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# LEGAL TOOLS FOR ENVIRONMENTAL EQUITY VS. ENVIRONMENTAL JUSTICE<sup>1</sup>

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In 1982, when Benjamin Chavis coined the term “environmental racism” to describe the targeting of a black community in Warren County, North Carolina for a toxic waste dump, it brought together two powerful movements – the civil rights and environmental movements – into a growing force that would eventually reach the White House and the United States Supreme Court.<sup>2</sup> No one would have guessed at the time that within a five day span around Earth Day 2001, the legal side of the movement against environmental racism would see its brightest, and then darkest, days.

Since the early 1980s, numerous studies have looked at the correlation between environmental hazards and the race and class demographics of the communities where these hazards are located.<sup>3</sup> The vast majority have shown a trend toward low-income communities and especially communities of color being unfairly burdened with excessive pollution from a variety of polluting industries and chemical exposures.<sup>4</sup> These studies affirmed the understanding of an environmental racism trend. While many are quick to conclude that communities of color are targeted solely because of their generally low-income socioeconomic status, most of the studies have demonstrated that race is more of a factor than class.<sup>5</sup> In other words, if one were to compare a middle-class community of color to a low-income white community, and look at which community is more likely to have a hazardous waste facility sited there, the middle-class community of color would have a greater chance of being targeted for such a facility. In fact, in some cases, race is a more significant indicator of pollution burdens than income, poverty, childhood poverty, education, job classification, or home ownership.<sup>6</sup> Demographic studies showing disparate distribution of polluting industrial facilities have been key aspects of many environmental racism lawsuits. Such studies of discriminatory effects are necessary since intentional discrimination is very hard to prove, except in the rare cases where inappropriate industry siting reports are leaked.<sup>7</sup>

The growing movement against environmental racism came together in October 1991 for the First National People of Color Environmental Leadership Summit held in Washington, D.C. Participants drafted and adopted the seventeen Principles of Environmental Justice.<sup>8</sup> The Principles set forth a bold vision of what would be necessary to address environmental racism.<sup>9</sup>

Initially, the controversy in Warren County, North Carolina resulted in the General Accounting Office studying the locations of hazardous waste landfills in the southeastern United States.<sup>10</sup> The 1983 study found that three of the four existing hazardous waste landfills were in African-American communities, when

African-Americans constituted only twenty percent of the region’s population.<sup>11</sup>

In 1990, the Congressional Black Caucus met with the U.S. Environmental Protection Agency (“EPA”), accompanied by academics and activists, to discuss the disparate environmental risks in low-income and minority communities.<sup>12</sup> The EPA created the Environmental Equity Workgroup in July 1990 in response to the presentation of findings by social scientists that “racial minority and low-income populations bear a higher environmental risk burden than the general population” and that the EPA’s inspections failed to adequately protect low-income communities of color.<sup>13</sup> Analysis shows that the agency takes longer to get around to cleaning up toxic waste sites in communities of color and that penalties under hazardous waste laws were five times higher in white communities than in communities of color and forty-six percent higher for other programs relating to air, water, and waste.<sup>14</sup>

## “EQUITY” – DERAILING THE ENVIRONMENTAL JUSTICE MOVEMENT

In June 1992, the Environmental Equity Workgroup produced a report that supported the findings that recommended the formation of an EPA office to address these disparities.<sup>15</sup> In November 1992, one year after the Principles of Environmental Justice were written, the EPA formed an Office of Environmental Equity.<sup>16</sup> In response to public criticism, the EPA changed the name of the office to the Office of Environmental Justice in 1994.<sup>17</sup>

The “equity” versus “justice” framing is more than mere semantics. It represents the fundamental difference between the concepts of “poison people equally” and “stop poisoning people, period!” There is not a single mention in the movement-defined Principles of Environmental Justice of the notion that the goal is to simply redistribute environmental harms so that white communities have their “fair share” of pollution.<sup>18</sup> Even if this “equity” vision were possible, the environmental justice movement has put forth a much deeper analysis, based on phasing out

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inappropriate technologies that ought not exist in any community. However, the EPA, and numerous state environmental agencies bunted and co-opted the bolder “justice” agenda by setting up offices and working groups around environmental “equity.”<sup>19</sup>

When the EPA and a number of state environmental agencies cleaned up the titles of their programs, renaming them “environmental justice,” they retained their “equity” agenda. Today, governmental bodies and others who have followed their lead universally define environmental justice as some version of “fair treatment and meaningful involvement.” The EPA defines environmental justice as:

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. Fair treatment means that no group of people should bear a disproportionate share of the

agency habit of holding a public hearing and ignoring/dismissing the comments before issuing pollution permits. The fourth part of the “meaningful involvement” definition – that “decision makers seek out and facilitate the involvement of those potentially affected” – is sometimes made real when exceptional agency staff go the extra mile to ensure that the public knows about a meeting or hearing. However, it is still far too frequent that the outreach is so inadequate, or the meeting logistics made so inconvenient, that no one from the impacted community even shows up at these “environmental justice” meetings.<sup>21</sup>

### GAINING GROUND

The same year that the EPA changed the Office’s name to “Environmental Justice,” President Clinton, on February 11<sup>th</sup>, 1994, signed Executive Order 12898, titled “Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations.”<sup>22</sup> The Executive Order requires each federal agency to develop an agency-wide environmental justice

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negative environmental consequences resulting from industrial, governmental and commercial operations or policies. Meaningful involvement means that: (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; (2) the public’s contribution can influence the regulatory agency’s decision; (3) their concerns will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.<sup>20</sup>

Without any real legislative teeth to back up these “equity posing as justice” policies, environmental agencies have no tools to even try to redistribute environmental harms. Rather, they use these policies to try to look responsive to environmental justice concerns when trotting them out at government-sponsored “environmental justice” conferences, public meetings and hearings on pending pollution permits, and other forums.

As long as there is no blatant intentional racism to be found, the “fair treatment” hurdle is deemed cleared, as the agencies have no authority to act on the distributional equity of harms concept in their “fair treatment” definition. The “meaningful involvement” hurdle still looks, on the ground, like the usual

strategy, sets up an interagency working group that reports to the President, requires certain agency studies, and sets forth a public participation plan.<sup>23</sup>

While White House-level recognition of environmental justice was a shot in the arm of the movement, the Order explicitly states that it does not go beyond current law and creates no new rights or remedies, procedural or otherwise.<sup>24</sup> Nonetheless, the Executive Order was helpful in a groundbreaking case before the Nuclear Regulatory Commission (“NRC”) in 1997 – *In Matter of Louisiana Energy Services, L.P.*<sup>25</sup> – perhaps the only case where an agency denied a permit to a polluting industry because of racially discriminatory impacts in the siting process. Louisiana Energy Services (“LES”) sought to build a uranium enrichment facility between the tiny towns of Forest Grove and Center Springs in rural Northern Louisiana’s Claiborne Parish.<sup>26</sup> A grassroots community group, Citizens Against Nuclear Trash (“CANT”), challenged the proposal’s permits in the administrative process before the Atomic Safety and Licensing Board (“ASLB”) of the NRC.<sup>27</sup> Founded by freed slaves after the Civil War, the two towns (with a combined population of about 250) were about 97% African-American.<sup>28</sup> Their inhabitants lived in grinding poverty, with no stores, schools, medical clinics,

or businesses in the towns, and no running water in many of the homes.<sup>29</sup> Over 69% of the black population of Claiborne Parish earned less than \$15,000 annually, 50% earned less than \$10,000, and 30% earned less than \$5,000.<sup>30</sup> Over 31% of the black population in Claiborne Parish had no motor vehicles, over 10% lacked complete plumbing in their houses, and 58% lacked a high school education.<sup>31</sup> One would be hard-pressed to find a more underprivileged community to target for such a facility.

To find a site for their uranium enrichment facility, LES hired a company, Fluor Daniel, Inc., with extensive experience in industrial facility site selection.<sup>32</sup> In their siting process, they had initially narrowed a list of potential sites to seventy-eight, where the average percentage of black population within a one-mile radius of each of the sites across sixteen parishes was 28.35%.<sup>33</sup> Since the black population in Louisiana was about 32.5%, this was pretty fair to start.<sup>34</sup> However, once the list of potential sites was cut to thirty-seven, the average black population rose to 36.78%.<sup>35</sup> It rose again to 64.74% once the list of sites was narrowed to six.<sup>36</sup> At the end of the process, they managed to pick the one site with the highest percent black population of all seventy-eight examined sites (97.1%).<sup>37</sup>

LES admitted to doing an “eyeball” assessment of potential sites.<sup>38</sup> They admitted to eliminating sites from consideration because they were close to “sensitive receptors” like hospitals, schools, and nursing homes (thus eliminating communities privileged enough to have such amenities) or because the site is near a “very nice lake” with “nice homes, vacation and fishing, hunting.”<sup>39</sup> The ASLB found this evidence to be “more than sufficient to raise a reasonable inference that racial considerations played some part in the site selection process.”<sup>40</sup> In a powerfully worded decision, the ASLB stated, in part:

Racial discrimination in the facility site selection process cannot be uncovered with only a cursory review of the description of that process appearing in an applicant’s environmental report. If it were so easily detected, racial discrimination would not be such a persistent and enduring problem in American society. Racial discrimination is rarely, if ever, admitted. Instead, it is often rationalized under some other seemingly racially neutral guise, making it difficult to ferret out. Moreover, direct evidence of racial discrimination is seldom found. Therefore, under the circumstances presented by this licensing action, if the President’s nondiscrimination directive is to have any meaning a much more thorough investigation must be conducted by the Staff to determine whether racial discrimination played a role in the [enrichment facility] site selection process.

. . . [T]he Staff must conduct an objective, thorough, and professional investigation that looks beneath the surface of the description of the site selection process in the Environmental Report. In other words, the Staff must lift some rocks and look under them.<sup>41</sup>

The decision acknowledged that the obligations under the Executive Order were new to the agency and that agency staff’s primary responsibilities have historically been to evaluate technical concerns, not to apply the social science skills needed to investigate whether racial discrimination played a part in a facility siting decision – skills that are far from the experience and expertise of NRC staff.<sup>42</sup> The ASLB’s decision concluded with a determination that a staff investigation of the siting process, to determine whether racial discrimination played a role in that process, was essential to ensure compliance with the Executive Order, and that the Final Environmental Impact Statement was insufficient in other ways and needed to be revised.<sup>43</sup>

Such a strong decision was a welcome surprise, especially coming from an agency whose very existence is financially tied<sup>44</sup> to the survival of the notoriously racist nuclear industry, whose uranium mining and nuclear waste disposal burdens fall almost exclusively on black, Hispanic, and Native American communities.<sup>45</sup> Though the victory over LES in Louisiana held,<sup>46</sup> the legal precedent was undermined on appeal.

On appeal to the NRC Commissioners, the Commission reversed the ASLB’s requirement of an inquiry into racial discrimination in siting, but affirmed its disparate impact ruling.<sup>47</sup> In reversing the requirement of inquiry into racial discrimination, the Commission held that no “nondiscrimination directive” exists in Executive Order 12898 and that the National Environmental Policy Act (the law requiring Environmental Impact Statements on certain federal projects) is not “a tool for addressing problems of racial discrimination.”<sup>48</sup>

## TITLE VI AS A TOOL FOR ENVIRONMENTAL JUSTICE

As the LES case was playing out, the nation’s first attempt to address environmental racism using Title VI of the Civil Rights Act of 1964 was moving toward the U.S. Supreme Court, fresh from an amazing victory in the Third Circuit.

The mostly African-American City of Chester, Pennsylvania is home to the nation’s largest trash incinerator, a sewage treatment plant that burns the county’s sewage sludge, a paper mill that burns waste coal, numerous chemical plants and toxic waste sites, and formerly hosted the nation’s largest medical waste autoclave. It is surrounded on either side by oil refineries and coal, oil and gas-fired power plants.<sup>49</sup>

In 1996, Chester Residents Concerned for Quality Living (“CRCQL” – pronounced “circle”) sued the Pennsylvania Department of Environmental Protection (“PADEP”) for issuing a permit to Soil Remediation Systems (“SRS”), a company planning to build a facility to clean petroleum contaminated soil by burning off the contaminants.<sup>50</sup> This “soil burner” facility would have been sandwiched between the trash and sewage sludge incinerators.

Suit was brought in the Eastern District of Pennsylvania under both sections 601 and 602 of the Title VI of the Civil Rights Act of 1964.<sup>51</sup> Section 601, codified as 42 U.S.C. § 2000d, provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination



under any program or activity receiving Federal financial assistance.<sup>52</sup> Section 602, codified as 42 U.S.C. § 2000d-1, authorizes and directs agencies, such as the EPA, which provide financial assistance to state agencies like PADEP “to effectuate the provisions of § 2000d of this title . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute . . . .”<sup>53</sup>

The complaint alleged that PADEP’s grant of the permit violated: 1) § 601 of Title VI of the Civil Rights Act of 1964; 2) EPA’s civil rights regulations promulgated pursuant to § 602 of Title VI; and 3) PADEP’s “assurance pursuant to the regulations that it would not violate the regulations.”<sup>54</sup> The District Court quickly did away with the first cause of action, citing Supreme Court precedent that § 601 applies only to intentional discrimination and that CRCQL failed to allege that PADEP intentionally discriminated when granting the pollution permit to SRS.<sup>55</sup> The District Court dismissed the second and third claims on the basis that, while there is a private right of action under § 601, there is no such right under § 602.<sup>56</sup>

In *Chester Residents Concerned for Quality Living v. Seif*,<sup>57</sup> the Chester residents appealed the ruling to the Third Circuit Court of Appeals, focusing only on the second cause of action: the core § 602 claim.<sup>58</sup> Establishing important precedent, the Third Circuit reversed the District Court’s ruling.<sup>59</sup> The Third Circuit panel found that the District Court misread the U.S. Supreme Court’s fractured ruling in *Guardians Ass’n v. Civil Service Commission of New York City*,<sup>60</sup> falsely assuming that it stood for the notion that there is private right of action under § 602.<sup>61</sup>

Instead, the Third Circuit recognized that the Supreme Court had since recognized that *Guardians* affirmed 1) that a private right of action exists under § 601 of Title VI, requiring plaintiffs to prove discriminatory *intent*; and 2) that agencies may validly promulgate discriminatory *effect* regulations under § 602.<sup>62</sup> The ruling did not, however, decide the issue of whether there is a private right of action to enforce regulations promulgated under § 602.<sup>63</sup> The Third Circuit stitched together two sets of opinions in *Guardians* to infer that a five-justice majority would support a private right of action under § 602.<sup>64</sup> A dissent by Justice Stevens (joined by Justices Brennan and Blackmun) concluded with a statement that the plaintiffs “only had to show that the respondents’ actions were producing discriminatory effects in order to prove a violation of [the regulations].”<sup>65</sup> Justices White, writing for the court, and Marshall, dissenting, both found it acceptable for a plaintiff to bring a discriminatory *effect* case under § 601, so the Third Circuit inferred that they would find the same acceptable under § 602.<sup>66</sup> This five Justice-majority inference wasn’t enough for the Third Circuit to hold that *Guardians* is dispositive on the Chester case, since the Supreme Court had not spoken directly to the issue.<sup>67</sup>

With nothing dispositive in Supreme Court precedent, the Third Circuit looked at its own precedent.<sup>68</sup> In doing so, it found that the District Court misread Third Circuit precedent in concluding that no private right of action exists under § 602 when, in fact, that case spoke only to whether a plaintiff must

exhaust administrative remedies under § 602 before bringing a suit directly under § 601.<sup>69</sup> With no precedent on the specific question, the Third Circuit applied its own three-prong test for determining when it is appropriate to imply private rights of action to enforce regulations and found that there *is* a private right of action under § 602.<sup>70</sup>

PADEP appealed to the U.S. Supreme Court.<sup>71</sup> By the time the case reached the highest court, PADEP had revoked the permit for SRS, the permittee whose permit challenge formed the basis of the case.<sup>72</sup> Both sides, fearing unfavorable precedent, asked the Supreme Court to declare the case moot, but PADEP also asked the Supreme Court to vacate the Third Circuit decision, which – over the protest of CRCQL – the Supreme Court did.<sup>73</sup> In a one-sentence decision, the case was vacated as moot with instructions to dismiss.<sup>74</sup> After all this effort, Chester residents had one less polluter to contend with, but impacted communities around the country were left again with no federal court precedent allowing a private right of action under Title VI for allegations of discriminatory effects against federally funded permitting agencies. Until Camden.

## STARTING OVER

Some of the same Philadelphia attorneys involved in *Chester* found opportunity to start over, setting precedent in the same Circuit, across the river in Camden, New Jersey – a community with a very similar story to that of *Chester*. In 2001, (*Camden I*)<sup>75</sup> was filed under similar theories as used in *Chester*.<sup>76</sup>

Like *Chester*, South Camden’s Waterfront South neighborhood is surrounded by toxic industrial threats.<sup>77</sup> The South Camden lawsuit was over a permit granted by NJDEP to Saint Lawrence Cement (“SLC”) for a facility that would grind blast furnace slag, exposing the community to fine particulate matter laden with toxic metals.<sup>78</sup>

In a lengthy, well-documented, and carefully thought-out opinion, the District Court sided with the South Camden residents, concluding that:

- (1) The NJDEP’s failure to consider any evidence beyond SLC’s compliance with technical emissions standards, and specifically its failure to consider the totality of the circumstances surrounding the operation of SLC’s proposed facility, violates the EPA’s regulations promulgated to implement Title VI of the Civil Rights Act of 1964; and (2) Plaintiffs have established a prima facie case of disparate impact discrimination based on race and national origin in violation of the EPA’s regulations promulgated pursuant to § 602 of the Civil Rights Act of 1964.<sup>79</sup>

As in *Chester*, the plaintiffs included a § 601 claim of intentional discrimination, but didn’t back it up, focusing instead on their § 602 disparate impact discrimination claim.<sup>80</sup> After the Supreme Court vacated the Third Circuit’s decision in *Chester*, the Circuit revisited the issue of whether there is an implied private right of action under § 602 of Title VI, finding in *Powell v. Ridge*<sup>81</sup> that such a right exists.<sup>82</sup>

That matter being settled law in the Circuit, the court moved on to rule on whether mere compliance with existing environmental laws and regulations is sufficient to meet the requirements of Title VI.<sup>83</sup> In other words, even if a corporate polluter would release pollution in amounts deemed acceptable, and permitted under environmental regulations, could that polluter still be found to be contributing to a violation of a community's civil rights under Title VI? This question strikes at the heart of what environmental justice activists have complained about for years. Environmental permitting agencies routinely give out pollution permits that are calculated to allow only a certain number of people to die of cancer. This permitting regime is widely criticized for not accounting for vulnerable populations (children, the elderly, fetuses, those with compromised immune systems) and for looking at only one chemical exposure at a time. The existing permitting regime does not factor in the increased chance of illness when one's community is surrounded by dozens of pollution sources, each exposing the community to a wide array of pollutants that can even interact with one another to magnify their health impacts.<sup>84</sup> Industry and government officials pretend that an industrial facility that stays within its permit limits means that the facility is "safe" and thus not harming health. This is far from the truth.

As the District Court framed the issue in *Camden I*: "This case presents the novel question of whether a recipient of EPA funding has an obligation under Title VI to consider racially discriminatory disparate impacts when determining whether to issue a permit, in addition to compliance with applicable environmental standards."<sup>85</sup> The court found that an agency *does* have such an obligation.<sup>86</sup> To reach this conclusion, the court looked at the fact that permitting agencies do not look at the cumulative effects of permitting multiple polluters in a single community.<sup>87</sup> Since environmental laws and regulations are not yet up to this task, the court held that it is appropriate for this to be considered as part of a Title VI analysis in the permitting process.<sup>88</sup>

The District Court also looked closely at the issue of particulate matter (soot), since the EPA was in the process of adopting stricter regulations on fine particulate matter, known as PM-2.5.<sup>89</sup> Regulations in effect at the time only covered PM-10 (larger soot particles), but a substantial body of science showing major health impacts from the smaller PM-2.5 pollution caused the EPA to propose more stringent regulations.<sup>90</sup> At the time of the case, these PM-2.5 regulations were not in effect and NJDEP had no legal obligation to consider this sort of pollution in environmental permitting. However, the body of science showing harm existed and was enough to prod the EPA into regulatory action. The District Court held it relevant to consider the issue within the context of a Title VI disparate impact analysis.<sup>91</sup>

Environmental laws and regulations often take several decades to catch up to what science tells us about the threat of pollutants on health. This is largely due to the need for a "scientific consensus" to line up enough dead bodies before regulatory and political action against a pollutant is even possible, as well as the reality of corporate campaign contributions, lobbying, and

lawsuits intended to block or delay implementation of new regulations. *Camden I*'s novel "totality of the circumstances"<sup>92</sup> use of Title VI to shortcut the glacial environmental regulatory process and apply modern science to community health burdens is a huge benefit to impacted minority communities, but a dramatic threat to the economic interests of corporate polluters.

On April 19, 2001, three days before Earth Day, the United States District Court for the District of New Jersey granted a preliminary injunction to the South Camden plaintiffs.<sup>93</sup> The court vacated SLC's air pollution permits and enjoined the cement company from operating its proposed facility.<sup>94</sup> The court when on to stipulate operations could not commence until the NJDEP performed an appropriate adverse disparate impact analysis in compliance with Title VI to the satisfaction of the District Court.<sup>95</sup> The Earth Week celebration lasted five days.

### THE COURTS CLOSE THE DOOR ON ENVIRONMENTAL JUSTICE

On, April 24, 2001, two days after Earth Day, this victory came crashing down as the U.S. Supreme Court ruled on *Alexander v. Sandoval*.<sup>96</sup> The case had nothing to do with environmental matters, but did involve § 602.<sup>97</sup> The high court ruled that there is no private right of action under § 602, effectively shutting down any litigation over racially disparate impacts caused by federally-funded agencies, unless one can prove intent.<sup>98</sup> The 5-4 majority opinion, written by Justice Scalia, focused on the idea that courts may no longer find that there is a private right of action to enforce federal law unless Congress intends such a right.<sup>99</sup>

When Title VI was enacted in 1964, the Court was in the habit of creating private rights of action and providing remedies as they found necessary to effectuate congressional purpose.<sup>100</sup> This practice was abandoned in 1975 when the Supreme Court created a test in *Cort v. Ash*,<sup>101</sup> setting forth four factors to determine whether Congress intended for a private right of action to exist under a statute:

- (1) whether the plaintiff is one of the class for whose benefit the statute was enacted;
- (2) whether there is any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one;
- (3) whether it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiffs; and
- (4) whether the cause of action is one traditionally relegated to state law.<sup>102</sup>

The *Sandoval* majority ignored most of the *Cort v. Ash* factors, focusing narrowly on part of the second factor where the Court stated: "We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."<sup>103</sup> The majority pointed to *Touche Ross & Co. v. Redington* to back up their opinion that, "like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."<sup>105</sup> While the *Sandoval* majority failed to point this out, *Touche Ross* backs up their abuse of the *Cort v. Ash* factors

by stating that the “Court did not decide that each of these factors is entitled to equal weight.”<sup>106</sup>

The *Sandoval* majority concluded its *Cort v. Ash* analysis by holding that the “rights-creating” language in § 601 (“no person ... shall ... be subjected to discrimination”) is not present in § 602 because § 602 “limits agencies to ‘effectuating’ rights already created by § 601,” and that “the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI’s protection.”<sup>107</sup> Yet, as Justice Stevens pointed out in a dissenting opinion, it makes sense that there is no “rights-creating” language in § 602 since “it is perfectly obvious that the regulations authorized by § 602 must be designed to protect precisely the same people protected by § 601.”<sup>108</sup>

In his dissent, Justice Stevens first pointed out that the question of a private right of action under § 602 should not even be before the Supreme Court, since not a single Court of Appeals has ruled that there is no such right.<sup>109</sup> He listed eleven cases in ten Federal Circuits where federal courts, all on the same page, supported a private right of action under § 602; a twelfth case suggested that the question was still open.<sup>110</sup>

Second, Justice Stevens argued that the majority misinterpreted *Guardians*. He pointed out, as the Third Circuit did in *Chester*, that there were five justices supporting the notion that “private parties may seek injunctive relief against governmental practices that have the effect of discriminating against racial and ethnic minorities.”<sup>111</sup>

Third, Justice Stevens argued that a proper analysis under *Cort v. Ash* supports the notion that there is an implied private right of action under § 602.<sup>112</sup> Clearly, there is no doubt that the plaintiff in a discriminatory impact case is one of the class for whose benefit the statute was enacted, and it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiffs. Justice Stevens documented that there was legislative intent – among proponents and opponents of the Civil Rights Act of 1964 – that Title VI included a private right of action for discriminatory impacts.<sup>113</sup> The Supreme Court’s decision in *Cannon v. University of Chicago*<sup>114</sup> found that Congress intended a private right of action to enforce both Title IX of the Education Amendments of 1972 (a gender discrimination statute modeled on Title VI, and expected to be construed the same way) and Title VI.<sup>115</sup> Justice Stevens pointed out that the analysis of *Cort* in *Cannon* “was equally applicable to intentional discrimination and disparate impact claims” and that *Cannon* was, in fact, a disparate impact case.<sup>116</sup>

Fourth, Justice Stevens argued that § 601 is not limited to intentional discrimination, in contradiction to the majority which claimed such a limitation was “beyond dispute.”<sup>117</sup> He dissected the Court’s decisions in *Guardians* and *Regents University of California v. Bakke*<sup>118</sup> and found that *Bakke* did not rule directly on the matter and that *Guardians* mistakenly assumed that *Bakke* did.<sup>119</sup>

Most significant to the resolution of the Camden case is Justice Stevens’ argument that there is still private right of action reaching § 602 under 42 U.S.C. § 1983.<sup>120</sup> Section 1983 of the Civil Rights Act of 1871 imposes liability on anyone who, under

color of state law, deprives a person “of any rights, privileges, or immunities secured by the Constitution and laws.”<sup>121</sup> It is almost comical in that, for all the wrangling a private right of action under § 602, plaintiffs can still bring the same legal challenge by simply invoking § 1983 to enforce rights created by regulation, causing Justice Stevens to describe *Sandoval* as “something of a sport.”<sup>122</sup>

The sporting continued in *Camden I* on April 24<sup>th</sup>, 2001. *Sandoval* had been decided that morning. That afternoon, the District Court asked the parties in *Camden I* to brief the following two questions: (1) whether the claim could be brought as an intentional discrimination claim under § 601 and (2) whether the § 602 claim could be maintained by invoking 42 U.S.C. § 1983, as Justice Stevens suggested.<sup>123</sup> Perhaps for the first time in any federal court, the *Camden I* case raised the question of “whether the same disparate impact regulations which can no longer be enforced through a private right of action brought directly under § 602 of Title VI, can be enforced pursuant to 42 U.S.C. § 1983.”<sup>124</sup> The District Court upheld its April 19 decision and injunction, finding that the disparate impact discrimination claim can be brought under § 1983.<sup>125</sup>

As before, the victory was short-lived. The courtroom door shut to civil rights plaintiffs in *Sandoval* was to be one in a series of doors slamming shut, closing out opportunities for justice in the courts. On appeal in the Third Circuit addressed the question of whether a regulation can create a right enforceable through § 1983, in the absence of clear rights-creating language in the statute.<sup>126</sup> Justice Stevens had argued in his *Sandoval* dissent that the courts should apply *Chevron* deference in such situations, allowing agencies to create rights in regulations when interpreting broadly-worded statutes, unless the regulations are an unreasonable interpretation of the statute.<sup>127</sup> The Third Circuit did not agree. They held that an administrative regulation could not create a right enforceable under § 1983 unless the right can be implied from the statute authorizing the regulation.<sup>128</sup> Using the Supreme Court’s *Blessing v. Freestone* test<sup>129</sup> to see if the right can be implied from the regulation adopted under § 602 and enforced with 42 U.S.C. § 1983, they ruled that it could not.<sup>130</sup>

The “we won’t find any rights you can enforce unless Congress clearly spelled them out for you” trend was made harder the following year, with a 2002 U.S. Supreme Court ruling in *Gonzaga Univ. v. Doe*.<sup>131</sup> *Gonzaga* made the *Blessing* test even harder to meet, requiring that Congress intend to create a federal right, not merely intend the statute to benefit the plaintiff.<sup>132</sup> *Gonzaga* boldly states: “We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983.”<sup>133</sup>

## THE FOX NOW GUARDS THE HENHOUSE

With this nail in the coffin of environmental justice litigation, the courts have basically said: If you can’t prove the federally-funded agency’s discrimination is intentional, all you can do is to complain to the agency itself and ask them to hold themselves accountable. Asking the fox to guard the henhouse has been as fruitful as one might imagine.<sup>134</sup> About 250 Title VI complaints



were filed with the EPA's Office of Civil Rights from 1993 to 2011, the vast majority of which were dismissed or rejected.<sup>135</sup>

The EPA's first decision on a Title VI complaint was in 1998, ruling on a complaint against Michigan's environmental agency for permitting Select Steel to build a new steel mill in their predominantly African-American neighborhood of Flint, Michigan.<sup>136</sup> In their decision, the EPA found no discrimination.<sup>137</sup> The EPA assumed that the proposed steel mill would be in compliance with environmental laws, and held that complying with environmental laws means that there would be no "adverse effect" on the community.<sup>138</sup> The EPA further held "[i]f there is no adverse effect from the permitted activity, there can be no finding of a discriminatory effect which would violate Title VI and EPA's implementing regulations."<sup>139</sup>

The EPA's position in their *Select Steel* decision is that there can be no violation of Title VI of the Civil Rights Act because there is no violation of environmental laws.<sup>140</sup> This contradicts the Department of Justice's interpretation that civil rights laws are independent and that compliance is evaluated in light of anti-discrimination requirements.<sup>141</sup> It also contradicts common sense, since environmental laws are designed to allow certain levels of pollution – usually without factoring in other nearby sources of pollution – and allowable pollution levels are often based on what is technically and economically possible for an industry to achieve, not on what levels are healthy for the community. The inevitable "adverse" effects on health can surely have a discriminatory effect, even if pollution levels are within permitted limits, as the District Court in *Camden* recognized.<sup>142</sup>

Even when you win, you lose. In August 2011, the EPA finally issued an investigative report on a 1999 Title VI complaint filed over disparate impacts of methyl bromide pesticide spraying near grade schools predominantly serving Latino children in California.<sup>143</sup> In the only case where the EPA ever found a violation of Title VI,<sup>144</sup> it failed to provide a meaningful remedy.<sup>145</sup> After 12 years of delays, the EPA secretly negotiated a settlement with the California Department of Pesticide Regulation, without involving the plaintiffs, and settled for additional monitoring of methyl bromide near schools, and "outreach" by the Department of Pesticide Regulation.<sup>146</sup> The plaintiffs, and all future school children won no real relief from this decision. The EPA is supposed to withhold federal funding when it finds Title VI violations.<sup>147</sup> Settling in secret for crumbs when it finds its first violation is not promising.

The Obama White House and EPA Administrator, Lisa Jackson, while claiming to take environmental justice and civil rights seriously, have permitted this awful decision under their watch.<sup>148</sup> EPA's latest decision, in August 2012, confirms that EPA – even under presumably favorable political leadership – is not a place to find justice. The Center for Race, Poverty and the Environment had to sue the EPA to finally get the agency to decide on a case filed eighteen years earlier, in 1994.<sup>149</sup> Only when the court imposed a deadline on the EPA, did the EPA finally act on complaint – by dismissing it.<sup>150</sup> The complaint alleged discrimination with regard to the fact that all three of California's hazardous waste landfills are in low-income Latino

communities.<sup>151</sup> The EPA absolved the federally-funded state agency that permitted the facilities because they were not actually involved in siting the facilities.<sup>152</sup> Such an interpretation is quite dangerous, since state permitting agencies rarely pick the sites, but do decide whether to grant permits for where corporations seek to build polluting facilities. Stunningly, the EPA also found that the three hazardous waste landfills did not harm public health despite unexplained birth defect clusters and high infant mortality rates.<sup>153</sup> In coming to this conclusion, the EPA failed to evaluate the impact of diesel trucks coming to the facilities, even though the agency had awarded a California group, Greenaction, a grant to work with one of these communities specifically on diesel pollution issues.<sup>154</sup>

Such twelve to eighteen year delays are not uncommon. The EPA is required to accept for investigation or deny a Title VI complaint within 20 days, and within 180 days of accepting one, must issue preliminary findings from its investigation.<sup>155</sup> However, many complaints have languished fifteen years or more without any agency response.<sup>156</sup> In 2003, the U.S. Commission on Civil Rights found that the EPA lacked an effective system for investigating the growing backlog of complaints.<sup>157</sup> In 2009, the Ninth Circuit Court of Appeals ruled against the EPA in the first case related to the backlog of Title VI complaints, noting a "consistent pattern of delay by the EPA" and that the delays in that case "appear, sadly and unfortunately, typical of those who appeal to [the EPA] to remedy civil rights violations."<sup>158</sup> In 2011, a Deloitte Consulting LLP report on the EPA's Office of Civil Rights showed that their backlog problems continue.<sup>159</sup>

### **"ENVIRONMENTAL JUSTICE" LEGISLATION**

After several years of frustration with courts refusing to hear environmental racism claims on the merits and the EPA failing to respond to Title VI complaints, some environmental justice activists have sought to legislatively "fix" *Sandoval*. In 2006, Senator Menendez (D-NJ) introduced S. 4009, the Environmental Justice Enforcement Act of 2006.<sup>160</sup> In 2008, on the seventh anniversary of the *Sandoval* ruling, Senator Menendez reintroduced the bill as S. 2918, and Congresswoman Solis (D-CA) introduced the same, as H.R. 5896.<sup>161</sup> The legislation has not been reintroduced in either the 111th or 112th Congress (2009-2012).

The Environmental Justice Enforcement Act essentially overturns key findings in *Sandoval* and a whole string of cases preceding it by creating a clear statutory right to sue for disparate impacts under § 601.<sup>162</sup> Section 601 would be amended so that a recipient of federal funds accused of discriminatory impact may only escape liability if they can "demonstrate that the challenged policy or practice is related to and necessary to achieve the nondiscriminatory goals of the program or activity alleged to have been operated in a discriminatory manner."<sup>163</sup> A plaintiff may also prove discrimination by demonstrating that a less discriminatory alternative policy or practice exists, and that the recipient of federal funds refuses to adopt such alternative policy or practice.<sup>164</sup> The legislation also clearly spells out rights to recovery.<sup>165</sup> Plaintiffs bringing claims based on disparate impact may recover equitable relief, attorney's fees (including



expert fees), and costs.<sup>166</sup> Those bringing claims of intentional discrimination may also recover compensatory and punitive damages, though punitive damages are not available against governmental bodies.<sup>167</sup>

While framed as an environmental justice bill, the Environmental Justice Enforcement Act is not limited to environmental claims. It would reopen doors to private disparate impact claims of any sort that are “on the basis of race, color or national origin.”<sup>168</sup> Perhaps if the rest of the civil rights movement were aware of this, or if the Obama Administration’s actions were as serious about combating discrimination as his words, the legislation would have been reintroduced and made more of a priority.

While passage of the Environmental Justice Enforcement Act would be a huge victory for civil rights, its impact on achieving environmental justice would be fairly small in the big picture. It is hard for most community groups to bring Title VI cases without free legal help, which the groups in *Chester* and *Camden* had. The number of communities that can bring claims is also limited, since such cases are only likely to succeed where there are blatant racial disparities,

comparable to *Chester* and *Camden*. Many other “environmental justice” communities don’t share such stark demographic disparities, and some are likely to be seen as arguable, such as where major polluting facilities are planned in poor, rural white areas adjacent to prisons housing mostly racial minorities, as is the case in a community near Gilberton, Pennsylvania.<sup>169</sup> Since Title VI provides no protection for class discrimination, many impoverished and heavily impacted communities, like those suffering in West Virginia’s mountaintop removal mining regions, are left without legal protection. Some have argued that the future direction of environmental justice law needs to include protections for victims of economic discrimination.<sup>170</sup>

Even with a private right of action on race and class discrimination, the legal tool lends itself to a one facility at a time, one community at a time, solution. With the systematic onslaught of pollution and unnecessary industries, it would be more appropriate for the environmental justice movement to be pushing for broader policy-level changes, not unlike the Environmental Justice Enforcement Act’s “prove discrimination by demonstrating that a less discriminatory alternative policy or practice exists” idea – but one where people could sue if the government permits a company to operate a technology where a less polluting alternative technology or practice exists. Currently, under the National Environmental Policy Act,<sup>171</sup> certain federally

funded or sponsored projects must do an Environmental Impact Statement that is supposed to include an analysis of alternatives, but there is no requirement that the project proponents actually adopt any of the better alternatives they write up in the impact statement.<sup>172</sup>

Until we see the day when these broader policies are politically possible, we must take advantage of every opportunity to protect every community from environmental harm – especially those that are made easy targets because of actual or perceived political powerlessness. A renewed Title VI would be a weak tool toward “justice.” A wave of lawsuits would, at best, start to redistribute environmental harms, with some polluting projects turning their sights

on communities with a larger white population. Any distributional equity would mostly pertain to locating new polluters, as such litigation isn’t likely to dislodge and relocate existing industries.

When corporate polluters are chased out of a community, most give up after targeting one or two other communities. Some are more persistent. In 1998, a company named PhilPower Corporation sought to build a wood waste incinerator in

Delaware.<sup>173</sup> They targeted one community after another – ultimately targeting six communities.<sup>174</sup> Most were communities of color, but when they tried to set foot in a suburban white community, that was enough to get state legislation moving that ultimately banned incinerators statewide in 2000.<sup>175</sup>

This is an ideal example of where equity can be a step toward justice. However, more typical examples from other, more famous, environmental justice battles didn’t turn out so well. In the LES example, the company tried three more times, twice in whiter communities in Tennessee, where they were defeated both times, and ultimately landed in a low-income, forty-five percent Hispanic community in New Mexico.<sup>176</sup> While this is more “equitable” than the company’s initial target, it is still environmental racism and it will still do grave harm to the environment and the people who live in the region. Another notorious example, well-known in the environmental justice movement, is that of Shintech – a Japanese company that sought to build a PVC plastics factory in Convent, Louisiana, in a region known as “cancer alley” due to the high concentration of petroleum refineries, chemical, and plastic production facilities.<sup>177</sup> While the battle against Shintech stopped them from locating in Convent, they ultimately got a facility built – albeit smaller – in a largely white community in another county in the region.<sup>178</sup>

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## ENVIRONMENTAL EQUITY IS IMPOSSIBLE

Given unequal routes of exposure to toxic pollutants, even those released in white communities disproportionately impact people of color. Some racial minorities consume more fish and thus suffer higher exposure to toxic mercury, dioxins and PCBs.<sup>179</sup> Dioxins and PCBs travel quite far, accumulating at the Earth's poles. Indigenous people living in the Arctic Circle subsist necessarily on a diet heavy in animal fat, where these toxins accumulate at high doses, with one of the largest sources having been a trash incinerator in an environmental justice community in Harrisburg, Pennsylvania. In both cases, the racially disparate exposures would occur even if every smokestack were in a nearby affluent white community, as the pollutants (and fish) travel before the uneven exposures are felt.

Water fluoridation is another example where toxic exposure is inherently unequal. While urban communities are most often fluoridated, disproportionately exposing people of

some risk (such as recycling facilities, where the siting should be made more equitable and the impacts should be insulated from residential land uses).

Given this, it does not make sense to pose legislative solutions in terms of environmental justice. Most “environmental justice” policies have actually been “equity” policies weakly designed to redistribute harms. Such policies usually just focus on increased “public involvement,” but some aim to establish protocols that discourage agency permitting of new polluting facilities in designated “environmental justice” communities.

While it's good to discourage the concentration of new polluters where existing polluters are already concentrated – mainly low-income communities and communities of color – it hardly goes far enough. There is still the matter of existing polluters, and no one has seriously proposed uprooting industries in order to relocate some in wealthy, white suburbs. Clearly, that would

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color to the hazardous chemicals used, the chemicals – even within the same community – impact people of color more than whites. Fluoride helps the body absorb lead, which affects the brain in ways that diminish IQ and contribute to learning disabilities, violent behavior and increased likelihood of cocaine addiction. The fluoride-induced increase in lead exposure is most pronounced in blacks, and also affects Hispanics more than whites.<sup>180</sup>

## CONCLUSION

The “environmental equity” goal of redistributing harms is not only impossible, but is largely undesirable. For the worst environmentally harmful industries, such as nuclear reactors, combustion-based power plants, incinerators, and the like there are alternatives that are generally cheaper, zero-emission, and which produce far more jobs. For these types of harmful industries, it's proper to say “Not in Anyone's Backyard.” Such a position fits with the Principles of Environmental Justice.

The equity concept only belongs to bringing fairness in the distribution of socially beneficial things (such as access to parks and public transit, or availability of fresh produce in urban “food deserts” – each of which have been tackled as environmental justice issues), and in socially necessary facilities that carry

prove politically impossible, and any such effort, even if legal, would be economically ridiculous and politically divisive. If there were economic resources (and political will) to relocate polluting industries, then those funds would be better put into replacing the polluting technology with non-pollution alternatives. It is more strategic to help more privileged communities understand how they are also affected by pollution, and to use that awareness to create a solidarity to work toward broader solutions.

Policies designed to redistribute beneficial things (parks, groceries, access to public transit, health care, schools...) are good and can be honestly framed as equity policies. A law designed to ensure equitable enforcement of environmental laws would be most helpful, and would also fairly fall in the “equity” realm.

Policies that are truly about environmental justice are unlikely to be framed in such terms, as they would look like laws that help everyone by transitioning from various polluting practices to clean ones. Examples include laws replacing toxic chemicals with safe alternatives, banning incineration, or removing dirty energy subsidies. Such laws would most help the communities of color who suffer the disproportionate impacts, but the laws themselves would not need to be framed in terms

of environmental justice or with any race-based language. This is just as well, and advisable, considering the misguided “color-blind” approach that courts have taken with such issues as affirmative action.

As we sharpen legal tools to achieve environmental justice for all, we must not sell short and settle for equity of harms disguised as justice. As Martin Luther King, Jr. knew, injustice anywhere is a threat to justice everywhere.<sup>181</sup>



## Endnotes: LEGAL TOOLS FOR ENVIRONMENTAL EQUITY VS. ENVIRONMENTAL JUSTICE

<sup>1</sup> For the full-length version of this article, see [www.ejnet.org/ej/ejlaw.pdf](http://www.ejnet.org/ej/ejlaw.pdf)

<sup>2</sup> *Environmental Justice- History*, AVOICE, <http://www.avoiceline.org/environmental/history.html> (last visited Nov. 20, 2012).

<sup>3</sup> See generally Robert D. Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All These Years*, 38 ENVTL. L. 371, 373-77 (2008) (tracing the history of environmental justice from the 1987 United Church of Christ study, *Toxic Wastes and Race in the United States*, through this new study in 2007); ROBERT D. BULLARD ET AL., TOXIC WASTES AND RACE AT TWENTY: 1987-2007 (2007), available at <http://www.ejnet.org/ej/twart.pdf>; Bradford C. Mank, *Environmental Justice and Title VI: Making Recipient Agencies Justify Their Siting Decisions*, 73 TUL. L. REV. 787, 790 n.1 (1999) (compiling a list of studies dating to 1983). Additional studies available at: <http://www.ejnet.org/ej/>.

<sup>4</sup> See Mank, *supra* note 3, at 792 (concluding in the review of many studies that “there is credible evidence that minority groups experience significant discrimination in some areas of the country”).

<sup>5</sup> See Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation*, 56 OHIO ST. L.J. 329, 334-40 (1995) (examining studies on siting of waste sites and citing many that conclude that race is a more significant indicator of siting than socioeconomic factors).

<sup>6</sup> See ENVIRONMENTAL STUDIES CAPSTONE, SWARTHMORE COLLEGE, MAPPING ENVIRONMENTAL JUSTICE IN DELAWARE COUNTY 20 fig.5, 21 fig.6, 22 fig.7, 23 fig.8, 24 fig.9 (2006), available at <http://www.ejnet.org/chester/delco-swat.pdf> (displaying data on geographic distribution of race, education, unemployment, and age with respect to air and water pollution); *Distribution of Environmental Burdens in Delaware County*, SCORECARD [http://www.scorecard.org/community/ejsurvey.tcl?fips\\_county\\_code=42045#dist](http://www.scorecard.org/community/ejsurvey.tcl?fips_county_code=42045#dist) (last visited Jan. 17, 2013) (comparing distribution of environmental burdens by race, income, poverty, childhood poverty, education, job classification, and home ownership and showing that the ratio of burden is higher based upon race than any other indicator).

<sup>7</sup> J. STEPHEN POWELL, CERRELL ASSOC., POLITICAL DIFFICULTIES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING, STUDY FOR THE CALIFORNIA WASTE MANAGEMENT BOARD 1, 4-6 (1984), <http://www.ejnet.org/ej/cerrell.pdf> (failing to specifically mention racial criteria, but this study, aimed to help the state site 43 trash incinerators, spelled out numerous other criteria for communities “more” or “less” likely to resist siting of “major facilities” like trash incinerators; of the three that were ultimately built, all were in low-income Hispanic communities). In another example, Epley Associates, hired in North Carolina to help site a nuclear waste dump, did a window-survey of communities and suggested that specific communities be considered or not based on race and class factors. See Environmental Research Foundation, *Nuclear Industry Discovers Solution to Waste Problem: Bribery and Deception*, RACHEL.ORG (Nov. 26, 1991), <http://www.rachel.org/?q=en/node/4191>; see also Michael Heiman, *Waste Management and Risk Assessment: Environmental Discrimination through Regulation*, 17 URBAN GEOGRAPHY 400 (1996).

<sup>8</sup> FIRST NAT’L PEOPLE OF COLOR ENVTL. LEADERSHIP SUMMIT, THE PRINCIPLES OF ENVIRONMENTAL JUSTICE (1991), <http://www.ejnet.org/ej/principles.pdf> [Hereinafter PRINCIPLES OF ENVIRONMENTAL JUSTICE].

<sup>9</sup> *Id.* (setting an agenda that stood for human rights, democratic community decision-making, education, women’s and workers’ rights, and health care, while standing against imperialism, militarism, corporate abuses, and toxic and nuclear production).

<sup>10</sup> U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983), <http://www.gao.gov/products/RCED-83-168> (last visited Jan 17, 2013).

<sup>11</sup> *Id.* at 1.

<sup>12</sup> *Environmental Justice – History*, *supra* note 2.

<sup>13</sup> *Environmental Justice – Basic Information*, ENVTL. PROT. AGENCY, <http://www.epa.gov/environmentaljustice/basics/ejbackground.html> (last visited Jan. 17, 2013).

<sup>14</sup> Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT’L L.J., Sept. 21, 1992, at S2, <http://www.ejnet.org/ej/nlj.pdf> (last visited Jan. 17, 2013).

<sup>15</sup> *Environmental Justice – Frequently Asked Questions*, ENVTL. PROT. AGENCY, <http://web.archive.org/web/20100408215551/http://www.epa.gov/compliance/ej/resources/faqs/index.html> (last visited Nov. 20, 2012).

<sup>16</sup> *Id.*

<sup>17</sup> *Environmental Justice – History*, *supra* note 2; Heiman, *supra* note 7, at 418, n. 13.

<sup>18</sup> PRINCIPLES OF ENVIRONMENTAL JUSTICE, *supra* note 8.

<sup>19</sup> See *Environmental Justice – Basic Information*, *supra* note 13 (conflating the terms justice and equity).

<sup>20</sup> *Id.* (emphasis added).

<sup>21</sup> At three “environmental justice” meetings held in Pennsylvania, that this author is personally familiar with, two of them (in Philadelphia and Harrisburg) involved such poor community outreach that no one in the community showed up to speak, and in Erie, Pennsylvania, where the world’s largest tire incinerator was proposed next to housing projects in the city, the “environmental justice” meeting was held—not at the high school within walking distance, where the polluter held its initial meeting—but at a suburban school five miles away, where no one in the nearby community of color managed to attend.

<sup>22</sup> Exec. Order No. 12898, 3 C.F.R. 859 (1994), *reprinted as amended in* 42 U.S.C. § 4321 (2011), <http://www.archives.gov/federal-register/executive-orders/pdf/12898.pdf>.

<sup>23</sup> *Id.* §§ 1-102, 1-103, 3-301, 5.

<sup>24</sup> *Id.* § 6-609.

<sup>25</sup> 45 N.R.C. 367 (1997).

<sup>26</sup> *Id.* at 371.

<sup>27</sup> *Id.* at 370.

<sup>28</sup> *Id.* at 371.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 376-78.

<sup>33</sup> *Id.* at 392.

<sup>34</sup> Louisiana, U.S. CENSUS BUREAU, [http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/00\\_SF1/DP1/0400000US22](http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/00_SF1/DP1/0400000US22) (last visited January 15, 2013).

<sup>35</sup> 45 N.R.C. at 371.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 395.

<sup>39</sup> *Id.* at 387-88.

<sup>40</sup> *Id.* at 391.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 391-92.

<sup>43</sup> *Id.* at 412.

<sup>44</sup> Approximately 90% of the Nuclear Regulatory Commission’s funding is legally mandated to come from fees assessed to nuclear facility operators, creating the incentive for Commission staff to keep the industry open if they are to keep their jobs. See *License Fees*, NRC.GOV, <http://www.nrc.gov/about-nrc/regulatory/licensing/fees.html> (last visited Mar 14, 2013).

<sup>45</sup> See, e.g., *Radioactive Racism: The History of Targeting Native American Communities with High-Level Atomic Waste Dumps*, PUB. CITIZEN, <http://www.citizen.org/documents/radioactiveracism.pdf> (last visited Nov.20, 2012) (documenting incidents which indicate that Native Americans have “disproportionately borne the brunt of the impacts from the nuclear fuel chain over the past 60 years”).

continued on page 55

- <sup>46</sup> See *Louisiana Energy Services: Uranium and Environmental Racism*, EJNET.ORG, <http://www.ejnet.org/ej/les.html> (last visited Nov. 15, 2012) (relating that while Louisiana Energy Services was indeed defeated in their efforts to build in northern Louisiana, and was subsequently kicked out of two communities they targeted in Tennessee, they ultimately managed to build their uranium enrichment facility in Eunice, New Mexico, in a community with a Hispanic population nearly triple the national average and a poverty rate 45% above the national average).
- <sup>47</sup> In the Matter of Louisiana Energy Services, L.P., 47 N.R.C. 77, 101, 106-07 (1998).
- <sup>48</sup> *Id.* at 100-102.
- <sup>49</sup> Mike Ewall, *Environmental Injustice in Delaware County, PA*, ACTIONPA.ORG (Feb. 2008), <http://www.ejnet.org/chester/delco-ej.pdf> (listing waste facilities within Delaware County, PA).
- <sup>50</sup> *Chester Residents Concerned for Quality Living v. Seif (Chester I)*, 944 F. Supp. 413, 415 (E.D. Pa. 1996).
- <sup>51</sup> *Id.* at 414, 417.
- <sup>52</sup> 42 U.S.C. § 2000d (2000).
- <sup>53</sup> 42 U.S.C. § 2000d-1 (2000).
- <sup>54</sup> *Chester Residents Concerned for Quality Living v. Seif (Chester II)*, 132 F.3d 925, 927-28 (3d Cir. 1997).
- <sup>55</sup> *Chester I*, 944 F. Supp. at 417 (“We thus find that by alleging only discriminatory effect rather than discriminatory intent, plaintiffs failed in their complaint to allege a violation of Title VI.” (emphasis in original)).
- <sup>56</sup> *Id.* at 417-18.
- <sup>57</sup> 132 F.3d 925 (3d Cir. 1997).
- <sup>58</sup> *Id.* at 928.
- <sup>59</sup> *Id.* at 937.
- <sup>60</sup> 463 U.S. 582, 103 S. Ct. 3221, 77 L.Ed.2d 866 (1983).
- <sup>61</sup> *Chester II*, 132 F.3d at 929.
- <sup>62</sup> *Id.* (citing *Alexander v. Choate*, 469 U.S. 287, 292-94, 105 S. Ct. 712, 716 (1985)).
- <sup>63</sup> *Id.*
- <sup>64</sup> *Id.* at 930.
- <sup>65</sup> *Id.* (quoting *Guardians* 463 U.S. at 645, 103 S. Ct. at 3255) (Stevens, J., dissenting)).
- <sup>66</sup> *Id.* (citing *Guardians*, 463 U.S. at 584, 589-93, 103 S. Ct. at 3223, 3226-28 (opinion of White, J.); 463 U.S. at 615, 103 S. Ct. at 3239-40 (Marshall, J., dissenting)).
- <sup>67</sup> *Id.* at 930-31.
- <sup>68</sup> *Id.* at 932.
- <sup>69</sup> *Id.* (discussing *Chowdhury v. Reading Hosp. and Med. Ctr.*, 677 F.2d 317 (3d Cir. 1982)).
- <sup>70</sup> *Id.* at 933 (explaining three prong test looks at: “(1) whether the agency rule is properly within the scope of the enabling statute; (2) whether the statute under which the rule was promulgated properly permits the implication of a private right of action; and (3) whether implying a private right of action will further the purpose of the enabling statute.” (quoting *Polaroid Corp. v. Disney*, 862 F.2d 987, 994 (3d Cir. 1988) (internal quotations and citation omitted)).
- <sup>71</sup> *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 915, 118 S. Ct. 2296 (1998) (granting writ of certiorari).
- <sup>72</sup> See generally Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can A Legal Tool Build Environmental Justice?* 27 B.C. ENVTL. AFF. L. REV. 631, 675-80 (2000) (detailing the dynamics surrounding the CRCQL Supreme Court appeal).
- <sup>73</sup> *Id.*
- <sup>74</sup> *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 974, 119 S. Ct. 22, 22-23 (1998) (“The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Third Circuit with instructions to dismiss.”).
- <sup>75</sup> 145 F. Supp. 2d 446 (D.N.J. 2001).
- <sup>76</sup> *Id.* at 473-474.
- <sup>77</sup> *Id.* at 459-60.
- <sup>78</sup> *Id.* at 450.
- <sup>79</sup> *Id.* at 451-52.
- <sup>80</sup> *Id.* at 472 (noting that the Plaintiffs spent particular attention on briefing the claim of disparate impact in violation of § 602).
- <sup>81</sup> 189 F.3d 387 (3d Cir. 1999).
- <sup>82</sup> *Id.* at 399.
- <sup>83</sup> *Camden I*, 145 F. Supp. 2d at 474.
- <sup>84</sup> See generally *Risk Assessments vs. Alternative Assessments*, EJNET.ORG, <http://www.ejnet.org/ej/riskassessment.html> (last visited Nov.20, 2012) (explaining flaws in risk assessment and advocating for a more involved process).
- <sup>85</sup> *Camden I*, 145 F. Supp. 2d at 474.
- <sup>86</sup> *Id.*
- <sup>87</sup> *Id.* at 488-90.
- <sup>88</sup> *Id.* at 490.
- <sup>89</sup> *Id.* at 461-66.
- <sup>90</sup> *PM<sub>2.5</sub> NAAQS Implementation*, ENVTL. PROT. AGENCY, [http://www.epa.gov/ttnnaaq/pm/pm25\\_index.html](http://www.epa.gov/ttnnaaq/pm/pm25_index.html) (last updated July 14, 2008).
- <sup>91</sup> *Camden I*, 145 F. Supp. 2d at 497-98 (noting the EPA’s own admission that their regulations regarding particulate matter were “inadequate to protect the public health”).
- <sup>92</sup> *Id.* at 499.
- <sup>93</sup> *Id.* at 452.
- <sup>94</sup> *Id.*
- <sup>95</sup> *Id.* at 503-05.
- <sup>96</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001).
- <sup>97</sup> *Id.* at 279.
- <sup>98</sup> *Id.* at 293.
- <sup>99</sup> *Id.* at 286-87.
- <sup>100</sup> *Id.* at 287 (“That understanding is captured by the Court’s statement in *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), that ‘it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose’ expressed by a statute.”).
- <sup>101</sup> 422 U.S. 66, 95 S. Ct. 2080 (1975).
- <sup>102</sup> *Id.* at 78.
- <sup>103</sup> *Sandoval*, 532 U.S. at 288.
- <sup>104</sup> *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).
- <sup>105</sup> *Sandoval*, 532 U.S. at 286 (citing *Touche Ross* 442 U.S. at 578).
- <sup>106</sup> *Touche Ross*, 442 U.S. at 575.
- <sup>107</sup> *Sandoval*, 532 U.S. at 288-89.
- <sup>108</sup> *Id.* at 316 (Stevens, J., dissenting).
- <sup>109</sup> *Id.* at 295, 317.
- <sup>110</sup> *Id.* at 295 n.1.
- <sup>111</sup> *Id.* at 299.
- <sup>112</sup> *Id.* at 311.
- <sup>113</sup> *Id.* at 302 n.9.
- <sup>114</sup> *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).
- <sup>115</sup> *Id.* at 702-03.
- <sup>116</sup> *Sandoval*, 532 U.S. at 298 (Stevens, J., dissenting).
- <sup>117</sup> *Id.* at 303; *id.* at 280 (Scalia, J.).
- <sup>118</sup> *Regents Univ. Cal. V. Bakke*, 438 U.S. 265 (1978).
- <sup>119</sup> *Sandoval*, 532 U.S. at 307-08 (Stevens, J., dissenting).
- <sup>120</sup> *Id.* at 299-301.
- <sup>121</sup> 42 U.S.C. § 1983; *Blessing v. Freestone*, 520 U.S. 329, 340 (1997).
- <sup>122</sup> *Sandoval*, 532 U.S. at 300 (Stevens, J., dissenting).
- <sup>123</sup> *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot. (Camden II)*, 145 F. Supp. 2d 505, 509 (D.N.J. 2001).
- <sup>124</sup> *Id.*
- <sup>125</sup> *Id.*
- <sup>126</sup> *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot. (Camden III)*, 274 F.3d 771, 781 (3d Cir. 2001).
- <sup>127</sup> *Sandoval*, 532 U.S. at 309 (Stevens, J., dissenting).
- <sup>128</sup> *Camden III*, 274 F.3d at 774.
- <sup>129</sup> *Blessing v. Freestone*, 520 U.S. 329, 338, 117 S.Ct. 1353, 1358 (1997). The *Blessing* test to determine whether a federal statute creates an individual right enforceable through § 1983 looks at the following: (1) Congress must have intended that the provision in question benefit the plaintiff; (2) the plaintiff must demonstrate that the right protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence; and (3) the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory terms.
- <sup>130</sup> *Camden III*, 274 F.3d. at 791.
- <sup>131</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).



- <sup>132</sup> *Id.* at 283; *see also* Derek Black, *Picking up the Pieces after Alexander v. Sandoval: Resurrecting a Private Cause of Action for Disparate Impact*, 81 N.C.L. REV. 356, 366-67 (2002) (“The Gonzaga Court stated that it was not changing the Blessing test, but Gonzaga stressed that Congress must intend to create a federal right, not merely intend the statute to benefit the plaintiff.”).
- <sup>133</sup> *Gonzaga*, 536 U.S. at 283.
- <sup>134</sup> *See* CENTER FOR RACE, POVERTY & THE ENVIRONMENT, ET. AL., *THE EPA DENIES CIVIL RIGHTS PROTECTION FOR COMMUNITIES OF COLOR* (2011), <http://www.ejnet.org/ej/tvifactsheet.pdf> (arguing that the EPA’s Select Steel decision and California Department of Pesticide settlement have eroded civil rights protection and demanding their rescission and increased oversight).
- <sup>135</sup> *Title VI Complaints Listing*, EJNET.ORG, <http://www.ejnet.org/ej/2011-07-15complaints.pdf> (last visited Nov. 24, 2012).
- <sup>136</sup> ANN E. GOODE, ENVTL. PROT. AGENCY, *SELECT STEEL DECISION MEMORANDUM & REPORT 10* (1998), [http://www.epa.gov/ocr/docs/ssdec\\_ir.pdf](http://www.epa.gov/ocr/docs/ssdec_ir.pdf).
- <sup>137</sup> *Id.* at 37-38.
- <sup>138</sup> *Id.* at 2.
- <sup>139</sup> *Id.* at 3.
- <sup>140</sup> *Id.* at 2.
- <sup>141</sup> *See* Brief Amicus Curiae of the United States at 13, 19, *Save Our Summers v. Washington Department of Ecology*, 132 F. Supp. 2d 896 (E.D. Wash. 1999) (No. CS-99-269-RHWQ), *available at* <http://www.cforjustice.org/wp-content/uploads/2009/03/amicus.pdf>. Endnote 143: insert “*available at*” before URL (urging the court to consider the purposes and structure of both environmental laws and civil rights laws to find an approach which would reconcile any tension or conflict between the two and that, because the two different types of statutes can be harmonized, there is no need to consider which is controlling, and they may be separately applied).
- <sup>142</sup> *Camden I*, 145 F. Supp. 2d at 498-99.
- <sup>143</sup> OFFICE OF CIVIL RIGHTS, ENVTL. PROT. AGENCY, *INVESTIGATIVE REPORT FOR TITLE VI ADMINISTRATIVE COMPLAINT FILE NO. 16R-99-R9* (2011), <http://www.epa.gov/ocr/TitleVIcases/ir-082511.pdf>.
- <sup>144</sup> *Id.* at 37 (determining that the plaintiffs had made a *prima facie* showing of adverse impact).
- <sup>145</sup> *Compare id.* at 37-38 (stating that the EPA agreed to increased monitoring of air concentration levels and community outreach and education efforts), *with* Complaint at 40-41, *Angelita C. v. Cal. Dep’t of Pesticide Regulation*, No. 16R-99-R9 (Office of Civil Rights, Env’tl. Prot. Agency) (1999), <http://www.ejnet.org/ej/angelitac-complaint.pdf> (asking the EPA to ban methyl bromide, or in the very least to enforce much larger buffer zones).
- <sup>146</sup> OFFICE OF CIVIL RIGHTS, *supra* note 143, at 37-38.
- <sup>147</sup> Press Release, Center on Race, Poverty, & the Environment, *EPA Fails to Enforce Civil Rights Act* (Aug. 25, 2011), <http://www.ejnet.org/ej/angelitac-crpe-pr.pdf> (quoting Brent Newell, General Counsel).
- <sup>148</sup> *See EPA roundly criticized over draft supplement to Civil Rights plan*, INSIDE EPA.COM (July 20, 2012), <http://www.enviro-lawyer.com/EPA%20Roundly%20Criticized.pdf> (quoting a neighborhood association as saying that “[d]espite Rosemere’s lawsuit and the subsequent national debate of the failures of the [EPA Office of Civil Rights (OCR)], and despite [Lisa Jackson’s] continued promises for EPA to increase efficiency in that office to make environmental justice a national priority, the OCR continues to fail in its intake and investigation guidelines in regard to Title VI complaints.”).
- <sup>149</sup> *See* *Padrias Hacia Una Vida Mejor v. Jackson*, No. 1:11CV01094 AWI DLB, 2012 WL 1795823, at \*3 (May 16, 2012), <http://www.epa.gov/ocr/TitleVIcases/decisions/#padres> (“On June 30, 2011, Plaintiffs filed this lawsuit. Plaintiffs allege that EPA has violated, and continues to violate, 40 C.F.R. § 7.115(c)(1) because it failed to issue preliminary findings and recommendations for voluntary compliance in response to Plaintiffs’ Title VI complaint within 180 days of EPA’s initiation of investigation.”).
- <sup>150</sup> RAFAEL DELEON, ENVTL. PROT. AGENCY, *DISMISSAL AND CLOSURE OF TITLE VI COMPLAINT* (Aug. 20, 2012), [http://www.epa.gov/ocr/TitleVIcases/decisions/padres/Padres\\_complaint\\_01-95-R9\\_decision-ltr\\_DTSC\\_20120830.pdf](http://www.epa.gov/ocr/TitleVIcases/decisions/padres/Padres_complaint_01-95-R9_decision-ltr_DTSC_20120830.pdf).
- <sup>151</sup> *Id.* at 1.
- <sup>152</sup> *Id.*
- <sup>153</sup> *Id.* at 4-7.
- <sup>154</sup> Eiji Yamashita, *EPA awards grant to environmental group: Greenaction Campaign to Conduct Outreach on Impact of Diesel Emissions*, HANFORD SENTINEL, Dec. 10, 2011, [http://www.hanfordsentinel.com/news/local/epa-awards-grant-to-environmental-group/article\\_856323fa-22d5-11e1-894b-001871e3ce6c.html](http://www.hanfordsentinel.com/news/local/epa-awards-grant-to-environmental-group/article_856323fa-22d5-11e1-894b-001871e3ce6c.html).
- <sup>155</sup> 40 C.F.R. §§ 7.120(d), 7.115(c).
- <sup>156</sup> *EPA Fails to Enforce Civil Rights Act*, *supra* note 147 (reporting that dozens of complaints have languished at the EPA).
- <sup>157</sup> U.S. COMMISSION ON CIVIL RIGHTS, *NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE* 55-62 (2003), <http://www.usccr.gov/pubs/envjust/ej0104.pdf>.
- <sup>158</sup> *Rosemere Neighborhood Assoc. v. U.S. Env’tl. Prot. Agency*, 581 F.3d 1169, 1175 (9th Cir. 2009), <http://www.ca9.uscourts.gov/datastore/opinions/2009/09/17/08-35045.pdf>.
- <sup>159</sup> DELOITTE CONSULTING LLP, *EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS – FINAL REPORT 19* (2011), [http://www.epa.gov/epahome/pdf/epa-ocr\\_20110321\\_finalreport.pdf](http://www.epa.gov/epahome/pdf/epa-ocr_20110321_finalreport.pdf) (concluding that the backlog was “directly attributable to OCR’s difficulty in securing the time of resources in the program and regional offices that have required technical and regulatory expertise to execute the highly analytical investigation plan”).
- <sup>160</sup> S. 4009, 109th Cong. (2006).
- <sup>161</sup> S. 2918, 110th Cong. (2008); H.R. 5896, 110th Cong. (2008).
- <sup>162</sup> S. 2918 § 1; H.R. 5896 § 1.
- <sup>163</sup> S. 2918 § 3; H.R. 5896 § 3.
- <sup>164</sup> *Id.*
- <sup>165</sup> S. 2918 § 5; H.R. 5896 § 5 (providing the right to recovery on (1) “claims based on proof of intentional discrimination” and (2) “claims based on the disparate impact standard of proof”).
- <sup>166</sup> *Id.*
- <sup>167</sup> *Id.*
- <sup>168</sup> S. 2918 § 3; H.R. 5896 § 3.
- <sup>169</sup> *See generally* SCHUYLKILL TAXPAYERS OPPOSED TO POLLUTION, <http://www.ultradirtyfuels.com> (last visited Nov. 27, 2012) (providing a brief history of “coal-to-oil” refineries in Schuylkill County and their impact on residents). In response to comments by the author, the Department of Energy, in their Environmental Impact Statement, recognized the prison population as an environmental justice community, but pretended that they would not be impacted by the coal-to-oil refinery proposed adjacent to them because the pollution would be within legal limits, along the flawed lines of the aforementioned *Select Steel* decision. DEP’T OF ENERGY, *FINAL ENVIRONMENTAL IMPACT STATEMENT FOR THE GLIBERTON COAL-TO-CLEAN FUELS AND POWER PROJECT xxxi-xxxii* (2007), [http://www.netl.doe.gov/technologies/coalpower/cctc/EIS/gilberton\\_pdf/0%20WMPI%20FEIS%20Front%20Matter.pdf](http://www.netl.doe.gov/technologies/coalpower/cctc/EIS/gilberton_pdf/0%20WMPI%20FEIS%20Front%20Matter.pdf).
- <sup>170</sup> *E.g.*, Uma Outka, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 246-248 (2005).
- <sup>171</sup> Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4231 et seq.).
- <sup>172</sup> 42 U.S.C. §§ 4332(C)(iii), (D)(iv), (E) (2011).
- <sup>173</sup> *See generally Philpower Incinerator Saga*, GREEN DEL., <http://greendel.org/versionone/incineration/ppstory.html> (last updated June 18, 2000) (providing history on the “Philpower Incinerator Saga”).
- <sup>174</sup> *Philpower Corporation*, ENERGY JUSTICE NETWORK, <http://www.energyjustice.net/map/displayfacility-69734.htm> (last visited Nov. 25, 2012).
- <sup>175</sup> Del. S.B. 280, 140th Gen. Assemb. (2000) (codified at Del. Code. Ann. tit. 7, §§ 6002-03).
- <sup>176</sup> *See supra* note 46 and accompanying text.
- <sup>177</sup> *See generally Environmental Justice Case Study: Shintech PVC Plant in Convent, Louisiana*, UNI. OF MICH., <http://www.umich.edu/~snre492/shin.html> (last visited Nov. 25, 2012) (providing a case study of the Shintech proposal).
- <sup>178</sup> *Id.*
- <sup>179</sup> TOXICOLOGY EXCELLENCE FOR RISK ASSESSMENT and ENVIRONMENTAL PROTECTION AGENCY, *COMPARATIVE DIETARY RISKS: BALANCING THE RISKS AND BENEFITS OF FISH CONSUMPTION* (1999), *available at* <http://www.tera.org/Publications/CDR%20Front%20Matter.pdf>.
- <sup>180</sup> ROGER D. MASTERS, *The Social Implications of Evolutionary Psychology: Linking Brain Biochemistry, Toxins, and Violent Crime*, in *EVOLUTIONARY PSYCHOLOGY AND VIOLENCE: A PRIMER FOR POLICYMAKERS AND PUBLIC POLICY ADVOCATES* (Richard W. Bloom and Nancy K Dess, Eds., 2003).
- <sup>181</sup> Letter from Martin Luther King, Jr., *Letter From Birmingham Jail* (April 16, 1963), *available at* <http://abacus.bates.edu/admin/offices/dos/mlk/letter.html>.