landfill.").

unreasonable delay in conducting investigations.[257] The Obama Administration took steps to clean house, but in January, 2017, the clock ran out on the Administration's reform efforts, and the transition to Scott Pruitt's EPA called, at least, for reconsideration of short and long-term goals and tactics.

This section outlines approaches for addressing race discrimination in the environmental justice context in light of the current realities. In the short run, communities facing discrimination will continue to pursue other avenues to seek relief from the disproportionate burden of contamination and exclusion from decision-making processes. Environmental justice groups can utilize all available legal tools, including enforcement of environmental laws, litigation to challenge intentional discrimination, and state and local causes of action in conjunction with organizing, community education, communication and other means of exerting influence and transforming paradigms. The choice of strategy will be situation specific, and, as described above, the availability of other approaches does not negate the need in the long run to breathe life back into civil rights enforcement. During the next few years, it will remain important to keep pressure on EPA to prevent backsliding, but it is hard to imagine that major reform efforts will get over the finish line during this administration. At the same time, the next three years afford the opportunity to reconceptualize civil rights enforcement at EPA and to develop the tools, means, and political will for putting a stronger program in place. The scale and intractability of the problem, however, suggest that solutions must go beyond incremental improvements. Given gaping holes in civil rights compliance and enforcement, the article renews the call for Congress to restore the private right of action to enforce regulatory requirements, a step that would reduce reliance on agency efforts.[258] In addition, this Part revisits the structure of Title VI enforcement established by statute and argues for reconsideration of the decision to locate enforcement in the many federal agencies that disburse federal funds. Rather than relying on small isolated OCRs within multiple departments with distinct and perhaps even conflicting missions, responsibility for Title VI could be housed within either the Department of Justice or an independent federal agency modeled after the EEOC.

A. In the Short Run: Other Avenues for Redress

Meaningful participation in decision-making is central to the environmental justice movement,[259] and environmental justice groups emphasize the agency of community members and strategies that provide opportunity for community-based engagement. These include research and study, protest, public education, organizing, communications, participation in public hearings and other administrative and legislative processes, as well as networking and movement building.[260] Litigation is but one set of tools to fight discriminatory policies and practices. Although scholars in the 1990s advocated for Title VI enforcement to address discrimination in the distribution of environmental burdens and benefits,[261] community groups now have a decades-long history of

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257 Complaint for Injunctive and Declaratory Relief, Californians for Renewable Energy v. EPA, No. 3:15-CV-03292, at ¶¶ 1–3 (N.D. Cal. July 15, 2015).

258 *See, e.g.*, The Environmental Justice Act of 2017, S. 1996, 115th Cong. § 10 (2017) (private rights of action for discriminatory practices).

259 *See* FIRST NATIONAL PEOPLE OF COLOR LEADERSHIP SUMMIT, *supra* note 3.

260 *See, e.g.,* BULLARD, *supra* note 15, at 12–13.

261 *See, e.g.,* James H. Colopy, Note, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L. REV. 125, 128 (1994); Rachel Godsil, Note, *Remedying Environmental*

turning to a range of legal strategies given the limitations they faced bringing disparate impact claims to court and the ineffectiveness of filing complaints with EPA and other federal agencies.[262]

In today's environment, with little prospect for effective remedies through the administrative process under Title VI over the next few years, communities can continue to raise concerns about procedural inequalities and environmental disparities without relying on EPA's civil rights enforcement program. Although litigation and advocacy under federal and state environmental laws are a complement not a substitute for raising claims of discrimination under civil rights law, environmental laws provide opportunities for participation in decision-making and challenging the opening, expansion and operation of polluting sources. [263]

Moreover, claims of intentional discrimination in permitting processes, such as those raised by the St. Francis Prayer Center against MDEQ, for example, can be brought in court.[264] In California, both intentional discrimination and actions by state agencies or government funded programs that have an unjustified disparate impact can be challenged in court under state law.[265] Moreover, in situations where community members are facing discrimination by private or local actors, they may be able to file complaints with their state attorneys general, depending on the state. During the Administration of George W. Bush, for example, community-based organizations Make the Road by Walking and the New York Immigration Coalition brought claims under Title VI, HHS regulations, and state laws to the New York Attorney General rather than HHS. They alleged that New York area hospitals were violating Title VI and HHS regulations by failing to provide services in languages spoken by patient populations. The Attorney General accepted the complaints, investigated, and signed settlement agreements calling for the hospitals to implement comprehensive language access policies.[266]

Racism, 90 MICH. L. REV. 394, 397 (1991).

262 *See* Marianne Engelman Lado, *Litigation and Structural Change in Low-Income Communities: Toward a New Conceptualization of the Role of National Legal Campaigns*, Aspen Institute Roundtable on Comprehensive Community Initiatives 21–23 (July 1, 1998), https://assets.aspeninstitute.org/content/uploads/files/content/upload/2Lado.pdf [https://perma.cc/Z6EH-UUV3] (litigation strategy to challenge the privatization of public hospitals developed in light of conclusion that Title VI claims were unavailing).

263 *See supra* Part IIB and accompanying footnotes.

264 Letter from Dorka to Grether, *supra* note 67, at 2–4; *see also* Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2006 U.S. Dist. WL 1450520, at *12 (N.D. Tex. May 24, 2006) (claim of intentional discrimination in the provision of municipal services under Title VI survives motion for summary judgment); Miller v. City of Dallas, No. 3:98-CV-2955-D, 2002 U.S. Dist. LEXIS 2341, at *2 (N.D.Tex. Feb. 14, 2002) (intentional discrimination claim survives motion to dismiss).

265 *See* CAL. GOV'T CODE § 11135(a) (2017) (provides that no person shall be denied "full and equal access" to benefits); CAL. CODE REGS. tit. 2, § 11154 (i)(1) (2017) (prohibiting disparate impact discrimination); CAL. GOV'T CODE § 11139 (2017) (providing a private right of action to bring disparate impact claims); *see* Blumhorst v. Jewish Family Services of L.A., 24 Cal. Rptr. 3d 474, 480 (Ct. App. 2005) (recognizing the private right of action); JOHN AUYONG ET AL., U.C. HASTINGS COLLEGE OF LAW PUBLIC LAW RESEARCH INSTITUTE, OPPORTUNITIES FOR ENVIRONMENTAL JUSTICE IN CALIFORNIA: AGENCY BY AGENCY 8 (2003), http://gov.uchastings.edu/public-law/docs/PLRI_Agency-by-Agency_03.pdf [https://perma.cc/DDS7-BSCD] (discussing private right of action to bring disparate impact discrimination claims in California under Section 1139); Kate Baldridge, *If You Give a Mouse a Cookie: California's Section 11135 Fails to Provide Plaintiffs Relief in* Darensberg v. Metropolitan Transportation Commission, 43 GOLDEN GATE U. L. REV. 7, 9 (2013) (state law affords a private right of action to bring disparate impact claims but the burden of proof to substantiate claims can be high).

266 *See* Resolution Agreement Between the Office of the Attorney General of the State of New York and St. Elizabeth Medical Center (Sept. 12, 2003), http://www.nylpi.org/images/FE/chain234siteType8/site203/client/Health%20-

Although Title VI does not explicitly provide states with enforcement powers, at least one New York court has found that the Title VI affords a right of action for the New York attorney general to sue under the statute.[267] New York and California laws also contain provisions authorizing their attorneys general to enforce laws against "illegal activity" in their state, which can be interpreted to include violations of federal law.[268] California's Unfair Competition Law similarly prohibits any "any unlawful, unfair or fraudulent business act or practice."[269] The attorney general, as well as other law enforcement officials in the state, may bring an action for injunctive relief or for restitution against entities that engage in prohibited practices.[270] Notably, courts have recognized that the Unfair Competition Law can form the basis for a private cause of action even if the underlying statute does not.[271]

These various legal strategies – including enforcement of environmental laws, the opportunity to bring claims of intentional discrimination in court, and appeal to state officials, where state law vests such officials with authority to enforce federal law -- leave significant gaps. Recourse to EPA, for example, remains an important option for communities in eastern North Carolina

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%2009.12.04_Agreement%20St.%20Elizabeth's%20Hospital.pdf [https://perma.cc/27WE-TEE8]; Press Release, New York Lawyers for the Public Interest, "Make the Road by Walking, Inc." and New York Lawyers for the Public Interest, Inc. Declare Victory Over Language Access Complaints Settled by the Attorney General's Office (March 7, 2003), http://www.nylpi.org/wp-content/uploads/bsk-pdf-manager/83_HEALTH_-_PRESS_RELEASE_-_03.07.03_WOODHULL_WYCKOFF_SETTLEMEN.PDF [https://perma.cc/N2JS-MXL6] (Attorney General resolves language access complaints filed against Woodhull and Wyckoff Hospitals).

267 New York v. Utica City Sch. Dist., 177 F. Supp. 3d 739, 747 (N.D.N.Y. 2016) (Title VI contains the "sort of broad civil enforcement provision" that allowed *parens patriae* enforcement suits by the state); *cf.* P.R. Pub. Hous. Admin. v. U.S. Dep't of Hous. & Urban Dev., 59 F. Supp. 2d 310, 326–327 (D.P.R. 1999) (*parens patriae* action under Title VI to protect public housing residents from racial discrimination).

268 *See* N.Y. Exec. L.§ 63(12) ("Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, . . . for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case,. . . ."); *Utica City School District*, 177 F. Supp. 3d at 747 (N.D.N.Y. 2016) (quoting E.E.O.C. v. Fed. Express Corp., 268 F.Supp.2d 192 (E.D.N.Y. 2003)) (N.Y. Exec.L.§ 63 confers "the power 'to bring discrimination cases on behalf of the People of New York.'"); *see* People ex rel. Vacco v. World Interactive Gaming Corp., 714 N.Y.S. 2d 844, 848 (N.Y. Sup. Ct. 1999) (citing State v. Ford Motor Co., 74 N.Y.2d 495 (N.Y. 1989)) (authority of the attorney general extends to violations of state and federal law in carrying on, conducting, or transacting business); Oncor Commc'ns, Inc. v. State, 626 N.Y.S. 2d 369, 372–73 (N.Y. Sup. Ct. 1995), *aff'd* 636 N.Y.S. 2d 176 (N.Y. 1996); State v. Stevens, 497 N.Y.S. 2d 812, 813 (N.Y. Sup. 1985) (upholding attorney general's authority to bring action against activity violating federal regulations).

269 CAL. BUS. & PROF. CODE § 17200.

270 CAL. BUS. & PROF. CODE §§ 17204; *see* State Farm Fire & Casualty Co. v. Superior Court, 53 Cal. Rptr. 2d 229, 234 (Cal. Ct. App. 1996) (noting that "[l]aws that have been enforced under Section 17200's 'unlawful' prong include state antidiscrimination laws"), *abrogated on other grounds by* Cel-Tech Comm., Inc. v. Los Angeles Cellular Telephone Co., 973 P.2d 527 (Cal. 1999); Sybersound Records, Inc. v. UAV Corp., 517 F. 3d 1137, 1151–52 (9th Cir. 2008) (citing Nat'l Rural Telecomm. Co-op. v. DIRECTV, Inc., 319 F. Supp. 2d 1059 (C.D. Cal. 2003); Smith v. State Farm Mut. Auto. Ins. Co., 113 Cal. Rptr. 2d 399 (2001); Saunders v. Superior Court, 33 Cal. Rptr. 2d 438, 441 (1994)) (unlawful acts include business practices that are forbidden by law, including federal law); People v. McKale, 602 P. 2d 731, 737 (Cal. 1979) (discrimination can be an "unlawful business practice.").

271 Smith v. Chase Mortg. Credit Grp., 653 F. Supp. 2d 1035, 1044 (E.D. Cal. 2009) (citing Stop Youth Addiction, Inc. v. Lucky Stores, 950 P.2d 1086 (1998)); Mfrs. Life Ins. Co. v. Superior Court, 895 P.2d 56, 71-72 (Cal. 1995)).

challenging the everyday disparate effects of that state's permitting of thousands of swine facilities.[272] Moreover, it is unclear whether as a result of *Sandoval*, communities have a right of action to sue recipients of federal funds that fail to provide access to services for people who are limited English proficient,[273] or to challenge practices of intimidation and retaliation based on underlying disparate impact claims.[274] The remainder of this section focus on two long-term approaches to filling those gaps.

B. Meaningful Reform at EPA

EPA's record provides scant reason for faith that incremental reforms will be sufficient to create an effective civil rights program. Yet the historic success of HEW,[275] significant civil rights program at the U.S. Department of Education,[276] and recent enforcement activities at DOT,[277] reinforce the conclusion that with the political will, EPA can develop an effective civil rights enforcement program.

EPA has the authority to take a number of steps that would dramatically improve civil rights enforcement in the environmental context. This section will outline some of the most pressing reforms, including the production of guidance documents to set forth clear expectations for complying with Title VI; decoupling civil rights enforcement from interpretations of environmental law; the imposition of meaningful remedies to send a clear message to recipients that the agency will exercise its power to withhold federal funds; and the use of EPA's affirmative authority to conduct compliance reviews.[278]

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272 North Carolina Swine Facility Complaint, *supra* note 36, at 1.

273 *But see* T.R. v. School District of Philadelphia, 223 F. Supp. 3d 321, 335 (E.D. Pa. 2016) (allegations of failure to provide adequate translation and interpretation services sufficient to state a claim); U.S. v. Maricopa County, Ariz., 915 F. Supp. 2d 1073, 1081 (D. Ariz. 2012) (DOJ stated claim of national origin discrimination against limited English proficient population). For an example of a language access complaint filed with EPA, see Letter from Deborah Reade, *supra* note 58 (alleging that New Mexico Environment Department conducted a permitting process without providing linguistically appropriate access, among other things).

274 *See, e.g.,* ADEM intimidation complaint, *supra* note 60, at 1; NC intimidation complaint, *supra* note 60, at 1.

275 *See supra* notes 44–49 and accompanying text.

276 *See* OFFICE OF CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION, SECURING EQUAL EDUCATIONAL OPPORTUNITY: REPORT TO THE PRESIDENT AND THE SECRETARY OF EDUCATION 5 (2016) (among other things, in fiscal year 2016, OCR received more than 16,000 complaints, initiated 13 compliance reviews, resolved more than 8,600 cases, and developed and released 5 policy documents).

277 *See infra* notes 279–280 and accompanying text.

278 Advocates have also pressed for improvements in inter-agency coordination, the promotion of greater transparency by, for example, engaging complainants and other stakeholders directly and making available public information about EPA's external civil rights docket, and building capacity by increasing resources and addressing issues identified in the Deloitte Report, among other things. For additional recommendations, see 2016 EJ REPORT, *supra* note 103, at 92-93; A RIGHT WITHOUT A REMEDY, *supra* note 125, at 21; Deloitte, *supra* note 89, at 20–24, 28–29; NOT IN MY BACKYARD, *supra* note 102, at 168–71.

1. Finalizing Clear Guidance

Effective civil rights programs must communicate with specificity the type and degree of compliance required.[279] Time and again, EPA has failed to issue clear programmatic guidance to recipients of federal funds and comprehensive and uniform standards for investigating complaints.[280] EPA's lack of clarity creates confusion or, at least, justification for recipients of federal funds to argue that they are in compliance. After EPA made its finding of discrimination in the St. Francis Prayer Center case in Flint, Michigan, for example, MDEQ wrote to EPA with objections.[281] MDEQ argued that its policies and practices fully satisfied EPA standards because there was no authority for the particular standards EPA had applied to MDEQ's conduct.[282] MDEQ argued, for example, that there were no clear requirements mandating that the text of MDEQ's nondiscrimination notice provide specific information about language access or that its grievance procedure contain assurances that retaliation is prohibited. *Id.* at 5, 6. MDEQ's position was that EPA's findings were "not valid and incorrect" because EPA was alleging noncompliance with standards allegedly not required by the text of the regulations nor set forth in authoritative guidance. *Id.* A comprehensive guidance is needed to inform EPA staff, recipients, beneficiaries of EPA assistance, and the public as to their respective rights and obligations.

2. Decoupling Civil Rights from Standards Developed Under Environmental Laws

In 2017, with its release of the External Civil Rights Compliance Office Compliance Toolkit, EPA stepped back from the rebuttable presumption that absent non-compliance with environmental or health standards, EPA will not make a finding of adverse impact.[283] Perhaps more than any other single factor, the conflation of environmental standards with the analysis of adversity can be blamed for paralyzing civil rights enforcement at EPA at least since 1998, when EPA released the *Select Steel* decision incorporating the rebuttable presumption.[284] At the time a community files a complaint alleging that pollution from a new facility will have an adverse impact, the recipient argues that the permit will ensure compliance with environmental laws. With the presumption that environmental standards are sufficient to protect public health, the problem of "adverse impact" disappears, even if the facility is going to emit known toxics such as mercury or lead. Once a facility is in operation, communities seeking to challenge a renewal of a permit based on a record of violations by the facility face an equal challenge: if the state or EPA has made a finding of non-compliance, the facility is likely to have created a plan to remedy the problem, and again the rebuttable presumption asserts itself. Communities experiencing pollution and cumulative impacts from multiple facilities bear the burden of showing violations of federal environmental law rather than establishing that emissions of toxics constitute adverse impact.

DOT's decision in the 2013 Beavercreek case provides a start contrast. Community

279 *See* Thompson, *supra* note 223, at 223.

280 As a comparison, see FTA Circular 4702.1B, *supra* note 122.

281 *See* Letter from Heidi Grether, MDEQ, to Lilian S. Dorka, EPA (March 6, 2017) (response to notice of preliminary findings of noncompliance in EPA File No. 01R-94-R5).

282 *Id.*

283 *See* EPA, FREQUENTLY ASKED QUESTIONS, *supra* note 150, at 3.

284 *See* Letter from Goode to Schmitter, *supra* note 62, at 3–5.

members filed a complaint against the City of Beavercreek, a suburb of Dayton, alleging that the town, which had a predominantly white population, had rejected a proposal for bus stops near a mall though the proposal met all legal and usual criteria.[285] A letter of findings issued by the Federal Highway Administration evaluated the racial and ethnic composition of bus ridership and then concluded that, based on the statistics, African Americans were disproportionately impacted by the town's decision compared with Whites.[286] The decision then evaluated whether the recipient had a substantial legitimate justification. DOT included no detailed analysis of adverse impacts – not, for example, the economic loss of having limited access to the mall nor the statistical risk of injury or death if Dayton residents were to walk along the highway from the pre-existing bus stops. Limited access to the mall was assumed to be a cognizable adverse impact.

By contrast, EPA complicates assessments of impact. Even after EPA released the Toolkit, it continued to interpret its Title VI responsibilities and authorities through the lens of traditional environmental regulations: if facilities are in compliance with environmental statutes, then EPA continues to assume there is adequate protection for communities.[287] A final guidance should clarify that technical compliance with environmental laws is not the measure of whether a decision, policy, or practice causes an adverse impact.[288]

3. Creating Incentives to Comply

An early observer of civil rights enforcement argued in 1968 that an effective Title VI program must convince recipients "that 1) they needed federal funds; 2) funds *would* be withheld for noncompliance; and 3) the recipient would rather comply than lose the funds."[289] Though EPA took steps forward by issuing preliminary findings of discrimination in the Angelita C. and St. Francis Prayer Center cases,[290] the perception that it might finally have the will to enforce the law was undermined by the lack of effective remedies in both cases. With its weak performance over time and without once terminating funding, EPA has little or no credibility that it will withhold

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285 *See* Letter from Ellis Jacobs, Advocates for Basic Legal Equality, et al., at 2-3, 6 (Aug. 10, 2011), https://equitycaucus.org/sites/default/files/Advocates%20for%20Basic%20Legal%20Equality%20Inc%20Title%20VI%20Complaint%20Beavercreek%20OH.pdf [https://perma.cc/Y8TY-NVJR] (complaint filed with the Federal Highway Administration).

286 *See* Letter from William S. Whitlock, FHWA, to Michael Cornell, City of Beavercreek, et al., at 11 (June 26, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/07/DOT_fhwa_decision-_lead_v_city_of_beavercreek_june_2013.pdf [https://perma.cc/JPB4-QEJ4] ("As a result, African Americans are disproportionately affected by the City's denial of [the Regional Transit Authority's] application to install bus stops providing access to the Mall and other services along Pentagon Boulevard in the City.").

287 *See, e.g.,* Letter from Dorka to Grether, *supra* note 131, at 3 ("With respect to the allegations of adverse disparate health effects raised in the original complaint, EPA conducted four analyses to assess risk of health effects and did not find sufficient evidence to establish adversity/harm with respect to health effects. Therefore, there is insufficient evidence to support a prima facie case of adverse disparate impact.").

288 *See* California Rural Legal Assistance Foundation, *supra* note 62, at 5–12 (argument against continued reliance on statutory and regulatory environmental and health standards for determining adversity prong of disparate impact analysis).

289 Linda R. Singer et al., *Title VI of the Civil Rights Act of 1964—Implementation and Impact*, 36 GEO. WASH. L. REV. 824, 843 (1968) (emphasis in original).

290 *See supra* notes 152–165 and accompanying text.

funds for noncompliance.

In a 1975 report, the U.S. Commission on Civil Rights advocated for the termination of federal funding in instances of noncompliance with Title VI as an appropriate remedy, when the agency determined that fund termination would not have a detrimental effect on the health of the public.[291] Again, in its 2003 report, *Not in My Backyard*, the Commission urged federal agencies to use "all available tools to protect the precarious health status of the poor and people of color, whose overall lower health status can be exacerbated by exposure to environmental hazards."[292] If EPA is going to have a strong civil rights program, it must address discriminatory conduct by imposing meaningful remedies.[293]

4. Exercising Affirmative Authority

Pursuant to regulation, EPA has authority to conduct pre- and post-award compliance reviews.[294] In 2015, when EPA published an Advanced Notice of Proposed Rulemaking to amend its Title VI regulations, it proposed to eliminate a requirement that the agency demonstrate it has "reason to believe" that discrimination may be occurring before conducting an on-site post-award review.[295] In its history, however, EPA had only exercised its authority to conduct post-award compliance reviews once[296]—despite the fact that EPA had affirmative authority under existing regulations to collect data and conduct pre-and post-award compliance reviews even without "reason to believe" discrimination is occurring.[297] EPA acknowledged its existing authority and emphasized that compliance reviews are "an important part of the implementation of all EPA programs and essential to the functioning of comprehensive compliance and enforcement efforts."[298] Rather than launching an affirmative compliance review program, however, EPA asked for input on "how to schedule and conduct compliance reviews in ways that minimize unnecessary burdens to both EPA and the recipients."[299] EPA also proposed to delay any request for compliance reports until it issued guidance documents.[300]

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[291] *See* NOT IN MY BACKYARD, *supra* note 102, at 168 (citing U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT–1974 (1975)).

[292] *Id.*

[293] *See* A RIGHT WITHOUT A REMEDY, *supra* note 125, at 2.

[294] 40 C.F.R. § 7.110 (2011) ("[T]he OCR will determine whether the applicant is in compliance . . . This determination will be based on the submissions required . . . and any other information EPA receives during this time (including complaints) or has on file about the applicant. When the OCR cannot make a determination on the basis of this information, additional information will be requested. . . ."); 40 C.F.R. § 7.115 (2002) ("The OCR may periodically conduct compliance reviews of any recipient's programs or activities receiving EPA assistance, including the request of data and information, and may conduct on-site reviews when it has reason to believe that discrimination may be occurring. . . .").

[295] Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency, 80 Fed. Reg. 77,284, 77,287 (Dec. 14, 2015).

[296] *See* 2016 EJ REPORT, *supra* note 103, at 39. In 2011, EPA entered into an agreement with the Louisiana Department of Agriculture and Forestry to resolve a civil rights complaint filed under Title VI and a limited English proficiency compliance review conducted by EPA. *Id.* at 214.

[297] 40 CFR §§ 7.85 (2002), 7.110 (2011), 7.115 (2002).

[298] 80 Fed. Reg. 77,286.

[299] *Id.*

[300] *Id.* ("[T]he EPA does not intend to request compliance reports unrelated to compliance reviews and

Recipients of EPA funding are already on notice that EPA has the power to require them to submit additional information.[301] An effective civil rights program would include the exercise of affirmative compliance authority without excuses or delay.

C. The Long Game: Shifting the Paradigm

Though incremental reform at EPA should remain on the table, reasonable skepticism of the agency's potential for change suggests that more fundamental reforms should be considered in the long run to ensure that civil rights are enforced. Restoring the private right of action to enforce agency regulations would at least reduce reliance on agency enforcement. In addition, the article revisits the decision made by Congress in 1964 to delegate responsibility for implementation to the many federal agencies.

1. Restoring Access to the Courts

As a result of the Supreme Court's decision in *Alexander v. Sandoval*, community groups seeking to enforce EPA regulations prohibiting actions with an unjustified disparate impact on the basis of race, color or national origin pursuant to Title VI have been dependent on the agency. Since that time, a number of bills have aimed at reestablishing access to the courts by creating an express right of action either to enforce agency regulations[302] or to provide remedies for disparate impact claims,[303] or both. The 2008 bill championed by Ted Kennedy in the Senate and John Lewis in the House stated that the *Sandoval* decision had undermined statutory protections created by Congress over four decades "by stripping victims of discrimination . . . of the right to bring action in Federal court to redress the discrimination."[304] A statutory fix was needed, the bill asserted, because effective enforcement and the protection of rights "depend heavily on the efforts of private attorneys general" and could not be secured solely through the efforts of administrative agencies and DOJ.[305] Perhaps nowhere is the need to supplement agency action greater than in the environmental context.

In 2011, DOJ proposed an amendment to Title VI to make explicit that the statutory

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complaint investigations, from recipients any sooner than 90 days after it has drafted guidance about such reports, sought stakeholder input on the guidance, put the guidance out for notice and comment, and finalized the guidance.").

301 40 C.F.R. §§ 7.80 (pre-award information requirements), 7.85 (post-award information requirements).

302 *See, e.g.,* Civil Rights Act of 2008*,* S. 2554, 110th Cong. § 103 (2008) (proposing to amend Title VI by adding "Any person aggrieved by the failure of a covered entity to comply with this title, *including any regulation promulgated pursuant to this title*, may bring a civil action in any Federal or State court of competent jurisdiction to enforce such person's rights.") (emphasis added).

303 *Id.* at § 104 ("In an action brought by an aggrieved person . . . against a covered entity who has engaged in unlawful discrimination based on disparate impact . . . the aggrieved person may recover equitable relief, attorney's fees (including expert fees), and costs.").

304 *Id.* at § 101. While this article focuses on issues of discrimination on the basis of race, color and national origin raised specifically in the environmental justice context, these legislative efforts aim to restore the private right of action to enforce regulations under Title VI; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (2015); the Age Discrimination Act of 1975, 42 U.S.C. § 6101 et seq. (2011); and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 (2015)).

305 Civil Rights Act of 2008, S. 2554, 110th Cong. § 101 (2008) (citing *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968)).

prohibition against discrimination includes disparate impact claims,[306] and to afford relief for those claims.[307] Then again, in 2017, Rep. Robert (Bobby) Scott introduced another *Sandoval* fix to establish a right of action to enforce regulations prohibiting actions with disparate impacts on the basis of race,[308] followed by a similar provision in the Environmental Justice Act of 2017.[309] Although these efforts are unlikely to bear fruit in the current Congress, building momentum for the restoration of the private right of action is part of a strategy for ensuring that disparate impact claims are enforceable in the long-run.

2. Centralizing Civil Rights Enforcement

Title VI explicitly established a prohibition against discrimination in the use of federal funds, and then authorized federal agencies to implement the law by establishing standards of discrimination and withholding funds or enforcing the law "by any other means authorized by law."[310] Delegating authority to administrative agencies was a direct outgrowth of the circumstances that gave rise to Title VI. Ten years after the Supreme Court ruled in *Brown v. Board of Education* that "in the field of public education the doctrine of `separate but equal' has no place,"[311] the courts finally ruled that "separate but equal" was also prohibited under the federal Hill-Burton hospital construction program.[312] The champions of Title VI aimed to make clear that agencies administering programs such as Hill-Burton had explicit authority to impose conditions of nondiscrimination on the recipients of their grant and loan programs. [313] Early on, however, observers raised concerns about the capacity of the 22 agencies that then disbursed federal funds to hold recipients accountable. These agencies were "each desiring to advance its own substantive programs," so questions were raised as to whether the agencies would undertake strong enforcement of a law that may not be perceived to be directly related to those programs.[314] Now, decades later, given the shortcomings of agency enforcement, this section proposes consideration of legislation to centralize

306 *See* Letter from Ronald Weich, Assistant Attorney General, to Joe Biden, Vice President, and John Boehner, Speaker of the House of Representatives, at Title II § 208 (Sept. 20, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/09/21/letterslegprop.pdf [https://perma.cc/A9LB-7Q8B] ("Discrimination based on disparate impact is established under this title . . . ."); *see also* Servicemembers' Protection Act of 2012, S. 3322, 112th Cong. § 206 (2012).

307 *See* Letter from Weich to Biden & Boehner, *supra* note 306, at Title II § 208 ("Any person aggrieved by the failure of a covered entity to comply with this title may bring a civil action in any Federal or State court of competent jurisdiction to enforce such person's rights and may recover equitable relief, reasonable attorney's fees, and costs"); *see also* Servicemembers' Protection Act of 2012, S. 3322, 112th Cong. § 206 (2012).

308 Equity and Inclusion Enforcement Act, H.R. 2486, 115th Cong. § 3 (2017) ("The violation of any regulation relating to disparate impact under section 602 shall give rise to a private cause of action for its enforcement . . .").

309 Environmental Justice Act of 2017, S. 1996 115th Cong. § 10 (2017) ("Any person aggrieved by the failure of a covered entity to comply with this title, including any regulation promulgated pursuant to this title, may bring a civil action in any Federal or State court of competent jurisdiction to enforce such person's rights under this title.").

310 Civil Rights Act of 1964, Pub. L. 88-352, tit. VI §§ 601-602, 78 Stat. 241, 252-53 (codified as 42 U.S.C. §§ 2000d to 2000d-1 (2012)); *See* Singer, *supra* note 289, at 834.

311 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

312 Simkins v. Moses H. Cone Mem'l Hosp., 323 F.2d 959, 969–70 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

313 *See* Singer, *supra* note 289, at 827-28.

314 *Id.* at 844.

enforcement activities either at DOJ or in a new independent civil rights agency modeled after the EEOC.[315]

a. The Department of Justice

Under Executive Order 12250, DOJ is delegated authority to coordinate the implementation and enforcement of Title VI and other analogous nondiscrimination laws and to approve rules, regulations, and orders.[316] DOJ's responsibilities include reviewing existing and proposed agency rules, developing standards and procedures for taking enforcement actions, issuing guidelines for case resolution, and developing standards for agency recordkeeping and reporting.[317] Today, DOJ's Coordination and Compliance Section carries out this responsibility.[318]

DOJ's approach to coordination has been largely passive and observers have questioned its capacity to coordinate effectively.[319] To this day, DOJ describes its role as a technical assistance provider with limited ability to compel agency action.[320] DOJ fails even to compel standardized reporting of such basic information as caseloads and how long investigations are open before they reach resolution.[321] On the other hand, DOJ's co-facilitation of Interagency Working Groups on Title VI during the Obama Administration fostered greater dialogue and cooperation among federal agencies.

One reason DOJ was selected for a leading role in coordinating civil rights enforcement activity was that it had been involved in civil rights before the passage of Title VI,[322] and its enforcement expertise remains relevant in considering an expanded role for DOJ in the future. The proposal offered in this section is to amend Title VI to delegate rulemaking and enforcement activity to DOJ rather than the several agencies. Significant staffing and resources would be required to carry out these responsibilities. Embedding civil rights enforcement in programmatic departments with distinct, though arguably overlapping, missions makes civil rights staff vulnerable to pushback

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315 In recognition that the effectiveness of OCRs varies, future consideration could be given to the possibility that the centralized agency could have authority to delegate compliance and enforcement activity to a well-functioning OCR that meets particular criteria. The OCR at the Department of Education, for example, has developed significant expertise and might be more effective at providing incentives for its recipients to comply with the mandates of the law, at least during a transition period.

316 Exec. Order No. 12,250, 3 C.F.R. 298 (1980), *reprinted in* 42 U.S.C. § 2000d-1 (2012) (Leadership and Coordination of Implementation and Enforcement of Nondiscrimination Laws).

317 *Id.*

318 *Federal Coordination and Compliance Section*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/crt/federal-coordination-and-compliance-section-202 [https://perma.cc/EKY7-LFS7].

319 *See* Singer, *supra* note 289, at 862–65. Singer argues that DOJ's effectiveness in leading coordination activities may have been limited by resistance of other agencies to following "the dictates" of a sister agency. *Id.* at 865. Such dynamics would be altered, though, if enforcement activities were centralized at DOJ.

320 Interview with Vanita Gupta, Head of the Civil Rights Division, Dep't of Justice (Sept. 11, 2015).

321 The lack of standardization became apparent when the author received information from EPA, DOT, HUD, and the Department of Education in response to FOIA requests that were intended to gather basic data on case handling that would allow comparisons among agencies. Each agency disaggregates and labels Title VI outcomes in slightly different ways and data is incomplete, making cross-agency assessment more difficult.

322 *See* Singer, *supra* note 289, at 860.

from other interests within each agency.[323] Arguably, at least, civil rights enforcement might not have the same degree of organizational marginality or potential conflict at DOJ when compared to the OCRs in agencies such as EPA given DOJ's role in law enforcement more generally.[324] Moreover, centralizing functions would enable DOJ to standardize Title VI enforcement across the federal government, communicate expectations to all stakeholders and especially recipients of federal funds, and create organizational cohesion, in part by removing civil rights enforcement staff from small scattered OCRs in agencies with distinct goals and uniting them within one agency.[325] The next section will consider the possibility of establishing a new agency modeled after the EEOC to hold recipients of federal funds accountable.

b. A New Civil Rights Enforcement Agency: A Centralized OCR

Although Congress established different mechanisms for civil rights enforcement pursuant to Titles VI and VII, the model created by the EEOC may have benefits or at least lessons for enforcing the right to be protected from discrimination by programs or activities receiving federal funds.[326] In the area of employment discrimination and federal contracting, from at least the 1940s there were a number of precursor committees appointed by the President to eliminate racial and religious discrimination, which helps to explain the choice of structure for Title VII.[327] The Equal Employment Opportunity Act of 1962 laid out some of the features that would find their way into Title VII of the Civil Rights Act of 1964 as finally enacted:[328] the Commission would have authority to pursue educational efforts, investigate, and bring civil actions in federal court should efforts to resolve cases fail.[329] The Equal Employment Opportunity Act of 1972 subsequently gave the EEOC litigation authority to sue nongovernmental employers, unions, and employment agencies when the

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323 *See* Thompson, *supra* note 224, at 35–37 (describing the effect of turbulence, defined as unpredictability and/or hostility within an agency, in the context of nascent agency civil rights activities).

324 *See About DOJ*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/about (last visited Feb. 17, 2018) [https://perma.cc/4DD9-QSN8] ("To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.").

325 *See* Thompson, *supra* note 224, at 113 (discussing the benefits of centralization to the institutionalization of social reform programs). On the other hand, a unified civil rights enforcement program could create a clearer target for opponents. *See* Smith, *supra* note 44, at 125 (describing Secretary Gardner's decision to involve staff from across HEW to evade Congressional scrutiny).

326 An effort to develop a new approach to Title VI enforcement can benefit from an analysis of the EEOC's strengths and weaknesses. *See generally* Michael L. Selmi, *The Obama Administration's Civil Rights Record: The Difference an Administration Makes*," 2 IND. J. L. & SOC. EQUALITY 108 (2013); Dinah Payne et al., *Is Big Brother Watching?: Perceptions and Research on the Effectiveness of the EEOC*, 43 LAB. L. J. 249 (1992).

327 *See* U.S. Equal Emp't Opportunity Comm'n, Legislative History of Titles VII and XI of Civil Rights Act of 1964*,* at 2–4 (1968) (discussing the Fair Employment Practices Committee established by Executive Order 8,802 in 1941 and the President's Committee on Equal Employment Opportunity established in 1961, which represented "a dramatic break with the past" in that contractors were required not only to avoiding discrimination "on the basis of race, creed, color, or national origin, [but also] to take affirmative action to make the policy effective.").

328 *Id.* at 9.

329 *Id.* at 2160.

Commission found itself unable to enforce the laws through informal means.[330] The Act also granted the EEOC the authority to subpoena witnesses and documents necessary to investigate employment discrimination charges.[331] Other key provisions of the Act included the creation of the Equal Employment Opportunity Coordinating Council composed of the EEOC, the Departments of Justice and Labor, the Civil Service Commission, and the Civil Rights Commission.[332] The Council's goals included maximizing effort, promoting efficiency, and eliminating conflict among the various federal programs.[333]

In considering the possibility of establishing a new independent agency to enforce Title VI, various characteristics of the EEOC model should be examined to determine whether they are contributing to the ability of the Commission to carry out its mission and whether its functions map onto Title VI enforcement. Among other things, the EEOC is led by six presidential appointees—including five commissioners and the general counsel—with staggered five-year terms and restrictions intended to ensure representation from more than one political party. The chair, who serves as one of the five commissioners, has operational responsibility, but all commissioners participate in the development and approval of policies, decisions to issue charges of discrimination, and authorization of lawsuits.[334] Notably, the EEOC also has a role in working with all federal agencies developing regulations governing equal employment opportunities in their domains and coordinating enforcement of federal equal employment efforts.[335] Further research can evaluate the EEOC's performance in this role and whether it presages potential challenges for cooperation between a centralized OCR and the agencies disbursing federal funds.[336]

Whether at DOJ or in a new freestanding agency, this agency can consolidate public education, training, rulemaking, investigation, compliance review, enforcement, and recordkeeping functions. Just as the EEOC works with the various agencies on federal employment issues, there may be some continuing role for the agencies working in coordination with a centralized OCR, particularly where an agency has a strong record of civil rights enforcement. In general, however, consolidating this work could help to create a clearer, sharper mission, reduce dissonance for civil rights staff who are currently dispersed among multiple agencies with distinct agendas, and create greater cross administration consistency and expertise.[337]

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330 *Id.* at 15.

331 U.S. Equal Emp't Opportunity Comm'n, The Story of the United States Equal Employment Opportunity Commission: Ensuring the Promise of Opportunity for 35 Years (2000), at 15.

332 *Id.*

333 *Id.*

334 U.S. Equal Emp't Opportunity Comm'n, Performance and Accountability Report: Fiscal Year 2017 (2017), at 10, https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf [https://perma.cc/WH7A-CRLQ].

335 U.S. Equal Emp't Opportunity Comm'n, The Story of the United States Equal Employment Opportunity Commission: Ensuring the Promise of Opportunity for 35 Years (2000), at 28.

336 In exercising its spending power, Congress "may condition funds offered to the states on compliance with specified conditions." Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 537 (2012) (citing Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 686 (1999) and South Dakota v. Dole, 483 U.S. 203, 205–06 (1987)). Consolidating functions in a single agency should not affect the constitutionality of prohibiting discrimination by recipients of federal funds but should be developed in conformity with any notice and nexus requirements. *See* South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

337 *See* Thompson, *supra* note 224, at 116 (noting the role centralized and "tightly controlled" policy-making plays in ensuring strong civil rights enforcement in the context of HEW).

VI. CONCLUSION

This article posits that it is unacceptable to forego civil rights enforcement in the context of environmental justice. Racial discrimination in decision-making and racial disparities in the distribution of environmental benefits and burdens cry out for legal approaches that acknowledge, rather than render invisible, the role of race so that it can be addressed. EPA's record of civil rights enforcement is poor, and recent reform efforts failed to move the ball down the field sufficiently. Current leadership at EPA provides little hope for change in the short-run, and communities fighting discriminatory actions, policies, and practices will need to continue utilizing a patchwork of approaches and tools to advance their goals. This period, however, also provides the opportunity for long-term strategizing. Toward that end, the article proposes reforms at EPA that ultimately hinge on whether leadership has the political will to create a meaningful civil rights compliance and enforcement program. In addition, the article looks to a future Congress to restore the private right of action to enforce regulatory requirements and to centralize Title VI compliance activities into one agency with the commitment and expertise to hold recipients of federal funds accountable.