Hannah Perls:

Welcome to CleanLaw from the Environmental and Energy Law Program at Harvard Law School. I'm Hannah Perls, a senior staff attorney with EELP. And in this episode, I speak with Olatunde Johnson, the Ruth Bader Ginsburg Professor of Law at Columbia Law School.

In this episode, Professor Johnson and I break down the history and evolution of Title VI of the Civil Rights Act of 1964, a crucial legal tool for the environmental justice movement. Earlier this year, a federal judge blocked EPA and the Department of Justice from enforcing their Title VI rules, prohibiting actions that disparately impact communities of color in the state of Louisiana. And now those rules are at risk of being struck down nationwide.

This is the first episode in a two-part series on Title VI. If you're new to Title VI or the current litigation in *Louisiana v. EPA*, this episode is for you, but hopefully interesting for our Title VI experts as well.

Welcome Professor Johnson, and thank you so much for being on CleanLaw.

Prof. Johnson:

Thank you for having me.

Hannah Perls:

Now, before we get into Title VI, I think it would be great to just hear a bit more about how you got involved in this work. Before becoming a law professor, of course, you clerked for Justice Stevens on the Supreme Court. You worked for Senator Ted Kennedy on the Senate Judiciary Committee. You were with the NAACP Legal Defense Fund. Can you just talk a bit about how you came to work on civil rights, and ultimately, what led you to be a professor?

Prof. Johnson:

Yeah. Well, thanks for the question. I identify still as a lawyer more even than as a professor, but I went into law school really knowing I wanted to do public interest work. I would have said that I would have emerged as a criminal legal systems lawyer or maybe working in legal services, but one of the first internships I had was at the NAACP Legal Defense Fund, and I found myself working on voting rights cases on land loss, Black land loss cases in South Carolina, healthcare disparities, and low-wage employment issues. And that's what really made me think that I wanted to work at the intersection of race and poverty and that the Legal Defense Fund was a good way to do it.

I started off as a Skadden Fellow, these fellowships that are given to help launch lawyers into public interest, and I was working on low-wage employment and healthcare issues in that context, health equity, and then after a few years of working on those issues and other issues, I moved to Senator Ted Kennedy's Judiciary Committee office, which you mentioned. And there I worked on a range of issues, judicial nominations and confirmations as well as other civil rights and constitutional law issues.

In terms of the transition to the academy, I always really liked to write even when I was in practice, I certainly did in law school, and I loved teaching, and I did that and a lot of public presentations when I was working as a lawyer. And those things came together. I had the opportunity –someone reached out for me at a transitional point where I was trying to figure

out what else I wanted to do, and I started as a fellow here at Columbia Law School, and they hired me as a full-time faculty member, and that was in 2006 that I was hired. So it's now been a while.

Hannah Perls:

And since then you have really become a leading voice in terms of the meaning of Title VI, the evolution of Title VI. You wrote a wonderful piece on the 50th anniversary of Title VI of the Civil Rights Act. So now, here we are 60 years later. And before we get into what the law means for communities today and certainly for environmental justice, I want to start at the beginning. When Congress passed the Civil Rights law, what was Title VI specifically designed to address, and how is the law designed to achieve those goals?

Prof. Johnson:

So we're, as you said at the 60th anniversary of Title VI of the 1964 Civil Rights Act. We're also at the 70th anniversary of *Brown v. Board of Education*. And Title VI is linked to *Brown*. So the Supreme Court says, "You have to desegregate the public schools." A lot of school systems in the South just drag their feet. In fact, it was more than dragging their feet. There needed to be the exercise of federal military power sometimes just to get them to comply with Court opinions, and that wasn't a sustainable method.

There was what is now known as massive resistance to school desegregation. And the idea of Title VI was to force, encourage, incentivize, subsidize public schools throughout the country, but with a focus on the South to desegregate. And the way Title VI works is that it says, "No entity that takes federal funds can discriminate on the basis of race." And it was written broadly to not just be about schools. It also extends to healthcare. That was the other big domain where there were public hospitals that were not accepting Black patients. And it covers all federal agencies, including the Environmental Protection Agency.

Hannah Perls:

So if I understand, and please correct me here, this massive resistance to desegregation post *Brown v. Board of Education* really becomes part of the political impetus for Title VI and the broader Civil Rights Act. And Congress wrote the statute really broadly to encompass other forms of discrimination outside of education, including the EPA, like you mentioned. And in your scholarship on Title VI, you've cited dozens, if not hundreds of primary sources.

And if it's all right, I'd love to highlight one here that I found really helpful in preparing for the podcast, and it's a 1996 report from the U.S. Commission on Civil Rights, which, just as a background for listeners, is a bipartisan independent commission of the federal government. And that report focused on Title VI enforcement. And the commission affirmed that "Title VI prohibits a broad range of discriminatory activities, including incidents of racial or ethnic harassment, the creation of a hostile racial or ethnic environment, and a disproportionate burden of environmental health risks on minority communities."

And I thought that was fascinating, that these citing issues, these instances of environmental injustice, whether intentional or unintentional, were front of mind just two decades after the passage of Title VI. So given that, I would now love to transition to

enforcing Title VI and what that's looked like over the past few decades. And one thing the commission flagged in this 1996 report and, of course, continued to flag, as you know, through 2016 was that federal agencies were not effectively enforcing Title VI.

That these Title VI offices were understaffed and poorly coordinated. And while in theory these rules have teeth, the pulling of federal funds, in practice, agencies are really unwilling to use that lever. But at the same time, the Title VI enforcement system, as you've documented, it's heavily dependent on agencies as the primary enforcer. And this is a direct result of a series of Supreme Court decisions that significantly narrow the ability of community members to enforce Title VI over time. So given all of that, can you help us walk through that history starting at the beginning?

Prof. Johnson:

So one of the first steps that was taken by most federal agencies was to promulgate regulations that said what the act covered. And so that included that it extended to intentional discrimination, but also to disparate impact. What the statute required was that after the agencies promulgate the rules, they would be approved by a committee of the White House, which is unusual sort of set up by the White House.

And the significance of that is some of the same people who were involved in drafting the legislation when it was submitted to Congress, Title VI, were involved in the drafting of these rules. There was actually a lot of work done to enforce these regulations administratively, particularly in the education area. There are also private lawsuits going on. From the start, civil rights organizations assumed that they could privately enforce the statute, and that's through a set of decisions that emerged that ended up going to the Supreme Court. In cases like *Guardians* and *Choate*, the Court made clear that Title VI was privately enforceable. It doesn't have an explicit private right of action, but it implied a private right of action.

We'll talk about, there's contestation over how far that right of action goes. A really important case was the *Lau* case that went to the Supreme Court involving language access in San Francisco involving Chinese students who weren't given proper language instruction. And that was a case that was brought under a number of different regulations that the Court allowed to be privately enforced, including regulations that didn't just cover intentional discrimination but covered discriminatory effects.

Hannah Perls:

There was a lot there. And I want to make sure we really pull apart this discriminatory intent versus discriminatory effects. So just as a quick primer, and we'll talk about this more later on in the episode. When we say disparate impact, we don't mean any impact that disproportionately affects people or communities on the basis of race. We are talking about an unjustified disparate impact that is caused by a particular program or policy. So that's a high bar, right?

It's also important to repeat, I think what you said, Professor Johnson, that disparate impact was a component of those model regulations issued in 1964. They were based on the Department of Education's Title VI regulations, and by the mid-'80s, those model rules were adopted by every cabinet department and about 40 federal agencies. And that's consistent with what we know about the context in which Title VI and the broader Civil Rights Act was passed.

I think there is this really fantastic and illustrative quote from President Kennedy in 1963, right before the passage of the law, and forgive me, but I'm going to read it. He says, “Direct discrimination by federal, state, or local government is prohibited by the Constitution, but indirect discrimination through the use of federal funds is just as invidious and it should not be necessary to resort to the courts to prevent each individual violation.” And so this notion that we have, this structural, invidious discrimination that may or may not manifest as sort of this intentional interpersonal attack was just as important at this moment in 1963. So I just want to lift that up as we talk about disparate impact, disparate effects, intentional discrimination, that's what we're talking about is what can be enforced under this law. And of course, that is a major sticking point of litigation now that we'll get to at the end of the episode.

Prof. Johnson:

I think what you are pulling out in the quote by John F. Kennedy is very important. I take two things from it at least. One is that there was this broad notion of discrimination that actually the term discrimination didn't just mean invidiousness. It covered something that we call more like effect space discrimination. So actions that have an unjustified discriminatory effect. But also within that was an idea that the federal government has an affirmative duty to remedy or address that discrimination. That in other words, subsidizing discrimination that is happening entrenches it, and that the federal government has an affirmative duty not to do that, and in fact, to use its power to do the opposite.

Hannah Perls:

We've talked about what this law meant and how agencies originally began to implement the law through their regulations in those early '60s, '70s, and into the early '80s. But of course, at the same time, the courts are beginning to shape what the law covers and how it's enforced. You mentioned, for example, affirming that there is a private right of action under the law and citizens can sue to ensure that the law is being enforced. Can you just talk a bit about some of the major cases that changed the way the federal government and advocates seek to enforce Title VI against recipients of federal funding who would allegedly be using that funding to, as you say, entrench or even exacerbate those existing disparate outcomes?

Prof. Johnson:

The ones I want to highlight have to do with discriminatory effects and also the private right of action piece of it. So one is the *Lau* case that I talked about. You would've emerged from this *Lau* case involving Chinese students who are trying to get language access thinking that one, there's a private right of action to enforce Title VI even though it's not explicit in the statute. And that also, you can use that private right of action to enforce the regulations. And that scheme gets muddied in subsequent cases.

And so the first case is the *Bakke* case, which is an affirmative action case a lot of people know about. It had Equal Protection claims, and it had Title VI claims. It was a very fractured opinion. But from that decision, you could read the Court as saying that the text of Title VI only covers intentional discrimination.

It's coextensive with the Equal Protection Clause. So to be explicit about this, the Court itself had interpreted the Equal Protection Clause to only cover intentional discrimination. In *Bakke*, in this fractured opinion, and the lead opinion that we now rely on the most is

Powell's opinion writing for plurality. He says the Title VI is coextensive with the Equal Protection Clause. So you have this mystery then because it seemed like the *Lau* case said that you could enforce the disparate impact standard.

This gets somewhat resolved in some other very, very fractious cases like the *Guardians* case that comes out of the Second Circuit that goes to the Supreme Court, and another case called *Alexander v. Choate*, which is actually a Title IX case but they are read together. And the bottom line of all of those cases is that the Court creates a kind of compromise.

The statute, I'm going to give some numbers here, 601 of the statute is the prohibition on discrimination because of race, color, and national origin. 602 gives the agencies authority to promulgate regulations. So what emerges from *Guardians* and *Choate* essentially from the Supreme Court is that there's a private right of action to enforce the prohibitions on 601, which *Bakke* and *Guardians* according to *Choate*, extended only to intentional discrimination. And 602 is what the agency could enforce, and maybe some ambiguity about how far the private right of action went there, that becomes settled in a subsequent case.

Hannah Perls:

With *Guardians*, and now we're in 1983, we still have a very clear five-Justice majority that does not question that agencies absolutely have the authority to disparate impact in their regs and that prohibition is really necessary to effectuate the terms of the statute, which is what 602 says.

Prof. Johnson:

Yes, I think it's an important thing to emphasize. What I was describing before is just about what is privately enforceable. So the compromise that arises from that is that 601 extends to intentional discrimination. 602 is about disparate impact. That's certainly what emerges from that. And no question about whether or not the agency has an authority to enact disparate impact.

What was vulnerable and that was seized on in a subsequent case, *Alexander v. Sandoval*, was how far the private right of action went, not how far disparate impact went. It was very clear coming out of *Guardians* and *Choate* that there was the ability of the agencies to enforce disparate impact.

You've got these disparate impact rules that have been extending since 1964, and you have several Court opinions that make clear that those impact regulations are valid. So then you get up to *Alexander v. Sandoval*, lots of Alexanders in our decisions, which is a case that I actually had the opportunity to work on as a young-ish lawyer when I was at the NAACP Legal Defense Fund.

In *Alexander v. Sandoval*, this involved a challenge to English-only rules in the Department of Transportation in Alabama. The claim that was being made by Alabama was that the disparate impact regulations were not privately enforceable. And so the plaintiffs who were challenging these English-only rules, I think had a very strong argument that 601's prohibitions on intentional discrimination were privately enforceable as well as the disparate impact regulations. The *Lau* case had enforced those statutes. But unfortunately, the Supreme Court went another direction and said that the regulations were not privately enforceable.

In that case, Alabama and some of its amici suggested that maybe the disparate impact regulations were not even valid. But the Court did not reach that issue. And my job at the time as a young attorney was to write a brief, making clear that the regulations were valid, and it didn't end up having to be an issue in the case but it's part of what, for those who are trying to challenge the disparate impact regulations, has been sort of unfinished business in this area. They're still trying to go after the validity of the regulations.

Hannah Perls:

Before we get to that legal challenge, I just want to take stock of what this means in practice. Between 1964 and *Sandoval* in 2001, a real narrowing of what private citizens can challenge, which then means an increased reliance on federal agencies to enforce these provisions. And a great example in the environmental context was Chester residents concerned for quality living out of the Third Circuit, which challenged the disproportionate siting of polluting facilities and minority community, sort of a classic environmental justice suit. But this was pre-*Sandoval*, and so they could bring their own private right of action to challenge those decisions. And of course, that is no longer possible post-*Sandoval*.

So just trying to emphasize what this means for folks, seeing this pile-up of facilities in Black and Brown communities, and post-*Sandoval*, they can no longer bring their own lawsuit. They have to lean on federal agencies to enforce these provisions, which of course, really depends on whether the agency wants to enforce those provisions.

Prof. Johnson:

Right. And can vary, very much across administrations and also agencies have limited capacity even in the best of circumstances. Yeah, I mean, *Alexander v. Sandoval* was a tremendous blow to the civil rights community, to the environmental justice community, and this was at a time in which there was a lot of energy surrounding using the law in this way, using Title VI in this way.

In the '90s, I worked on one of the cases that used the private right of action to enforce the disparate impact regulations. It was also an environmental justice case. It was in LA. It was a transit equity case. And there wasn't the suggestion in that case that the regulations weren't privately enforceable. I mean, this was just seen as the route that we were going to take. Now, we were always careful in these cases to have an intentional discrimination claim and a disparate impact claim. We think those things are very connected. But yes, it was an enormous blow, an enormous blow to the environmental justice community when *Alexander v. Sandoval* said that those regulations were not privately enforceable.

Hannah Perls:

Well, now, of course, on the 60th anniversary of the Civil Rights Act, there is potentially a new blow coming. In August, a federal district court in Louisiana barred EPA and the Department of Justice from enforcing those disparate impact regulations under Title VI against any entity in the state of Louisiana that receives federal funds, so state agencies, local governments, and also private parties.

And recently, the state asked the court to amend its decision and asked for a national vacatur of those regs. So that's certainly something that we'll be watching for. But this case stems from an environmental justice investigation. Community St. John the Baptist Parish,

which is a majority Black community, had brought a complaint against the state environmental agency for continuing to allow these heavily polluting facilities to be concentrated in Black communities leading to really severe disparate health outcomes. So we have this new attack, and what the attack says is, “We challenge EPA's authority to review our actions under Title VI for disparate impact.” And they also challenged the agency's cumulative impact standards under those regulations. How significant is this new threat to Title VI and these community battles more broadly?

Prof. Johnson:

I'd say it's significant. Just to frame this a little bit, I work on other statutes, not just Title VI. Also, I work on fair employment, and I work in housing. In every context, there has been an attack on the disparate impact standard. It's an ongoing question that has to do with limiting the act to what people think of as intentional discrimination, which is very hard to prove. I think that what is different in this moment may be the extent of the focus and mobilization of states to challenge it. So after the Louisiana objects to enforcement in its own case, there's also the mobilization of other attorney generals who have now written, petitioned the EPA to rescind the Title VI disparate impact regulations. I think some of this is coming because the Biden administration seemed to be taking steps in the direction of greater enforcement of Title VI in the environmental justice area.

I think it also comes about because of two other developments in the law that now, people are mobilizing, now two Supreme Court decisions that limit agency power. So, in the *Louisiana* case, for example, from the start, they appealed to the major questions doctrine that was established in *West Virginia v. EPA*. Now they can add the Supreme Court's overturning of *Chevron*. So those are important for Title VI because if you remember, 602 is about agency regulations. A lot of our arguments in the *Alexander v. Sandoval* case were that those regulations were reasonable, which the court sub-silencio probably agreed. And now, there is the ability to seize on that given that *Chevron* standard, which is about deference to agency regulations has been overturned.

The second is the affirmative action case. It's about the *SFFA v. UNC* Harvard case is about affirmative action in higher education, and its ruling should only extend to higher education. It's about the use of the diversity rationale. But there's the appeal to *SFFA* to stand for a broad idea of colorblindness. And the argument that's being advanced is that to the extent Title VI allows you to consider disparate impact, but forces a color consciousness that is at odds with the Supreme Court's decision in *SFFA*.

Hannah Perls:

That's definitely something we're going to come back to because it was certainly underneath, if not explicitly stated in the court's rationale in *Louisiana v. EPA* where they issued that current statewide injunction. We'll see if it becomes a nationwide vacatur. I would add, unfortunately, to that list of Supreme Court opinions, *Corner Post*. We do have an episode earlier on called the Quagmire Quartet where we go through the four major administrative law decisions that came out of the Supreme Court. But one defense that the Department of Justice raised in the *Louisiana v. EPA* litigation is, these regs have been around for 60 years. What are you doing, challenging them now? And unfortunately, with *Corner Post*, we now have the idea that no matter how long the regulation has been around,

the statute of limitations begins to run when the harm accrues to the potential plaintiff. So, unfortunately, one more for the list.

Prof. Johnson:

Yeah. That is one more for the list. But I will say that I still think there's vitality to the argument of length of time because it speaks to this idea of, are the regulations intentioned with the idea that the text of the statute only covers intentional discrimination. But Congress has consistently found a way to reconcile those because there's overlap between intentional discrimination and disparate impact, and also, you can prohibit disparate impacts in order to prophylactically get at intentional discrimination. So I do think that you're right that there's no statute of limitations in challenging longstanding regulations, but they tell you something about statutory meaning and how we understand the relationship of disparate impact as a concept to the constitutional prohibition.

Hannah Perls:

Absolutely. We have 60 years of congressional acquiescence.

Prof. Johnson:

Yes.

Hannah Perls:

That the court should have to grapple with. And even in *West Virginia v. EPA*, the court pointed to the fact that Congress had attempted to pass but never successfully passed a cap-and-trade mechanism for carbon. So similarly, we have multiple attempts, I think, by various members of Congress over the years to get rid of the disparate impact standard. But of course, those all have failed. So to the extent that argument can go both ways, it could be made there as well.

I now want to dive into some of the arguments that Louisiana and other Republican attorneys general are making about the disparate impact standard. So, in broad strokes, the states are arguing that Title VI only prohibits intentional discrimination and does not grant agencies the authority to prohibit disparate impacts via regulation. And this is part of a broader political argument that the states have made in this case that "EPA has weaponized Title VI as a blanket grant of authority to veto any and all permitting decisions that offend its vision of environmental justice and equity."

The states also make the argument that by requiring states to apply the disparate impact standard, EPA is effectively requiring those state agencies to discriminate. So Professor Johnson, can you respond to those arguments that one, the disparate impact standard is in effect a blanket veto against any project that may harm communities of color, and two, considering race via the disparate impact standard is in and of itself an act of discrimination?

Prof. Johnson:

Yeah. I mean, you see a lot of times in the popular discourse to the extent that people know what disparate impact is in popular discourse, but just a claim of any kind of unintentional discrimination would suddenly violate the law. And disparate impact is actually a very

precise legal concept. I often have the shorthand of it being unjustified disparate impact. There is a multi-part test for determining what we mean by disparate impact. The first prong of that test is does a recipient, the federal funding recipient, is there criteria or method of administering its programs or activities adversely and disperately affect members of a group identified by race, color or national origin. So that's the first step is to ask if there's an adverse impact. It often requires a lot of expert testimony just to get at this notion of adverse impact, and there are statistical proof standards.

For example, in the environmental context, you will think about harmful effects such as its effect on your water or things like clean air, the effect on human health. They also really emphasize that you think about cumulative impacts if they're already environmental impacts. So, disproportionality is a term of art. And then the disparate impact test requires not just that this impact happens but that it's caused by whatever this recipient is doing. So it'll ask about a causal link between the recipient's policy or practice and the disparate impact. So if you show this kind of disproportionality and to emphasize it has to be on the bases covered by the statute, not just anything, race, color, or national origin, then the burden production is what we call it in law, shifts to the recipient to provide a substantial, legitimate justification for the policy or practice. It might be saying something like, “There's no place else for us to put these facilities.” At this stage they can also bring in whatever kind of government interest is being advanced here.

That's the basic framework. Then, if the defendant recipient shows that there's a substantial, legitimate justification, there's still a chance for the plaintiff or the complainant to prevail showing that there is an alternative practice that can be adopted or a policy that can be adopted by the recipient that serves this substantial legitimate justification, but that doesn't have a disparate impact. And that burden would be on the plaintiff or complainant to show that. And we call that the less discriminatory alternative step.

It's worth pointing this out because it tends to be a very... It's not an easy standard to meet. Disparate impact is a very helpful mechanism of proof, but it's not an easy one. And cases don't always prevail. It actually requires a lot of expert testimony as I've suggested, and there's some outs for the state so that it recognizes this idea that we don't want every kind of disparate impact, no matter how small, to violate the statute.

Hannah Perls:

This is a really helpful walkthrough. If I can summarize, and just please correct me if anything goes wrong here, but in broad strokes, what I hear you saying is that if we look at the disparate impact standard in practice, it absolutely does not function as a blanket veto. We have this rigorous three-step test that at step one you said requires complainants to show this unjustified disparate impact on the basis of race.

Then they have to show at step two that that impact was caused by a particular policy or program that receives federal financial assistance. So that causation hook. And then we still have a step three where the state or recipient has an out if they can show that there was a legitimate justification for that policy or program. So it's this really involved, data-heavy inquiry that puts the primary burden of proof on the complainant. Okay, so that was the first argument Louisiana raised.

Is the disparate impact standard effectively a blanket veto? I think we've covered that. Categorically, no, it is not. So getting to the second argument, applying the standard effectively requires states to discriminate, I think it could be helpful to zoom us out a bit.

Yes, this process can put an administrative burden on the state to explain their decision-making process a bit more. But what we're worried about is that communities have clean air and clean water and healthy homes, and most importantly, that people aren't taking federal money, taxpayer dollars and making people even sicker. At least on the basis of race. And what this process is for is to make sure that we're, one, aware of that harm if it's happening. Two, making sure that these federal dollars aren't making that worse. And three, that if it is, that we just think about how to make it better. This is ultimately a tool to help agencies make better decisions that keep communities safe and healthy, at least on the basis of race. And that we reckon with this legacy of disinvestment and sometimes deliberate placement of facilities or underinvestment.

Prof. Johnson:

Yeah, that's absolutely the goal. And I think we could even state it more strongly. We have so much evidence of the disproportionate burden that communities of color face when it comes to environmental harm, and it's been well documented. It's also clear that this burden is not just a burden that's there because of income. It's a burden that's deeply connected to racial segregation in housing, but also the lack of political power of communities of color, of minority communities that makes them more vulnerable to being just not cared for, not the object of concern, and not able to get the kinds of policy outcomes that other communities can get that might spare them environmental burden.

Hannah Perls:

Given this new slew of attacks, given this reemergence or strengthening of a colorblind narrative that we saw in *SFFA*. It came up in the *Louisiana v. EPA* litigation and certainly will emerge in copycat suits in the future. I just wanted to take stock of where we are and where we're going. So given the origins of Title VI, can you remind us why it's important that agencies continue to be able to enforce these disparate impact rules and what is at stake?

Prof. Johnson:

So it's not too dramatic to say that what is at stake is a life or death matter. The cases where you see these complaints being brought, I mean, take for example, Louisiana, which we've mentioned already, and Cancer Alley, are places in which the cancer rates were very, very high in Black communities due to polluting facilities that the state continues to permit.

Now, of course, in these cases, people are going to have to prove up these connections but we have countless examples. There's a letter that environmental justice and civil rights groups recently wrote to the EPA in response to this attempt to get rid of the rulemaking that cites places and instances, not just in Louisiana, in states all across the country where clean water and clean air, things like the Flint lead case, cases in which asthma rates are extremely high for Black, Latino, Native American children because of the kinds of incinerators polluting facilities, bad filtration systems, bus transfer stations, all of those things being placed in communities of color.

We could get into climate issues more generally and the ways in which communities of color bear the highest climate risks in ways that are often unattended to. So there are very big stakes to this, and it always sounds very technical when you get into what's the difference between intentional discrimination and disparate impact, but you need disparate impact because it allows the agency to investigate those states that are not complying with these civil rights rules and with general environmental rules too.

It makes the state do its own analysis to ensure that there is a distribution of environmental burdens, or I would like to frame it even more affirmatively to say that we really think about alternatives more broadly, so to creating environmental harm anywhere. We don't want them disproportionately located in minority communities, and that might push us to think about solutions that affect a broad population.

When I was a lawyer working for Ted Kennedy, we drafted what we called our *Sandoval* Fix. It was legislation that would restore the private right of action for disparate impact. I think the use of agency power is at the core of Title VI, but you need a private attorney general function to supplement what the agency does because an agency will never have enough capacity to do this by itself. And the problem is severe across the nation. So I would like to see the restoration of private enforcement for that to be clearer. And, it actually saddens me that some of these states are investing so much energy in dismantling the civil rights regime rather than thinking about how to avoid these disproportionate harms to communities of color.

Hannah Perls:

I think that's a great if, sobering note to end on. As a reminder to our listeners, the court in *Louisiana v. EPA* is right now considering a motion from Louisiana and this coalition of Republican attorneys general to vacate EPA and DOJ's Title VI disparate impact regulations nationwide, which would strip these federal agencies of the ability to ensure that recipients of federal funds are not using those funds to entrench racial disparities, which of course, would include continuing to site polluting facilities in communities of color like St. John the Baptist Parish in Louisiana.

And as Professor Johnson mentioned, this is a multi-pronged attack on Title VI. That same coalition has submitted a petition for rulemaking to EPA asking the agency to rescind its disparate impact regulations under Title VI, and we'll link to all of those documents in our show notes.

Again, this is the first in a two-part series that we're doing on Title VI. In our next episode, I'll be speaking with Debbie Chizewer at Earthjustice, and Nick Leonard at the Great Lakes Environmental Law Center about these attacks on Title VI, and what the Title VI complaint process actually looks like in practice. The good, the bad, and everything in between.

With that, I really just want to thank you, Professor Johnson for your time, for your expertise, and most importantly for the work that you do to continue to make the world a better place. That sounded really cheesy, but it's true. And where can people go to learn more about your work? Your scholarship? Where can they find you online?

Prof. Johnson:

On the Columbia website, it lists a lot of my publications. I also try to post them on SSRN, which is a good site for those who want to learn about legal and other kinds of scholarship more generally. So you can go there.

Hannah Perls:

Thank you so much. We really appreciate your time.

Prof. Johnson:

Thank you.