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Richard J. Lazarus

Georgetown University Law Center, lazarusr@law.georgetown.edu

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Richard J. Lazarus

Professor of Law

Georgetown University Law Center

lazarusr@law.georgetown.edu

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PURSuing "ENVIRONMENTAL JUSTICE": THE DISTRIBUTIONAL EFFECTS OF ENVIRONMENTAL PROTECTION

*Richard J. Lazarus**

I. INTRODUCTION

Environmental protection policy has been almost exclusively concerned with two basic issues during the last several decades: (1) what is an acceptable level of pollution; and (2) what kinds of legal rules would be best suited for reducing pollution to that level. By contrast, policy-makers have paid much less attention to the distributional effects, including the potential for distributional inequities, of environmental protection generally.

To be sure, scholars have engaged in considerable discussion of how the costs of environmental controls affect particular industries, and how these costs place a disproportionate burden on new versus existing, and large versus small, industrial sources of pollution.¹ But there has been at best only an ad hoc accounting of how the benefits of environmental protection are spread among groups of persons. And, when the costs of pollution control have been considered, such discussions have been narrowly confined to the economic costs.² There has been virtually no accounting of how pollution controls redistribute environmental risks among groups

* Professor of Law, Washington University, St. Louis, Missouri. Thanks are owed to Peter Byrne, Luke Cole, Chris Desan, Barbara Flagg, Michael Gerrard, and Chris Schroeder, and also to Tobie Bernstein, Wendy Brown, Richard Delgado, Rachel Godsil, Arnold Reitze, Douglas Williams, and participants in Northwestern University School of Law's faculty workshop for their comments on earlier drafts, which much improved this Article. Washington University law students Jennifer Sheehan, Christopher Perzan, and Patricia Verga provided valuable research assistance, but most deserving of thanks is Kevin Brown, Class of 1992, who taught me that this was a topic warranting greater academic inquiry.

¹ See Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1335-36 (1985); B. Peter Pashigian, *The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares*, 27 J.L. & ECON. 1 (1984); Peter Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025 (1983); WILLIAM TUCKER, *PROGRESS AND PRIVILEGE: AMERICA IN THE AGE OF ENVIRONMENTALISM* (1982) (author contends that environmentalism has unwittingly aided big business at the expense of small business and has inappropriately discounted the advantages of human process); Keith Schneider, *Rules Forcing Towns to Pick Big New Dumps or Big Costs*, N.Y. TIMES, Jan. 6, 1992, at A1; but see Daniel A. Farber & Phillip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 895-96 (1987) (questioning substantiality of evidence that environmental laws favor larger plants).

² See *infra* note 44.

of persons, thereby imposing a cost on some for the benefit of others.³

The 1970s marked the heyday of the modern environmental era.⁴ Earth Day in 1970 caught the imagination of a nation seeking consensus in the midst of the internal conflict engendered by the Vietnam war. Largely ignored in the celebration that accompanied the passage of a series of ambitious environmental protection laws during this time were those distinct voices within minority communities that questioned the value of environmentalism to their communities. They did not share in the national consensus that these new laws marked a significant movement towards a more socially progressive era. Some minority leaders described environmentalism as "irrelevant" at best and, at worst, "a deliberate attempt by a bigoted and selfish white middle-class society to perpetuate its own values and protect its own life style at the expense of the poor and the underprivileged."⁵ Environmentalists were seen as ignoring both the "urban environment" and the needs of the poor in favor of seeking "governmental assistance to avoid the unpleasant externalities of the very system from which they themselves have already benefitted so extensively."⁶ As one commentator described, environmentalists "would prefer more wilderness . . . for a more secure enclave in nature from the restlessness of history and the demands of the poor."⁷ A prominent

³ One notable exception in the context of environmental land use regulation is DANIEL R. MANDELKER, *ENVIRONMENT AND EQUITY: A REGULATORY CHALLENGE* (1981).

⁴ President Nixon signed the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 445 (codified at 42 U.S.C. §§ 4321-4370a (1988)) on January 1, 1970, and Congress followed soon afterwards by passing the Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (current version at 42 U.S.C. §§ 7404-7407, 7415-7418, 7601-7602 (1988)), the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-240, 86 Stat. 47 (omitted as superseded by 33 U.S.C. §§ 1251-1287 (1988)), the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531-1544 (1988)), the Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1975, Pub. L. No. 94-140, 89 Stat. 751 (codified at 7 U.S.C. § 136-136y (1988)), the Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601-2671 (1988)), and the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901-6992k (1988)), followed by substantial revisions in 1977 of both the clean air, Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified at 42 U.S.C. §§ 7401-7642 (1988)), and clean water, Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified at 33 U.S.C. §§ 1251-1287 (1988)), legislation. See Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 *LAW & CONTEMP. PROBS.* 311, 323-28 (1991).

⁵ James N. Smith, *The Coming of Age of Environmentalism in American Society*, in *ENVIRONMENTAL QUALITY AND SOCIAL JUSTICE IN URBAN AMERICA* 1 (James N. Smith ed., 1974) [hereinafter *ENVIRONMENTAL QUALITY AND SOCIAL JUSTICE*].

⁶ Peter Marcuse, *Conservation for Whom?*, in *ENVIRONMENTAL QUALITY AND SOCIAL JUSTICE*, *supra* note 5, at 17, 27; see also Charles E. Little, *The Double Standard of Open Space*, in *ENVIRONMENTAL QUALITY AND SOCIAL JUSTICE*, *supra* note 5, at 73, 75 ("The logic of our policy seems to rest on this syllogism: inner cities have no greenery; poor people live in inner cities; therefore parks, open space, and wilderness are not necessary for them. City parks budgets shrink, the disenfranchised are barred from suburbia, and National Park tourism policies tend to exclude the non-affluent.").

⁷ Rev. Richard Neuhaus, *In Defense of People: A Thesis Revisited*, in *ENVIRONMENTAL QUAL-*

black elected official put it even more bluntly: "[T]he nation's concern with the environment has done what George Wallace has been unable to do: distract the nation from the human problems of black and brown Americans."⁸

Neither the United States Environmental Protection Agency (EPA) nor the mainstream environmental groups appear to have paid attention to these charges.⁹ Quite possibly, this was because such claims were so unsettling and potentially divisive, particularly to the extent that they implicated the welfare of racial minorities. The environmental movement of the 1970s finds much of its structural roots and moral inspiration in the civil rights movement that preceded it.¹⁰ Hence, for many in the environmental community, the notion that the two social movements could be at odds was very likely too personally obnoxious to be believed or even tolerated.¹¹

ITY AND SOCIAL JUSTICE, *supra* note 5, at 59, 62 (excerpt from conference presentation of Rev. Neuhaus).

⁸ Leonard G. Ritt & John M. Ostheimer, *Congressional Voting and Ecological Issues*, 3 ENVTL. AFF. 459, 465 & n.18 (1974) (quoting *The Rise of Anti-Ecology?*, TIME, Aug. 3, 1970, at 42 (quoting Richard Hatcher, Mayor of Gary, Indiana)). More recently, Professor Derrick Bell fantasized the possibility that white Americans would agree to the enslaving of all black Americans in exchange for "gold to bail out near insolvent federal, state and local governments, chemicals to purify the almost uninhabitable environment, and a safe, affordable nuclear technology to relieve the nation's energy woes." Derrick A. Bell, *Racism: A Prophecy for the Year 2000*, 42 RUTGERS L. REV. 93, 98 (1989).

⁹ Greenpeace, U.S.A., is one frequently cited exception. See Safir Ahmed, *Seeing Red Over the Green Movement*, RIVERFRONT TIMES, Nov. 6-12, 1991, at 10, 11; Norris MacDonald, *Environmental Activities in Communities of Color*, in ENVIRONMENTAL RACISM: ISSUES AND DILEMMAS 32, 34 (Bunyan Bryant & Paul Mohai eds., 1991) [hereinafter ENVIRONMENTAL RACISM]; see also *infra* pp. 835-38.

¹⁰ The environmental movement's prominence in the aftermath of the civil rights movements' successes in the 1960s was not mere happenstance. Environmental groups not only adopted organizational structures, civil disobedience approaches, and litigation strategies based on those utilized by civil rights organizations, but also used the rhetorical power of the civil rights movement on behalf of environmental protection. Environmental rights were analogized to civil rights, and parallels were drawn between the emancipation of African-Americans and the emancipation of wildlife, plant life, and nature in general. See generally RODERICK F. NASH, THE RIGHTS OF NATURE 6-7, 34-35, 144-45, 162-63, 199-213 (1989) (concept of natural rights of people expanded to support the rights of nature as free from human domination); CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION 13, 25, 28-29 (1990) (Bill of Rights in the U.S. Constitution supported the notion that citizens have the right to be protected from pollution); PETER YEAGER, THE LIMITS OF THE LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION 107 (1991) (conservationists, like the civil rights activists, relied on the courts to affect change); see also, ELIZABETH DODSON GRAY, WHY THE GREEN NIGGER? REMYTHING GENESIS 1-8 (1979) (purported hierarchy of man above animals and nature is an illusion); PETER SINGER, ANIMAL LIBERATION 234 (2d ed. 1990) (outlining belief that animals deserve more humane methods of limiting their numbers by reducing fertility rather than by hunting); CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS 49-53 (1974) (heightened awareness of the interplay of humanity and nature as functional parts of a single organism called the planet Earth).

¹¹ Neuhaus, *supra* note 7, at 68 (Paul Swatek of the Sierra Club describing as "reprehensible" Rev. John Neuhaus' characterization of environmentalism as elitist and fascist). Other explanations for the lack of attention to these concerns are more practical in nature. Few, if any, of those expres-

More recently, however, the number of those suggesting that there may be serious distributional problems in environmental protection policy has significantly increased, and the character of their claims has shifted. Prominent voices in racial minority communities across the country are now forcefully contending that existing environmental protection laws do not adequately reflect minority interests and, in some instances, even perpetuate racially discriminatory policies.¹² For these individuals, the potential for a regressive distribution of the economic costs associated with pollution control is, while often mentioned, not the principal focus of their concerns. Rather, it is the prevalence of hazardous pollutants in the communities where they live and work that draws the brunt of their attention. One shorthand expression for such claims is "environmental racism,"¹³ but "environmental justice" (or "equity") appears to have emerged as the more politically attractive expression, presumably because its connotation is more positive and, at the same time, less divisive.

Until very recently, the legal academic community has paid relatively little attention to these emerging issues of "environmental jus-

sing such concerns had ready access to those making policy decisions. Furthermore, it made little sense strategically to risk alienating those within the environmental community, many of whom had historically voiced support for minority concerns.

¹² Roberto Suro, *Pollution-Weary Minorities Try Civil Rights Tack*, N.Y. TIMES, Jan. 11, 1993, at A1. The year 1991 witnessed a proliferation of events, the most significant being the convening in October of "The First National People of Color Environmental Leadership Summit" in Washington, D.C. Approximately 300 delegates from minority community organizations working on environmental issues attended, as well as an additional 200 "participants" and "observers" from state and federal government agencies, academic institutions, and mainstream environmental organizations. The purpose of the meeting was to initiate a dialogue between these community organizations and, even more significantly, to make a strong national statement regarding the seriousness of the problems in the distribution of environmental risks. See *Minorities Joining Environmental Movement, Charge "Environmental Racism" at Conference*, 22 Env't Rep. (BNA) at 1656 (Nov. 1, 1991); Keith Schneider, *Minorities Join to Fight Polluting Neighborhoods*, N.Y. TIMES, Oct. 25, 1991, at A20. During the fall of 1991, the State of New York Assembly held a series of four public hearings around the state on "Minorities and the Environment." See MINORITIES AND THE ENVIRONMENT: AN EXPLORATION INTO THE EFFECTS OF ENVIRONMENTAL POLICIES, PRACTICES, AND CONDITIONS ON MINORITY AND LOW-INCOME COMMUNITIES (1992) (reprinting of hearings transcripts). Finally, even more recently, Representative Henry Waxman, chair of the House Subcommittee on Health and the Environment of the House Committee on Energy and Commerce, held a hearing on February 25, 1992, on environmental justice issues. This was the first congressional hearing on the issue. Representatives from governmental agencies, minority environmental groups, and mainstream environmental organizations testified. See *Disproportionate Impact of Lead Poisoning on Minority Communities: Hearings before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 102d Cong., 2d Sess. (1992) [hereinafter *Lead Poisoning Hearings*] (not yet published; copy on file with the *Northwestern University Law Review*).

¹³ Dr. Benjamin Chavis of the United Church of Christ's Commission for Racial Justice apparently first used the term "environmental racism" in the early 1980s to describe the tendency of government and business to locate in minority communities hazardous waste disposal treatment, storage, and disposal facilities, and industries that emit toxic pollutants. *We Speak for Ourselves: Social Justice, Race & Environment*, RACE, POVERTY & ENV'T, Winter 1991, at 12 (book review).

tice."¹⁴ This absence of legal commentary contrasts sharply with a growing literature in other academic and popular periodicals,¹⁵ with the more recent efforts to increase awareness of environmental justice concerns within government,¹⁶ and with the filing of lawsuits derived from such concerns in the context of formal litigation.¹⁷

¹⁴ Students at the University of California at Berkeley Law School and New York University Law School held conferences on the subject in 1990. See Daniel Suman, *Reportback . . . Fighting LULU's: Effective Community Organizing*, RACE, POVERTY & ENV'T, Summer 1990, at 6. Students at Harvard Law School sponsored a one-day workshop in March 1991 and again in November 1992, and students at Washington University in St. Louis did the same in November 1991. Finally, students at the University of Michigan, Columbia University, and University of Minnesota law schools sponsored meetings on the issue in January, March, and October 1992, respectively.

There are to date just a handful of articles and student notes on the issue, all of recent origin. The first publication to address the issue in significant depth was a student note published in the *University of Michigan Law Review*, which focused on the availability of equal protection claims to remedy discriminatory siting of hazardous waste facilities, and the inadequacies of current state and federal legislation. See Rachel D. Godsil, Comment, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991); see also Luke W. Cole, *Remedying Environmental Racism: A View From the Field*, 90 MICH. L. REV. 1991 (1992). Luke Cole of the California Rural Legal Assistance, Inc., is publishing an article, contemporaneous to this piece, on "environmental poverty law." See Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. (forthcoming Dec. 1992) [hereinafter Cole, *The Need for Environmental Poverty Law*]. Descriptions of the issue focusing almost exclusively on hazardous waste facility siting are contained in R. George Wright, *Hazardous Waste Disposal and the Problems of Stigmatic and Racial Injury*, 23 ARIZ. ST. L.J. 777 (1991); Kelly M. Colquette & Elizabeth A. H. Robertson, *Environmental Racism: The Causes, Consequences, and Commendations*, 5 TUL. ENVTL. L.J. 153 (1991); and Naikang Tsao, Comment, *Ameliorating Environmental Racism: A Citizen's Guide to Combatting the Discriminatory Siting of Toxic Waste Dumps*, 67 N.Y.U. L. REV. 366 (1992). Finally, there is a symposium issue on the subject in the *University of Kansas Journal of Law and Public Policy*, which contains a series of short essays on the topic, the most significant of which is an essay by Professors Regina Austin and Michael Schill discussing "minority grassroots environmentalism." See Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69 (1991).

¹⁵ See, e.g., ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (1990) [hereinafter BULLARD, *DUMPING IN DIXIE*]; Paul Mohai, *Black Environmentalism*, 71 SOC. SCI. Q. 744 (1990); Robert D. Bullard, *Ecological Inequities and the New South: Black Communities Under Siege*, 17 J. ETHNIC STUD., Winter 1990, at 101 [hereinafter Bullard, *Ecological Inequities and the New South*]; David Kallick, *The Struggle for Community: Race, Class and the Environment*, 21 SOC. POL'Y, Fall 1990, at 18; Gar Smith, *Freeways, Communities and "Environmental Racism"*, RACE, POVERTY & ENV'T, Apr. 1990, at 7; Pat Bryant, *Toxics and Racial Justice*, 20 SOC. POL'Y, Summer 1989, at 48; Dick Russell, *Environmental Racism: Minority Communities and their Battle Against Toxins*, AMICUS J., Spring 1989, at 22; Robert D. Bullard & Beverly Hendrix Wright, *Environmentalism and the Politics of Equity: Emergent Trends in the Black Community*, 12 MID AM. REV. SOC. 21 (1987) [hereinafter Bullard & Wright, *Environmentalism and the Politics of Equity*]; Robert D. Bullard & Beverly Hendrix Wright, *The Politics of Pollution: Implications for the Black Community*, 47 PHYLON 71 (1986) [hereinafter Bullard & Wright, *The Politics of Pollution*]; Robert D. Bullard, *Solid Waste Sites and the Black Houston Community*, 53 SOC. INQUIRY 273 (1983) [hereinafter Bullard, *Solid Waste Sites*]; Susan Zakin, *The Ominous Color of Toxic Dumping*, SIERRA, July-Aug. 1978, at 14; Julian McCaull, *Discriminatory Air Pollution*, 18 ENV'T, Mar. 1976, at 26.

¹⁶ See *infra* notes 62-76 and accompanying text.

¹⁷ See *El Pueblo para el Aire y Agua Limpio v. Chemical Waste Mgmt., Inc.*, No. C91-2083

The purpose of this Article is to explore the distributional side of environmental protection and, more particularly, to explain the significance of including environmental justice concerns into the fashioning of environmental protection policy. Unlike earlier legal commentary, hazardous waste facility siting is not this Article's dominant focus. It offers a broader, more systemic, examination of environmental protection laws and policies.

The Article is divided into three parts. First, it describes the nature of the problem. This includes a discussion of the varied distributional implications of environmental protection laws, as well as the ways in which racial minorities could receive too few of the benefits, or too many of the burdens, associated with those laws.¹⁸ The second part of the Article accepts (without purporting to verify) the thesis that distributional inequities exist, and seeks to explain such inequities theoretically in terms of the present institutional framework for the fashioning of environmental protection policy and the probable distributional implications of that framework. The final part of the Article outlines how environmental justice concerns might be pursued within present and future environmental protection law and policy.

II. THE BENEFITS AND BURDENS OF ENVIRONMENTAL PROTECTION LAWS

A. *The Potential for Distributional Inequity*

Environmental protection confers benefits and imposes burdens in several ways.¹⁹ To the extent that the recipients of related benefits and burdens are identical, no problem of discrimination is presented (there may, of course, be other problems with the tradeoff). But identical recipients are rarely, if ever, the result.²⁰ Hardly any laws provide pareto

(N.D. Cal. July 8, 1991) (complaint filed); *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992); *Bordeaux Action Comm. v. Metro. Gov't of Nashville*, No. 90-0214 (M.D. Tenn. Mar. 12, 1990) (complaint filed); *NAACP v. Gorsuch*, No. 82-768-Civ-5 (E.D.N.C. Aug. 10, 1982) (denying preliminary injunction); *Bean v. Southwestern Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without op.*, 782 F.2d 1038 (5th Cir. 1986); *El Pueblo para el Aire y Agua Limpio v. County of Kings*, 22 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 20,357 (Cal. App. Dep't Super. Ct. 1991); *see also* Frances F. Marcus, *Medical Waste Divides Mississippi Cities*, N.Y. TIMES, June 24, 1992, at A13 (describes "environmental racism" lawsuits being brought on behalf of minority community to prevent burning of medical wastes at incinerator).

¹⁸ This Article does not purport to single out for separate discussion the distinct distributional issues affecting Native Americans, largely because those issues are closely intertwined with questions of Indian sovereignty that, while important, are more case-specific than this Article's outlook.

¹⁹ *See generally* RICHARD B. STEWART & JAMES E. KRIER, *ENVIRONMENTAL LAW AND POLICY* 168-73 (2d ed. 1978).

²⁰ One obvious source of disparity, which is not a focus of this Article, is intergenerational in character. The beneficiaries of much environmental protection are future generations while the immediate economic costs of such protection fall on the present. Conversely, future generations are the group most harmed by environmental degradation, while current generations reap the associated economic value.

optimality in the classic sense of making everyone better off and no one worse off.²¹ Virtually all laws have distributional consequences, including those laws designed to further a particular conception of the public interest.²² Problems of discrimination, therefore, may arise in the disparities between the distribution of benefits and their related burdens.²³

The benefits of environmental protection are obvious and significant. A reduction in pollution decreases the public health risks associated with exposure to pollution. It also enhances public welfare by allowing greater opportunity for enjoyment of the amenities associated with a cleaner natural environment. Many would also contend that environmental protection furthers the human spirit by restoring balance between humankind and the natural environment. More pragmatically, environmental protection laws are the source of new jobs in pollution control industries. EPA recently estimated, for instance, that the recently amended Clean Air Act would result in the creation of 30,000 to 45,000 full-time equivalent positions during 1996-2000.²⁴

The burdens of environmental protection range from the obvious to the more subtle. They include the economic costs borne by both the producer and the consumer of goods and services that become more expensive as a result of environmental legislation. For consumers, product and service prices may increase; some may become unavailable because the costs of environmental compliance renders their production unprofitable; while other goods and services may be specifically banned because of their adverse impact on the natural environment. For those persons who produce goods and services made more costly by environmental laws, personal income may decrease, employment opportunities may be reduced or displaced, and certain employment opportunities may be eliminated altogether. Finally, environmental protection requires governmental expenditures, the source of which varies from general per-

²¹ See EDGAR K. BROWNING & JACKQUELENE M. BROWNING, *MICROECONOMIC THEORY AND APPLICATIONS* 559 (3d ed. 1989).

²² Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 *YALE L.J.* 1211, 1214 (1991); BURTON A. WEISBROD ET AL., *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 103, 555 (1978).

²³ Of course, the perception among developing nations of just such a disparity is what prompted many of them, during the recent United Nations Conference on the Environment and Development held in Rio De Janeiro, to demand monies from wealthier nations. The justification for these payments was to compensate the developing nations for the costs associated with their taking action (for example, greater protection of tropical rain forests) that would provide environmental benefits to the entire world, including industrialized nations. See, e.g., Paul Lewis, *Negotiators in Rio Agree to Increase Aid to Third World*, *N.Y. TIMES*, June 14, 1992, at A1. Indeed, the availability of such transfer payments was not an incidental concern at the Earth Summit. Rather, it was a central focus of the negotiations. See Paul Lewis, *Pact on Environment Near, but Hurdles on Aid Remain*, *N.Y. TIMES*, June 12, 1992, at A10; Paul Lewis, *Pact Nears on Billions to Protect Nature in Third-World Countries*, *N.Y. TIMES*, June 1, 1992, at A1.

²⁴ *Business Gains from CAA Exceeding \$ 50 Billion Projected in Draft EPA Study*, *INSIDE EPA*, Jan. 17, 1992, at 1, 10.

sonal and corporate income taxes to special environmental taxes.²⁵ These expenditures necessarily decrease public monies available for other social welfare programs.

The burdens of environmental protection, however, also include the redistribution of the risks that invariably occur with pollution control techniques that treat pollution following its production. For instance, air pollution scrubbers and municipal wastewater treatment facilities reduce air and water pollution, but only by creating a sludge that, when disposed, will likely impose risks on a segment of the population different than the segment which would have been exposed to the initial pollution in the air or water.²⁶ Additionally, the incineration of hazardous wastes stored in drums and tanks converts a land disposal problem into an air pollution issue (leaving, of course, a sludge residue that presents a different land disposal problem), and thereby may change the identity of those in the general population exposed to the resulting pollution.²⁷ Just transporting solid and hazardous wastes from one geographic area to another for treatment or storage results in a major redistribution of the risks associated with environmental protection. Indeed, such transportation, and the resulting shift of environmental risks, has been the recent subject of massive litigation, as various jurisdictions have sought to export their wastes or prevent the importation of waste from elsewhere.²⁸

Nor does the purported prevention of pollution, as opposed to its treatment, necessarily eliminate the distributional issue. "Pollution prevention" frequently depends upon production processes that reduce one kind of pollution by increasing another.²⁹ For example, water pollution

²⁵ "In 1987, EPA, the states, and local governments spent about \$40 billion for environmental protection. If recent trends continue, they will need to spend approximately \$61 billion annually by the year 2000." U.S. EPA, A PRELIMINARY ANALYSIS OF THE PUBLIC COSTS OF ENVIRONMENTAL PROTECTION: 1981-2000 at ii (1991). The Federal Internal Revenue Code includes three "environmental taxes," including a tax on petroleum, a tax on certain chemicals, and a tax on certain imported substances. See 26 U.S.C. §§ 4611-4612, 4661-4662, 4671-4672 (1988 & Supp. II 1990). Revenues from these taxes are used, inter alia, to fund the Hazardous Substances Trust Fund provided for by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9611 (1988 & Supp. II 1990). See generally Richard A. Westin, *Tax Considerations*, in 1 ENVIRONMENTAL LAW PRACTICE GUIDE, ch. 9 (Michael Gerrard ed., 1992).

²⁶ CONSERVATION FOUNDATION, CONTROLLING CROSS-MEDIA POLLUTANTS 8-9 (1984).

²⁷ It also creates a new land disposal problem. For instance, a municipal resource recovery facility in Chicago, Illinois, that incinerates 350,000 tons of municipal solid waste each year produces 110,000 to 140,000 tons of ash, much of which is hazardous, that must be disposed. See *Environmental Defense Fund, Inc. v. City of Chicago*, 948 F.2d 345, 345-46 (7th Cir. 1991).

²⁸ See, e.g., *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992); *Chemical Waste Mgmt., Inc. v. Hunt*, 112 S. Ct. 2009 (1992); *National Solid Wastes Mgmt. Ass'n v. Alabama Dep't of Env'tl Mgmt.*, 910 F.2d 713 (11th Cir. 1990), *modified, reh'g denied*, 924 F.2d 1001 (11th Cir. 1991), *and cert. denied*, 111 S. Ct. 2800 (1991); *Government Suppliers Consol. Serv. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992); see also *Senators See 'Civil War' Over Waste Imports; Coats Says He Will Offer Import Ban Again*, [Current Developments] *Env't. Rep.* (BNA) 485 (1991).

²⁹ As its name suggests, "pollution prevention" contemplates techniques for reducing the

may increase as air pollution is decreased, or a decrease in the mining of one kind of natural resource may be limited or completely offset by the increase in mining of another. Such shifts in the type of pollution or activity allowed will almost invariably shift those risks arising with the "new" pollution or activity to different persons. Hence, pollution may decrease for society as a whole, yet simultaneously increase for certain subpopulations.

Racial minorities could therefore be disproportionately disadvantaged by environmental laws in a number of ways. For example, with regard to the benefits of environmental protection, the natural environments that are selected for protection may be less accessible, or otherwise less important, to minorities. This may be the result of priorities expressly established by statute, or by agency regulations or enforcement agenda.

Inequities in the ultimate distribution of environmental protection benefits may also result, paradoxically, from environmental improvement itself. A cleaner physical environment may increase property values to such an extent that members of a racial minority with fewer economic resources can no longer afford to live in that community.³⁰ Indeed, the exclusionary impact of environmental protection can be more than just an incidental effect; it can be the *raison d'être*, with environmental quality acting as a socially acceptable facade for attitudes that cannot be broadcast.³¹

Minorities may at the same time incur a share of the burdens of environmental protection that are disproportionate to those benefits that they receive. Higher product and service prices may be regressive, as may some taxes depending on their form.³² Although whites are poorer in greater absolute numbers than nonwhites, the latter group is disproportionately poorer in terms of population percentages. Minorities may also more likely be the victims of reduced or eliminated job opportunities. Similarly, they may be less likely to enjoy the economic, educational, or personal positions necessary to exploit the new job opportunities that environmental protection creates.³³ Finally, minori-

amount of pollution created in the first instance. It is contrasted with end-of-pipe controls of pollution, which seek to minimize pollution's threat after creation. *See generally* Pollution Prevention Act of 1990, 42 U.S.C. §§ 13101-13109 (Supp. II 1990) (need for more focused management to prevent pollution at the source rather than at time of treatment and disposal); Frances H. Irwin, *An Integrated Framework for Preventing Pollution and Protecting the Environment*, 22 ENVTL. L. 1 (1992) (the complex relationship of environmental effects requires an integrated framework of ideas to more effectively prevent environmental problems).

³⁰ A. MYRICK FREEMAN ET AL., *THE ECONOMICS OF ENVIRONMENTAL POLICY* 143 (1973); *see also* A. Dan Tarlock, *Western Water Law, Global Warming, and Growth Limitations*, 24 LOY. L.A. L. REV. 979, 1001 & n.152 (1991) (discussing regressive nature of growth limitations).

³¹ *See infra* note 82 and accompanying text.

³² Sandra Postel, *The Greening of America's Taxes*, N.Y. TIMES, May 19, 1991, at C11.

³³ Of course, this would depend on the types of jobs created. To the extent that the environmen-

ties may receive an unfair share of the environmental risks that are redistributed by environmental protection. Elimination of the risks in one location may result in the creation or increase of risks in another location where the exposure to minorities is greater.

B. Evidence of Environmental Inequity

To date, there has been relatively little systematic empirical investigation concerning the extent of inequity in the distribution of the benefits and burdens of environmental protection. The evidence that is available, however, "lend[s] support to the view that, on balance, programs for environmental improvement promote the interests of higher-income groups more than those of the poor; they may well increase the degree of inequality in the distribution of real income."³⁴

There are especially few studies, apart from anecdotal accounts, regarding the specific issue that racial minorities are distinctly disadvantaged by environmental protection laws. Those few studies, however, lend substantial credence to the claim that such disadvantages do exist, and suggest some reasons for their occurrence. As summarized in a recent congressional report, "[e]arlier studies conducted by government agencies and non-profit environmental organizations have concluded that disproportionate effects stem from many factors, including racism, inadequate health care, low-quality housing, high-hazard workplace environments, limited access to environmental information, and simple lack of sufficient political power."³⁵ Without a doubt, the available evidence is not immune from challenge. But for present purposes, it seems enough to suggest the strong possibility that virtually all of the theoretical distributional inequities outlined earlier in this Article are in fact occurring.

1. Benefits Of Environmental Protection.—The reduction of pollution mandated by environmental protection laws is likely to have the greatest potential for a redistribution that is favorable to minority communities. After all, for the same reasons that minorities may disproportionately be the recipients of redistributed environmental risks, they also were more likely subject to greater pollution in the first instance. There is substantial support for the thesis that minorities have historically been more likely to live in closer proximity to polluting industries than nonminorities.³⁶ There is likewise substantial evidence that minorities occupy

tal protection services required were both more labor-intensive and less dependent on skilled labor, job opportunities might be available, albeit less desirable. A stated purpose of New York City's recycling law, for instance, is to increase employment opportunities "for unskilled workers and handicapped persons." NEW YORK CITY CHARTER & ADMIN. CODE tit. 16, ch. 3, n.* (Supp. 1990).

³⁴ WILLIAM J. BAUMOL & WALLACE E. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* 253 (2d ed. 1988).

³⁵ H.R. REP. NO. 428, 101st Cong., 2d Sess. 41-42 (1990).

³⁶ For instance, a 1972 study concluded that in St. Louis, Kansas City, and Washington, D.C.,

significantly more environmentally hazardous jobs and, as a result, suffer a disproportionately higher number of environmentally-related injuries.³⁷

there was a significant difference between whites and blacks in exposure levels to suspended particulates and sulfur oxide. See A. Myrick Freeman III, *Distribution of Environmental Quality*, in ENVIRONMENTAL QUALITY ANALYSIS: THEORY AND METHOD IN THE SOCIAL SCIENCES 243, 264 (Allen V. Kneese & Blair T. Bower eds., 1972) ("In each city the average black family has a higher exposure to both air pollutants than does the average family (black or white) with an income under \$3,000."); McCaull, *supra* note 15, at 26 (A 1975 report "shows that chances of being exposed to poor-quality air in urban areas are greatest for persons in poverty, in occupations below the management or professional level, in low-rent districts, and in the black population."). The phenomenon appears likely to be the same today. See Frances F. Marcus, *As Jobs Come Calling, the Non-Wary Unite*, N.Y. TIMES, Apr. 9, 1991, at A16 (describing proposal to build \$700 million plant for processing wood pulp and manufacturing rayon in mostly black community in Louisiana; minority community opposed; governor, local white business interests in favor because of jobs and economic activity that it will bring to community); Paul Ruffins, *Blacks Suffer Health Hazards Yet Remain Inactive on Environment*, L.A. TIMES, Aug. 27, 1989, § 5, at 3 ("71% of blacks and 50% of Latinos—as opposed to only 34% of whites—reside in cities and breathe the most polluted air. Often they live in old housing with the highest concentrations of lead in the paint and plumbing. Between 1976 and 1980, more than 50% of all black infants under the age of 3 who were tested had blood lead levels higher than the Center for Disease Control's proposed standards. . . . Minorities are also likely to be exposed to toxins by working in the most hazardous jobs in the most unhealthy industries."). See generally Paul Mohai & Bunyon Bryant, *Environmental Racism: Reviewing the Evidence*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 13-176 (Bunyon Bryant & Paul Mohai eds., 1992); Cynthia Hamilton, *Industrial and Environmental Racism: The Denial of Justice*, in ENVIRONMENTAL RACISM, *supra* note 9, at 25 (race and poverty together bring about environmental inequities); William K. Reilly, *The Green Thumb of Capitalism: The Environmental Benefits of Sustained Growth*, 54 POL'Y REV. 16 (1990) (urban poor experience environmental degradation most directly); Bullard & Wright, *The Politics of Pollution*, *supra* note 15, at 71 (much of industry found near minority and lower-income neighborhoods); BULLARD, DUMPING IN DIXIE, *supra* note 15, at 8; Paul Mohai & Bunyon Bryant, *Environmental Inequities and the Inner City* (paper delivered at the Sixth Annual Technological Literacy Conference of the National Association for Science, Technology & Society, Washington, D.C. (Feb. 1991)) (copy on file with author).

³⁷ See Beverly Hendrix Wright, *The Effects of Occupational Injury, Illness, and Disease on the Health Status of Black Americans*, in THE PROCEEDINGS OF THE MICHIGAN CONFERENCE ON RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS 128, 128-41 (Bunyon Bryant & Paul Mohai eds., 1990) [hereinafter MICHIGAN CONFERENCE PROCEEDINGS]. The Michigan Conference Proceedings have recently been republished in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 36. Professor Wright describes three (necessarily overlapping) causal explanations for why there is a disproportionately high risk of injury, disease, and death among black workers: (1) socially induced disease (resulting from "social, rather than physical, genetic or environmental causes"), *id.* at 131; (2) physically induced disease ("those that occur because of intrinsic factors such as diets, smoking or genetics"), *id.* at 133; and (3) environmentally induced disease ("occur due to exposures in the environment"), *id.* at 135. In discussing each, she contends that discriminatory attitudes and practices are at the root of the disproportionate impacts.

With regard to socially induced causes, Professor Wright discusses the prevalence of hypertension among minority workers and argues that "the social practice of discriminatory job placement has resulted in the assignment of Blacks to extremely hazardous jobs that are also stress inducing." *Id.* at 132-33. With regard to physically induced causes, Professor Wright contends that they are often subterfuges by management to shift the "blame" to the victim when, in fact, "[m]yths or racist stereotypes are often used to camouflage discriminatory job placement practices resulting in the purposeful exposure of black workers to hazardous work conditions." *Id.* at 134.

Regarding environmentally induced factors, Professor Wright acknowledges the softness of

However, for these same reasons, any across-the-board reduction in pollution (or increase in occupational safety) should confer on minorities a larger benefit commensurate with their historically larger burden.³⁸

It is not at all certain, however, that this expected proportional re-dressing of the past has in fact occurred. Without addressing the factor of race, several empirical studies have suggested that the distribution of benefits from a reduction in pollution is neutral or even regressive.³⁹ These benefits include federal subsidies to publicly-owned wastewater treatment plants,⁴⁰ and the advantages of better air pollution control,⁴¹

some of the data relating cause (exposure to pollutants) to effect (injury), *id.* at 135, but she ultimately concludes that existing data is sufficient to "suggest that the excess risk of cancer that exists for black workers as compared to white workers may be due to greater exposure of black workers to carcinogens in the workplace." *Id.* at 137. She cites several examples, including: (1) a tire manufacturing plant in which 27% of the black workers, but only three percent of the white workers, worked in the most hazardous jobs at the plant, *id.* at 135-36; and (2) a ten-year study of the steel industry showing that 89% of the nonwhite cokeplant workers, but only 32% of white workers, were employed in the hazardous coke oven jobs and, possibly as a result, that the nonwhite workers "experienced double the expected death rate from malignant neoplasms." *Id.* at 136. Reportedly, one historical reason for the disproportionate number of Blacks working in the coke ovens was the myth that black workers "absorb heat better." *Id.* at 133 (quoting Morris E. Davis, *Occupational Hazards and Black Workers*, URB. HEALTH, Aug. 1977, at 16, 17). For a comparison of the occupations with the highest percentage of nonwhite workers and those with the highest incidence of occupational illness and injury, see JAMES C. ROBINSON, *TOIL AND TOXICS: WORKPLACE STRUGGLES AND POLITICAL STRATEGIES FOR OCCUPATIONAL HEALTH* 96-98 (1991) (rate of occupational injury for California workers varies considerably with ethnicity); Morris E. Davis & Andrew S. Rowland, *Problems Faced by Minority Workers*, in *OCCUPATIONAL HEALTH: RECOGNIZING AND PREVENTING WORK-RELATED DISEASE* 417, 419-20 (Barry S. Levy & David H. Wegman eds., 1983) (statistics showing the annual percentage of nonwhite workers suffering job-related injury and illness in the manufacturing industries); see also Peter T. Kilborn, *For Hispanic Immigrants, a Higher Job-Injury Risk*, N.Y. TIMES, Feb. 18, 1992, at A1 (hispanic factory and industrial workers are injured more often than nonhispanic and black workers).

³⁸ See E. Donald Elliott, *A Cabin on the Mountain: Reflections on the Distributional Consequences of Environmental Protection Programs*, 1 KAN. J.L. & PUB. POL'Y 5, 7 (1991) ("In my judgment, minorities and the poor probably benefit disproportionately from environmental protection measures."); William K. Reilly, *Environmental Equity: EPA's Position*, 18 EPA J. 18, 22 (March/April 1992) ("It is undeniable that minorities usually benefit from—are, indeed, the chief beneficiaries of—more general efforts to protect the environment.").

³⁹ The possible structural reasons for this phenomenon are outlined later in this Article at *infra* pp. 806-25.

⁴⁰ Robert A. Collins, *The Distributive Effects of Public Law 92-500*, 4 J. ENVTL. ECON. & MGMT. 344, 353 (1977). Professor Collins further found that the lowest-income classes received some net benefit from the federal subsidy, while the middle income classes were net losers. *Id.* at 352-53.

⁴¹ See Michael Gelobter, *Toward A Model of "Environmental Discrimination"*, in MICHIGAN CONFERENCE PROCEEDINGS, *supra* note 37, at 92 ("all changes in exposure have been regressively distributed since 1970 (the year in which the Clean Air Act was adopted)"); F. Reed Johnson, *Income Distributional Effects of Air Pollution Abatement: A General Equilibrium Approach*, 8 ATLANTIC ECON. J. 10, 17 (1980) (While environmental policy "costs are approximately proportional to income," data from previous studies "tend[s] to confirm the supposition that environmental policy incidence is regressive, with only the top two income classes obtaining positive net benefits.") (summarizing results of a Swedish study on the income distributional effects of air pollution control).

including those associated with programs directed at improving urban air quality.⁴² A similar conclusion has been drawn regarding the impact of federal occupational health and safety laws.⁴³

2. *The Burdens of Environmental Protection.*—The burdens associated with environmental protection generally take two forms. First, there are the economic costs of pollution control. These are typically imposed on either the government or industry in the first instance, but are ultimately redistributed through taxes and higher prices for consumer goods. They may also be indirectly redistributed through salary cuts and layoffs. Second, as previously described, there are the burdens of environmental risks that are necessarily redistributed by environmental protection laws. Although these laws strive for a net reduction of risks, some discrete populations may suffer a net increase in the process.

The "burden" dimension to environmental protection has received significantly more attention than the "benefit" side. Additionally, until quite recently most studies addressing the distribution of environmental protection burdens have focused on the economic costs associated with such protection. Less attention has been paid to the distribution of environmental risks.

Most of the studies lend considerable support to the thesis that distributional inequities exist insofar as the distribution of burdens may be regressive. Moreover, to the extent that these studies have specifically considered the distributional effects upon racial minorities, preliminary inquiries strongly suggest that inequities exist there as well.

(a) *Economic costs.*—Economists have occasionally studied how the costs and benefits of pollution control are distributed.⁴⁴ These

⁴² David Harrison, Jr. & Daniel L. Rubinfeld, *The Distribution of Benefits from Improvements in Urban Air Quality*, 5 J. ENVTL. ECON. & MGMT. 313, 314 (1978) ("[T]he absolute level of benefits, measured in dollars . . . rises consistently and substantially with income. Only when expressed as a percentage of income are air quality benefits pro-poor.").

⁴³ See Beverly Hendrix Wright, *The Effects of Occupational Injury, Illness, and Disease on the Health Status of Black Americans*, in MICHIGAN CONFERENCE PROCEEDINGS, *supra* note 37, at 128, 129 ("Blacks and other minority workers . . . have not benefitted from these improvements to the degree that white workers have.").

⁴⁴ BAUMOL & OATES, *supra* note 34, at 235-56; Roger H. Bezdek et al., *The Economic and Employment Effects of Investment and Pollution Abatement and Control Technology*, 18 AMBIO 274 (1989); Taylor H. Bingham et al., *Distribution of the Generation of Air Pollution*, 14 J. ENVTL. ECON. & MGMT. 30 (1987); Harry F. Campbell, *On the Income Distributional Effects of Environmental Management Policies*, 12 WATER RESOURCES 1077, 1077-80 (1976); Collins, *supra* note 40, at 344; Nancy S. Dorfman & Arthur Snow, *Who Will Pay For Pollution Control?—The Distribution By Income of the Burden of the National Environmental Protection Program 1972-80*, 28 NAT'L TAX J. 101, 101-15 (1975); Freeman, *supra* note 36; Leonard P. Gianessi & Henry M. Peskin, *The Distribution of the Costs of Federal Water Pollution Control Policy*, 56 LAND ECON. 85-102 (Feb. 1980); David E. Hansen & S. I. Schwartz, *Income Distribution Effects of the California Land Conservation Act*, 59 AM. J. AGRIC. ECON. 294, 294-301 (1977); Harrison & Rubinfeld, *supra* note 42, at 313-32; Johnson, *supra* note 41, at 10-21; Adam Rose et al., *Assessing Who Gains and Who Loses from*

analyses generally suggest that pollution controls are regressive. As one commentator put it fairly early on, “[u]nfortunately, the further one moves towards ‘putting a price on pollution’ the more regressive the burden generally becomes . . . [W]hen it comes to cleaning up the environment, policy makers will be confronted with the classical dilemma between distributional fairness and allocative efficiency.”⁴⁵

Economists offer several explanations for this distributional phenomenon. Some speculate that many of the environmental amenities guaranteed by protective legislation are available, as a practical matter, only to those with the wealth and time for their enjoyment. Furthermore, even when the improved environment is itself a low-income residential area, the resulting economic value is not necessarily captured by those living in the area but is more likely to be gained by absentee property owners who can subsequently charge their tenants higher rent for living in a cleaner neighborhood. At the same time, higher product prices and displaced job opportunities resulting from pollution control seem to have disproportionately adverse effects on persons with fewer economic resources.⁴⁶ For example, much environmental land use regulation reduces the amount of land available for housing. This reduction increases the price of both land and, therefore, housing, thus effectively reducing the amount of affordable housing available to low-income persons.⁴⁷

Few of these studies confront the race issue directly. One study that did concluded that distributional inequities existed along racial lines in the distribution of the costs associated with water pollution control. The

Natural Resource Policy: Distributional Information and the Public Participation Process, 15 RESOURCES POL'Y 282 (1989).

⁴⁵ Dorfman & Snow, *supra* note 44, at 115. Those who question the extent to which existing environmental laws promote efficiency, however, would likely contend that those laws are, for that same reason, wrong-headed in both respects; that is, they promote neither efficiency nor distributional fairness. The Office of Management and Budget and some federal judges, for instance, have recently suggested that environmental laws actually undermine public health concerns because they make people poorer, and “richer is safer.” In other words, an individual with more economic resources (*i.e.*, wealth) is likely to be more healthy than an individual with fewer such resources. Hence, because environmental laws decrease economic wealth (or so proponents of this theory assume), they simultaneously decrease public health. *See, e.g.*, *International Union v. OSHA*, 938 F.2d 1310, 1326 (D.C. Cir. 1991) (Williams, J., concurring) (“higher income can secure better health, and there is no basis for a casual assumption that more stringent regulation will always save lives”); Frank Swoboda, *OMB's Logic: Less Protection Saves Lives; Letter Blocking Health Standards for 6 Million Workers Shocks Officials at Labor Dept.*, WASH. POST, Mar. 17, 1992, at A15; *see also* Frank Swoboda, *OMB to Review Standards of Health Covering 6 Million*, WASH. POST, Mar. 26, 1992, at A19 (“OMB said it has not abandoned the idea that federal agencies should be required to determine whether protective health standards harm more workers than they help.”).

⁴⁶ *See, e.g.*, Freeman, *supra* note 36, at 273-74. To the extent that the cost of environmental protection is imposed uniformly, moreover, its net impact is likely to be regressive. *See* Elliott, *supra* note 38, at 8.

⁴⁷ Daniel R. Mandelker, *The Conflict Between Environmental Land Use Regulation and Housing Affordability*, 15 ZONING & PLAN. L. REP. 1 (1992).

study's author found, specifically, that "[w]hites have a greater absolute burden, while nonwhites generally have a slightly greater proportional burden" in the distribution of such costs.⁴⁸

(b) *Environmental risks.*—Studies addressing the redistribution of environmental risks are far fewer in number than those concerned with economic costs, but race has more frequently been a focus of inquiry in the former. Two studies are no doubt the most widely acknowledged because they advance the thesis that race matters in the distribution of environmental risks and that racial minorities receive a disproportionate amount of those risks.

The first study, entitled *Siting of Hazardous Waste Landfills and their Correlation with Racial and Economic Status of Surrounding Communities*, was prepared by the General Accounting Office (GAO) in 1983. Conducted in response to a request by Walter E. Fauntroy, a congressional representative from the District of Columbia,⁴⁹ the GAO surveyed locations of hazardous waste landfills in the southeastern United States.⁵⁰ Specifically, GAO examined offsite hazardous waste landfills (not part of or contiguous to an industrial facility) located in eight southeastern states. The GAO found that "[b]lack make up the majority of the population in three of the four communities where the landfills are located."⁵¹ The GAO also found that "[a]t least 26 percent of the population in all four communities have income below the poverty level and most of this population is Black."⁵²

The second study, undertaken by the United Church of Christ Commission for Racial Justice (UCC) and reported in 1987, was far more sweeping in its scope.⁵³ It purported to examine the location of controlled and uncontrolled hazardous waste sites across the United States for the purpose of determining whether they were disproportionately located in racial minority neighborhoods.⁵⁴ The report concluded that

⁴⁸ Gianessi & Peskin, *supra* note 44, at 97.

⁴⁹ Representative Fauntroy made his request in the aftermath of his arrest at a demonstration protesting the siting of a hazardous waste facility in a mostly black community in Warren County, North Carolina. See Godsil, *supra* note 14, at 394 & n.3.

⁵⁰ U.S. GEN. ACCOUNTING OFFICE, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES* (1983).

⁵¹ *Id.* at 2.

⁵² *Id.*

⁵³ UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, *TOXIC WASTES AND RACE IN THE UNITED STATES* (1987) [hereinafter UCC STUDY].

⁵⁴ *Id.* at ix. The report defined "minority population" as the "summation of the following populations: (1) Black population not of Spanish origin; (2) Asian & Pacific Islander, American Indian, and Eskimo & Aleut populations not of Spanish origin; (3) Other non-white populations not of Spanish Origin; and (4) Hispanic population." *Id.* at 63. The report was based on minority population figures derived from the 1980 U.S. Census, *id.* at 9, and on the 415 operating commercial hazardous waste facilities then listed in EPA's hazardous waste management system. *Id.* at 10. The study compared five major variables, including "'minority percentage of the population,' 'mean

“[a]lthough socio-economic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant.”⁵⁵ According to the report’s authors, “[t]his remained true after the study controlled for urbanization and regional differences.”⁵⁶

The UCC study found, in particular, that “[i]n communities with two or more operating hazardous waste facilities or one of the five largest landfills, the mean minority percentage of the population was more than three times that of communities without facilities (38 percent versus 12 percent).”⁵⁷ Furthermore, “[i]n communities with one operating commercial hazardous waste facility, the mean minority percentage of the population was approximately twice that of communities without facilities (24 percent versus 12 percent).”⁵⁸ The study also found that “[t]hree out of every five Black and Hispanic Americans lived in communities with uncontrolled toxic waste sites.”⁵⁹

The GAO and UCC studies have been widely publicized, particularly within minority communities, and have generated considerable con-

household income’, ‘mean value of owner-occupied homes’, ‘number of uncontrolled toxic waste sites per 1,000 persons’ and ‘pounds of hazardous waste generated per person.’” *Id.*

⁵⁵ *Id.* at xiii.

⁵⁶ *Id.* According to the report, however, its statistical findings reflect a 90% confidence level, *id.* at 11, which is not particularly high. Apparently, the statistical methodology utilized in the UCC study is also not uncontroversial. The study utilizes a “discriminate” rather than “regression” analysis technique, which is the more widely accepted basis for differentiating between the effect of multiple dependent variables. The UCC study also equates the siting of toxic sites with exposure to toxic releases, and relies on present demographic data rather than the demographic data pertaining to the time that the initial siting decision may have been made. A more recent study takes issue with some of the UCC study’s conclusions. Specifically, Professor James Hamilton considers the impact of a community’s ability to engage in collective action on a hazardous waste facility’s willingness to expand its waste processing capacity. James T. Hamilton, *Politics and Social Cost: Hazardous Waste Facilities in a Truly Coasian World* (June 1991) (unpublished working paper, on file with the *Northwestern University Law Review*). Hamilton employs logistic regression analysis to conclude that collective action potential (measured by voter turnout in the 1980 presidential election) is a statistically significant factor (at a 99% confidence level), *id.* at 22, and also concludes that “controlling for other factors race is not a statistically significant factor in the expansion selection process[.]” *Id.* at 24. Hamilton also concludes that “[n]one of the variables related to compensation demands such as income or education are statistically significant.” *Id.* at 22. Apart from the difference in statistical confidence levels and methodologies utilized by the two studies, a major difference between them is that the UCC study focuses on where sites are now located, UCC STUDY, *supra* note 53, at 10, which allows for demographic changes after the siting decision is made, while the Hamilton paper looks to the factors existing at the time that a facility manager makes a particular expansion decision. Hamilton, *supra* at 3. While the former inquiry is more descriptive of the problems actually faced by minorities, the latter is more relevant to constitutional analysis that is concerned with a decisionmaker’s subjective motivation. See *infra* notes 171-205 and accompanying text.

⁵⁷ UCC STUDY, *supra* note 53, at 13.

⁵⁸ *Id.*

⁵⁹ *Id.* at xiv. According to the report, blacks are significantly overrepresented in the populations of metropolitan areas with the largest number of uncontrolled hazardous waste sites. These include Memphis (173), St. Louis (160), Houston (152), Cleveland (106), Chicago (103), and Atlanta (94). *Id.*

trovery⁶⁰ and academic inquiry.⁶¹ The most prominent response was a conference held at the University of Michigan in January 1990 in which academics and government officials from across the country presented and discussed papers concerning environmental justice issues from a variety of perspectives.⁶² The Michigan Conference participants thereafter met with EPA Administrator William K. Reilly who, at their urging, created an "Environment and Equity" working group at the agency. This working group was charged with auditing the agency's policies from

⁶⁰ See Michael Satchell, *A Whiff of Discrimination?*, U.S. NEWS & WORLD REP., May 4, 1992, at 34.

⁶¹ The most prolific writer and advocate on the subject of "environmental injustice" is a sociologist, Professor Robert Bullard, who has written numerous articles over the last nine years describing how racial minorities are more likely to be exposed to toxic pollutants than are whites. See, e.g., Bullard, *Ecological Inequities and the New South*, *supra* note 15; Bullard & Wright, *Environmentalism and the Politics of Equity*, *supra* note 15; Bullard & Wright, *The Politics of Pollution*, *supra* note 15; Bullard, *Solid Waste Sites*, *supra* note 15. In 1990, Professor Bullard published a book on the subject, which brings together in one volume much of his research and reflection on the issue. See BULLARD, *DUMPING IN DIXIE*, *supra* note 15. Within that volume, Bullard explains that the largest commercial hazardous waste landfill is located in Emelle, Alabama, where blacks represent 78.9% of the population, and that the fourth largest landfill is located in Scotlandville, Louisiana, where 93% of the population is black. *Id.* at 41. According to Bullard, these two sites alone have more than one-third of the estimated licensed hazardous waste landfill capacity in the United States. *Id.* Bullard also describes how waste facilities tend to be in black neighborhoods. *Id.* at 43. Another study of the impact of race on the siting of hazardous waste facilities has not supported either Bullard's or the UCC Study's conclusions. See Hamilton, *supra* note 56.

⁶² See Bunyan I. Bryant & Paul Mohai, *The Michigan Conference: A Turning Point*, 18 EPA J. 9, 10 (1992). The titles of the articles included in the published proceedings provide a sense of the scope of the Conference. They include: (1) *Toxic Waste and Race in the United States*; (2) *Can the Environmental Movement Attract and Maintain the Support of Minorities?*; (3) *Environmental Blackmail in Minority Communities*; (4) *Environmental Voting Record of the Congressional Black Caucus*; (5) *Toward a Model of "Environmental Discrimination"*; (6) *Minority Anglers and Toxic Fish Consumption: Evidence from a State-Wide Survey of Michigan*; (7) *Invitation to Poison: Detroit Minorities and Toxic Fish Consumption from the Detroit River*; (8) *The Effects of Occupational Injury, Illness, and Disease on the Health Status of Black Americans*; (9) *Hazardous Waste Incineration and Minority Communities: The Case of Alsen, Louisiana*; (10) *Environmentalism and Civil Rights in Sumter County, Alabama*; (11) *Uranium Production and its Effects on Navajo Communities along the Rio Puerco in Western New Mexico*; (12) *Pesticide Exposure of Farm Workers and the International Connection*; and (13) *The Dumping of Toxic Waste in African Countries: A Case of Poverty and Racism*. These papers generally supported the findings of the UCC Study. For example, a study of the siting of hazardous waste incineration facilities in and around Baton Rouge, Louisiana, found that "minority communities have an average of one site per every 7,309 residents. White communities have only one site per every 31,100 residents." Harvey L. White, *Hazardous Waste Incineration and Minority Communities: The Case of Alsen, Louisiana*, in MICHIGAN CONFERENCE PROCEEDINGS, *supra* note 37, at 142, 149. Furthermore, when volume is factored in, "[t]he white communities have less than 1% of the hazardous waste . . . [e]ven though the minority communities are significantly smaller . . ." *Id.* at 150 (footnote omitted). The University of Michigan held a second symposium a year later. The published proceedings include a statistical analysis of the Detroit area, which concluded that while both race and income were significant determinants in terms of location of commercial hazardous waste facilities (the chances of blacks living within a mile of such a facility were approximately four-and-a-half times greater than whites), the effect of race was the "stronger" determinant. See Paul Mohai & Bunyan I. Bryant, *Race, Class, and Environmental Quality in the Detroit Area*, in ENVIRONMENTAL RACISM, *supra* note 9, at 42, 43.

an environmental equity perspective, including both income and race as factors to be considered.⁶³

This working group issued its "Environmental Equity" report in the summer of 1992.⁶⁴ The report surveyed and evaluated existing data regarding the extent to which minorities may bear disproportionately high burdens from environmental pollution, and its analysis of the data was noticeably more refined and demanding than that of earlier studies. Perhaps for this very reason, however, the working group's report ultimately lends substantial credence to the conclusions of prior, less detached studies.

The report distinguished between "health effects" and "exposure to environmental pollutants," and found (1) that existing data shows differences in "exposure to some environmental pollutants by socioeconomic factors and race," and (2) "clear evidence that there are differences by race for disease and death rates."⁶⁵ Nonetheless, EPA also concluded that a gap in the data exists concerning the relation between the two findings. Specifically, the report noted that "[e]xposure is not the same as health effects," and that "[t]here is a general lack of data on environmental health effects by race and income" and, more particularly, on the "environmental contribution to these diseases."⁶⁶ According to EPA,

⁶³ Pursuant to the Emergency Planning and Community Right to Know Act, 42 U.S.C. §§ 11001-11050 (1986), there now exists a more useful source of data concerning toxic releases than existed at the time of the earlier investigations, including those conducted by GAO and UCC. That law established the Toxic Release Inventory (TRI), in which companies must report the amounts of toxics released from their facilities. Using that data, a recent graduate of Washington University School of Law (St. Louis) examined the amount of toxic releases in predominantly (75% or greater) White and Black neighborhoods of St. Louis, Missouri. He found that there were approximately 50% more toxic releases by weight in black neighborhoods, notwithstanding that their respective populations were roughly equal to white communities. See Kevin L. Brown, *Environmental Discrimination—Myth or Reality?* 17 (Mar. 29, 1991) (unpublished manuscript, on file with the *Northwestern University Law Review*).

⁶⁴ See 1 ENVIRONMENTAL EQUITY WORKGROUP, OFFICE OF POLICY, PLANNING, AND EVALUATION, U.S. EPA, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, WORKGROUP REPORT TO THE ADMINISTRATOR (June 1992) [hereinafter EPA ENVIRONMENTAL EQUITY REPORT]. EPA's release of the draft report in February 1992 caused a considerable stir. The day that the report was released, Representative Henry Waxman (D. Cal.) held a press conference in which he charged that the EPA report was a "public relations ploy" rather than a meaningful effort "to understand and respond to the very real health problems faced by people of color." See Congressman Henry A. Waxman, *Environmental Equity Report is Public-Relations Ploy*, News Release (Feb. 24, 1992) (copy on file with the *Northwestern University Law Review*). Representative Waxman released, along with his critical comments, copies of internal agency memoranda in which agency officials had similarly criticized the draft report for lack of candor regarding the "meagerness of [EPA] efforts." See Memorandum from Ed Hanley, Deputy Assistant Administrator for Administration, to Clarice Gaylord, Re: Environmental Equity Report (December 1991) [hereinafter Hanley Memorandum] (copy on file with the *Northwestern University Law Review*). Waxman also released a copy of a dissenting opinion that certain EPA employees sought to have appended to the draft report, but which agency officials ultimately declined to include.

⁶⁵ EPA ENVIRONMENTAL EQUITY REPORT, *supra* note 64, at 11, 13.

⁶⁶ *Id.*

with the exception of lead, for which the evidence of disproportionate impact by race is dramatic,⁶⁷ "[f]or diseases that are known to be environmentally induced, there is a lack of data disaggregated by race and socioeconomic variables."⁶⁸

The EPA report concluded that minorities have disproportionately greater "observed and potential exposure" to environmental pollutants and, specifically, noted four causes for this phenomenon.⁶⁹ The first is a greater concentration of minorities in urban areas where emission densities tend to be greatest and, accordingly, where air pollution is usually the most hazardous.⁷⁰ In fact, government scientists recently concluded that blacks and Hispanics reside in higher percentages than whites in geographic areas that are currently not in compliance with federal Clean Air Act requirements for particulate matter, carbon monoxide, ozone, sulfur dioxide, and lead.⁷¹ These scientists also concluded that income alone did not explain the percentage discrepancy: "[A] comparison between poor, African American, and Hispanic percentages shows that these minority groups are more concentrated in [substandard air quality regions] than the poor population in general."⁷² Additionally, in another study described by EPA in its environmental equity report, epidemiologists found that ninety percent of steelworkers most heavily exposed to certain organic pollutants were nonwhite and that these persons suffered from respiratory cancer at a rate eight times more than would normally be expected.⁷³

Identified by EPA as the other causes of greater minority exposure

⁶⁷ See *infra* notes 114-16 and accompanying text.

⁶⁸ EPA ENVIRONMENTAL EQUITY REPORT, *supra* note 63, at 11. The EPA report describes an existing debate among commentators regarding the extent to which "differences in cancer rates between African Americans and Whites can be explained by the effects of poverty." *Id.* at 13. Some commentators contend that virtually all of the differences can be explained by poverty, rather than race (to the extent, of course, that the two factors can themselves be disaggregated), while others posit that "there is still a substantial amount of variation that seems to be explained only by race or ethnicity." *Id.* (citing Claudia R. Baquet et al., *Socioeconomic Factors and Cancer Incidence Among Blacks and Whites*, 83 J. NAT'L CANCER INST. 551-57 (1991); Ann Gibbons, *Does War on Cancer Equal War on Poverty?*, 253 SCIENCE 260 (1991); Vincente Navarro, *Race of Class Versus Race and Class: Mortality Differentials in the United States*, 336 THE LANCET 1238-40 (1990)).

⁶⁹ The report stresses that the measurements of environmental contaminants represent the "potential" for exposure and not "actual" exposure. "Even though the potential for exposure may be the same, not all potentially exposed persons will experience the same actual exposure." EPA ENVIRONMENTAL EQUITY REPORT, *supra* note 64, at 13.

⁷⁰ *Id.* at 13-14.

⁷¹ *Id.* at 14 (citing D.R. Wernette & L.A. Nieves, *Minorities and Air Pollution: A Preliminary Geo-Demographic Analysis*, Paper presented at the Socioeconomic Research Analysis Conference II (June 27-28, 1991)).

⁷² D.R. Wernette & L.A. Nieves, *Breathing Polluted Air: Minorities Are Disproportionately Exposed*, 18 EPA J. 16, 17 (1992).

⁷³ EPA ENVIRONMENTAL EQUITY REPORT, *supra* note 64, at 17 (citing OFFICE OF HEALTH AND ENVIRONMENTAL ASSESSMENT, U.S. EPA, CARCINOGEN ASSESSMENT OF COKE OVEN EMISSIONS (1984)).

to environmental contaminants were (1) the physical proximity of minority populations to hazardous waste sites;⁷⁴ (2) minority consumption of contaminated food;⁷⁵ and (3) minority farmworker exposure to pesticides.⁷⁶ In each instance, minorities disproportionately engaged in certain kinds of activities (residence, diet, and work, respectively) that exposed them to greater environmental risks.

Finally, the EPA report raised the possibility that minorities may suffer disproportionately from environmental pollution not just because they are in fact exposed to it in greater amounts, but also because certain members of this group are more likely to be vulnerable to its adverse effects. For most contaminants, certain population subgroups are more sensitive than is the general population. According to EPA, there is reason to believe that "several population groups identified as being sensitive to the health effects of air pollution seem to be disproportionately composed of low-income or racial minority individuals compared to the general population."⁷⁷

III. THE STRUCTURE OF ENVIRONMENTAL INEQUITY

A. *General Causes: Racism and the Relative Absence of Minority Economic and Political Power*

The structural roots of environmental inequities are very likely the same as those that produce other forms of racially disproportionate im-

⁷⁴ EPA's discussion of the siting issue relies exclusively on the UCC and GAO evidence regarding the physical proximity of commercial hazardous waste treatment facilities or uncontrolled hazardous waste sites to minority residential communities. EPA simply recounts those earlier studies. Somewhat surprisingly, it makes no independent effort to evaluate the veracity of these study's conclusions. See EPA ENVIRONMENTAL EQUITY REPORT, *supra* note 64, at 14-15. There is a cryptic statement, however, suggesting the possibility of some controversy in this area. After summarizing the prior studies, the report simply concludes "[i]t is clear that more study of this issue is required to fully understand the associations of race, income, and facility location." *Id.* at 15. Apart from the possible negative implications of this statement, the report provides no hint as to any deficiencies in the prior studies.

⁷⁵ See Patrick C. West et al., *Minority Anglers and Toxic Fish Consumption: Evidence from a State-Wide Survey of Michigan*, in MICHIGAN CONFERENCE PROCEEDINGS, *supra* note 37, at 108. According to this paper, and other recent studies relied upon by EPA, many potentially harmful environmental contaminants (e.g., PCBs, dioxins, furans) bioaccumulate to dangerous concentration levels in fish, and those fish are not only eaten in disproportionate amounts by some racial minorities (including Native Americans and Blacks), but are also prepared for eating in a manner (*i.e.*, including skin and less fat trimmed) in which more contaminants will be consumed. EPA ENVIRONMENTAL EQUITY REPORT, *supra* note 64, at 15-16.

⁷⁶ EPA's report describes how "80-90% of the approximately two million hired farmworkers . . . are racial minorities," and how studies have shown that workplace exposure to chemicals in agriculture is one of the areas of greatest human health risks. EPA ENVIRONMENTAL EQUITY REPORT, *supra* note 64, at 16.

⁷⁷ *Id.* at 22 ("asthmatics, persons with certain cardiovascular diseases or anemia, and women at risk of delivering low-birth-weight fetuses").

pacts. In this regard, environmental protection is yet another expression of a more widespread phenomenon.

The most obvious and common source are racist attitudes—whether in blatant, thinly guised, or unconscious forms—that pervade decision-making. Historically, racial minorities have been persistent victims of racial discrimination in this country. Although de jure discrimination is now forbidden by law, racist attitudes, both consciously and unconsciously held, are plainly widespread.⁷⁸ These range from hostility toward racial minorities, to false stereotypical judgments about members of that class. As Alex Aleinikoff recently explained, “[r]ace matters with respect to the people we choose to spend time with or marry, the neighborhoods in which we choose to live, the houses of worship we join, our choice of schools for our children, the people for whom we vote, and the people we allow the state to execute.”⁷⁹ People routinely make stereotypical judgments about others based on racial identity.⁸⁰ While such judgments may appear less threatening than those based on outright racial hostility, their adverse impact may in fact be more potent because of their pervasiveness and masked nature, which makes them so difficult to identify and root out.

Therefore, it is not at all unlikely—and, indeed, it may be probable—that racist attitudes and false stereotypes have influenced various decisions relating to environmental protection. Certainly there is no reason to suppose that environmental protection is somehow immune from actions based on societal attitudes that, while widely condemned, are nevertheless prevalent.⁸¹ For example, the use of environmental quality to support racially exclusionary zoning practices would seem to confirm that suspicion.⁸²

⁷⁸ Thomas A. Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1066-69 (1991); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

⁷⁹ Aleinikoff, *supra* note 78, at 1067.

⁸⁰ Stephen L. Carter, *When Victims Happen to be Black*, 97 YALE L.J. 420, 429 (1988).

⁸¹ Professor Derrick Bell’s “Chronicle of the Space Trader,” in which white Americans trade the freedom of black Americans for environmental protection is no doubt one of the most dramatic statements of the proposition. See Derrick A. Bell, Jr., *After We’re Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393 (1990); Bell, *supra* note 8.

⁸² See *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); cf. *International Union v. Johnson Controls*, 111 S. Ct. 1196 (1991); see also DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 567 (2d ed. 1980); Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM 101 (Charles M. Haar & Jerold A. Kayden eds., 1989); cf. Luke Cole, *The Anti-Immigration Environmental Alliance: Divide and Conquer at the Border*, in RACE, POVERTY & ENV’T, Summer 1992, at 13. There have been successful equal protection claims brought against municipalities based on their failure to provide equivalent services, including water and sewage treatment, to black neighborhoods. See *Dowdell v. Apopka*, 511 F. Supp. 1375 (M.D. Fla. 1981) (disparities in water, stormwater drainage in black/white neighborhoods motivated by discriminatory intent); *Johnson v. City of Arcadia*, 450 F. Supp. 1363 (M.D. Fla. 1978) (race discrimination based on black neighborhoods not being provided with same level of municipal services as white neighborhoods); see generally Martin Jaffe, *Municipal Service Disparities:*

In any event, powerful vestiges of generations of racist policies plainly persist, and these vestiges are self-perpetuating.⁸³ As a result of racist laws and attitudes extending back to slavery itself, racial minorities today possess significantly less power both in the marketplace and in the political fora, particularly at the national level. This absence of economic and political clout makes it much more probable that racial minorities will receive an unfavorably disproportionate share of the benefits (less) and burdens (more) of living in society,⁸⁴ including those associated with environmental protection.⁸⁵ For example, the absence of economic resources compounds the threat of distributional inequities associated with environmental protection. Because those with fewer economic resources are disproportionately affected adversely by across-the-board price increases, such individuals are also more likely to suffer greater economic harm when prices rise because of environmental protection. The economic plight of many minority communities also confines its members as a practical matter to the less healthy residential areas which are, for that reason, less expensive to live in.⁸⁶ This confinement also creates the potential for what some have dubbed "environmental blackmail,"⁸⁷ as the community finds it more difficult to oppose the siting of a facility that, notwithstanding significant environmental risks, offers the possibility of immediate short-term economic relief.⁸⁸

In addition, persons with fewer economic means frequently conclude that they cannot afford the "luxury" of declining available work, notwithstanding the environmental risks associated with the job. At the

Liability Under Title VI of the Civil Rights Act of 1964, LAND USE L. & ZONING DIG., Feb. 1987, at 3, 3 (using Title VI as a claim in disparity-of-services suits).

⁸³ See, e.g., Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 855 (1983).

⁸⁴ See, e.g., Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978).

⁸⁵ See, e.g., Bullard & Wright, *Environmentalism and the Politics of Equity*, *supra* note 15, at 25.

⁸⁶ See A. Myrick Freeman III, *Distribution of Environmental Quality*, in ENVIRONMENTAL QUALITY ANALYSIS 243, 252, 257-58, 263 (Allen V. Kneese & Blair T. Bowers eds., 1972).

⁸⁷ See generally Robert D. Bullard, *Environmental Blackmail in Minority Communities*, in MICHIGAN CONFERENCE PROCEEDINGS, *supra* note 37 (environmental problems have become political issues as they threaten public health); see also DAVID ZWICK & MARCY BENSTOCK, WATER WASTELAND: RALPH NADER'S STUDY GROUP REPORT ON WATER POLLUTION 400 (1971).

⁸⁸ In commenting on a public utility company's decision to site a nuclear power plant in the economically depressed community of Plymouth, Massachusetts, a company official reportedly referred directly to the relevance of the socioeconomic status of the town's residents to the company's decision: "The town is sort of down on its uppers; it's sort of poor. When we announced it, they said, 'Oh, Santa Claus came.' They are a better kind of people to deal with . . ." PETER YEAGER, THE LIMITS OF THE LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION 87 (1991). On the other hand, the promise of economic benefits in exchange for environmental pollution may be more illusory than real. Although the pollution and associated environmental risks will no doubt occur, there is reason to suspect that many of the higher paying jobs in fact do not go to those in the community, but to nonminority persons who reside outside the immediate vicinity of the polluting facility. See Austin & Schill, *supra* note 14, at 69, 70.

same time, when jobs are displaced because of pollution control costs, those with less seniority are the ones most likely to lose their jobs. Minorities typically make up a disproportionately large percentage of those employees with lower seniority.⁸⁹ Furthermore, there is reason to suspect that minorities are also less likely to be in a position to obtain the more highly skilled employment opportunities that are created in the pollution control industry⁹⁰ or in other jobs becoming available as the nation shifts away from a dependency on smokestack technologies.⁹¹

Indeed, for these reasons, those commercial interests opposing environmental protection regulations have often sought support from minority communities. For example, in 1989 Washington D.C. voters defeated a mandatory beverage recycling law reportedly because industry opponents successfully targeted minority communities with advertisements suggesting that the law was regressive in its impact.⁹² More recently, oil company executives seeking support in their efforts to persuade Congress to allow oil exploration and development in the Arctic National Wildlife Refuge singled out presidents of black colleges and universities, arguing to them that their educational institutions could especially benefit from the promotion of such developmental interests.⁹³

The relative absence of political leverage is at least as significant as

⁸⁹ BULLARD, *DUMPING IN DIXIE*, *supra* note 15, at 12. Of course, these same factors can be turned somewhat on their head to argue against redistributive efforts in environmental protection. For instance, one could contend that the unilateral reduction of environmental risks in minority communities would be a source of racial injustice, by denying members of those communities the autonomy to choose for themselves between economic return and environmental risk. The members of the community might have preferred the benefits associated with economic development. Indeed, there are recent instances where industry has sought to "compensate" residents directly for the increased risks through advance monetary payments. See Ronald Smothers, *Future in Mind, Choctaws Reject Plan for Landfill*, N.Y. TIMES, Apr. 21, 1991, at A13. While this contention is not lacking in rhetorical force, its persuasiveness rests at least in part on its unstated acceptance of the legitimacy of the existing distribution of economic resources. If one were instead to assume that the existing distribution is itself unjust (for instance, in part a vestige of centuries of racist policies and attitudes), the question becomes considerably more complex. It becomes much harder in that circumstance to equate liberty with consumer choice. See WEISBROD ET AL., *supra* note 21, at 551; C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 794-98 (1986). To be sure, the problematic nature of overriding an individual's decision to forego environmental protection in favor of short term economic gain remains, but the propriety of doing so seems stronger.

⁹⁰ Bullard, *supra* note 87, at 62.

⁹¹ ANDREW HACKER, *TWO NATIONS—BLACK AND WHITE, SEPARATE, HOSTILE, AND UNEQUAL* 107-33 (1992).

⁹² Paul Ruffins, *Blacks Suffer Health Hazards Yet Remain Inactive on Environment*, L.A. TIMES, Aug. 27, 1989, at A3.

⁹³ One sweltering Saturday in 1988 on a resort island in South Carolina, an oil industry lobbyist from Anchorage was lecturing the presidents of the nation's black colleges on the development potential of the Arctic National Wildlife Refuge.

If the presidents [of the black colleges] could drum up support among African Americans for oil drilling in the pristine area, [an oil industry lobbyist] said, he would make sure that black colleges got a slice of the estimated \$297 billion revenue and royalty pie.

Brigid Schulte, *Arctic Energy Debate Rekindled*, CHI. TRIB., Dec. 26, 1990, at C1.

the absence of economic power. Entities within the federal government with the greatest impact on the give-and-take process that marks environmental protection include the courts, offices within multiple executive branch agencies, and a plethora of congressional committees with overlapping jurisdiction on environmental matters. Bargains struck in the lawmaking process are expressed in the distributions of the law's benefits and burdens among those interest groups competing for the decisionmakers' attention. Because legislative and regulatory priorities are established through this lawmaking process, those wielding greater political influence over this process are more likely to have their problems receive ample attention in the first instance. Where the resources required to enact a law or to initiate an enforcement action are especially great, such a political advantage can very well be determinative of how a program's benefits are ultimately distributed.

The same is true for allocations of those burdens associated with environmental protection. Lawmakers inevitably seek the path of least political resistance when allocating the burdens of environmental protection.⁹⁴ In deciding both from where and to whom environmental risks should be reallocated in the treatment and prevention of pollution, lawmakers are necessarily more responsive to the demands of constituents who possess the greatest political influence.⁹⁵ This phenomenon is evident in the siting of other undesirable public projects and private undertakings, ranging from highways to prisons. There is no obvious theoretical reason why the same forces should not be at work when the object of the project or undertaking is pollution control.

This is not to suggest, as some might,⁹⁶ that the lawmaking process nowhere evinces an effort on the part of lawmakers to discern a viable public interest apart from the bargains struck by those special interests

⁹⁴ See Hamilton, *supra* note 56.

⁹⁵ This same phenomena no doubt explains recent increases in the international export of domestic solid and hazardous wastes to developing countries, which the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes seeks to address by promoting "the prohibition of transboundary movements of hazardous wastes, especially [to] developing countries." United Nations Environment Programme Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes, Final Act and Text of Basel Convention, Mar. 22, 1989, 28 I.L.M. 649, 657.

⁹⁶ The extent to which "public choice theory" advances this view is itself a subject of debate. Compare Michael E. DeBow & Dwight R. Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEX. L. REV. 993 (1988) with Daniel A. Farber & Phillip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987) [hereinafter Farber & Frickey, *The Jurisprudence of Public Choice*] and with Daniel A. Farber & Phillip P. Frickey, *Integrating Public Choice and Public Law: A Reply to DeBow and Lee*, 66 TEX. L. REV. 1013 (1988); see also William Bishop, *A Theory of Administrative Law*, 19 J. LEGAL STUD. 489, 498 (1990) (Public choice theory "purports to explain many of the activities of modern government as having nothing to do with the public interest—except perhaps at the level of justification and propaganda—but rather to be motivated by attempts to redistribute wealth away from one group and toward another.").

competing before them for the purpose of their own wealth maximization. There is no doubt much merit to the contentions of those who resist that more cynical view of public choice theory and suggest that the lawmaking process possesses some independent integrity.⁹⁷ Likewise, the power of interest groups to influence legislative and regulatory outcomes seems to depend heavily on many context-specific circumstances, including the nature of their interest and the visibility of the issue.⁹⁸

My accounting of the formation of environmental protection laws does not depend, however, on a wholesale embracing of public choice theory, particularly the narrow notion of "economic rent seeking." The mainstream environmental public interest organizations have clearly played a significant role in the fashioning of those laws, and it is hard to characterize fairly their interests in narrow economic rent seeking terms (especially those that are nonanthropocentric in character).⁹⁹ But, that is not at all inconsistent with the common sense notions that environmental protection laws possess a significant distributional dimension and that this distribution ultimately reflects the concerns and values of those coalitions necessary for the law's enactment.

Finally, whatever susceptibility minority communities have to receive a disproportionate amount of the initial burdens of environmental protection is multiplied over time because of their relative lack of economic and political clout. Once a particular geographic area becomes the locus for an activity presenting a heightened set of risks, that has historically been a reason favoring, not opposing, the siting of more such activities in that area. The existing activities provide a surface "neutral" reason for subsequent siting determinations.

B. *Exacerbating Causes: The Structure of Environmental Policymaking*

There exist, moreover, factors more endemic to environmental law itself that may exacerbate distributional inequities likely present in the context of any public welfare law. These factors suggest more than the disturbing, yet somewhat irresistible thesis, that the distributional dimen-

⁹⁷ See Farber & Frickey, *The Jurisprudence of Public Choice*, *supra* note 96; Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988); Steven Kelman, "Public Choice" and Public Spirit, 87 PUB. INTEREST 80 (1987).

⁹⁸ See KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 312-17, 394-98 (1986).

⁹⁹ See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 356, 360 (1991). In this respect, I share Professor Don Elliott's view that much of the support for environmental measures is "altruistic" in character. See E. Donald Elliott, Jr., *A Cabin on the Mountain: Reflections on the Distributional Consequences of Environmental Protection Programs*, 1 KAN. J.L. & PUB. POL'Y 5, 7 (1991); see also Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORGAN. 59, 64-65 (1992); but see WILLIAM TUCKER, PROGRESS AND PRIVILEGE—AMERICA IN THE AGE OF ENVIRONMENTALISM 28-39 (1982).

sion of environmental protection policy likely suffers from the same inequities that persist generally in society. They suggest the far more troubling, and even less appealing, proposition that the problems of distributional inequity may in fact be more pervasive in the environmental protection arena than they are in other areas of traditional concern to civil rights organizations, such as education, employment, and housing.

Indeed, it is the absence of that minority involvement so prevalent in the more classic areas of civil rights concern that may render the distributional problem worse for environmental protection. Minority interests have traditionally had little voice in the various points of influence that strike the distributional balances necessary to get environmental protection laws enacted, regulations promulgated, and enforcement actions initiated.¹⁰⁰ The interest groups historically active in the environmental protection area include a variety of mainstream environmental organizations representing a spectrum of interests (conservation, recreation, hunting, wildlife protection, resource protection, human health), as well as a variety of commercial and industrial concerns. Until very recently,¹⁰¹ if at all, the implications for racial minorities of environmental protection laws have not been a focal point of concern for any of these organizations.¹⁰²

Much of environmental protection lawmaking has also been highly centralized, with the geographic focus in Washington, D.C.¹⁰³ The enactment of environmental statutes within that geo-political setting has

¹⁰⁰ To my knowledge, no systematic inquiry has ever been undertaken to assess the involvement of minorities in environmental law. The kind of study that would be required would consider not just the identity and numbers of minorities within the more important points of influence, but would also consider the nature of their involvement and, even more particularly, their relationship with other persons having influence over the development of environmental protection policy. See generally EDWARD O. LAUMANN & FRANZ V. PAPPI, NETWORKS OF COLLECTIVE ACTION—A PERSPECTIVE ON COMMUNITY INFLUENCE SYSTEMS 5-9 (1976) (describing principles of methodology referred to as “social structural analysis”). A somewhat analogous study (on an admittedly smaller scale) examining the structure of the Chicago Bar included just such a discussion of the racial dimension of the institution’s “social structure.” See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 295-96 (1982); see also MICHAEL J. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION (1988). A study of “elite networks” in the national policy areas of agriculture, energy, health, and labor, did not identify any minorities. See John P. Heinz et al., *Inner Circles or Hollow Cores? Elite Networks in National Policy Systems*, 52 J. POL. 355 (1990).

¹⁰¹ See *infra* notes 136-38 and accompanying text.

¹⁰² See A. Dan Tarlock, *Environmental Protection: The Potential Misfit Between Equity and Efficiency*, 63 U. COLO. L. REV. 871, 876 (1992) (describing “The Historical Roots of the Subordination of Equity to Efficiency” in environmental law and policy); see also Cole, *The Need for Environmental Poverty Law*, *supra* note 14, at 17-19.

¹⁰³ The federal government has displaced decentralized decisionmaking in response to the widely held perception that, given the rise of national markets and the interstate nature of many pollutants, nationwide solutions were required for adequate environmental protection. See Richard B. Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1543-54 (1983).

required the expenditure of considerable political resources.¹⁰⁴ As evidenced by the thirteen years required to amend the Clean Air Act, it is no easy task to obtain the attention of the numerous congressional committees, and to form the coalitions between competing interest groups, so necessary to secure a bill's passage.¹⁰⁵

Environmental legislation has ultimately been produced through intense and lengthy horse-trading among interest groups, a process necessary to secure a particular environmental law's passage.¹⁰⁶ This process has often depended upon the forging of alliances between diverse interests both within the environmental public interest community and within government bureaucracy. Often, these unions have included so-called "unholy alliances" between environmentalists and commercial and industrial interests, where the latter have perceived an economic advantage to be gained (or disadvantage to be minimized) by their supporting an environmental protection law that allocates the benefits and burdens of environmental protection in a particular fashion.¹⁰⁷ Regardless of the approach taken, or alliances forged, to procure a law's passage the in-

¹⁰⁴ See Eskridge, *supra* note 99, at 361-63 (describing the "agenda-setting" role of interest groups).

¹⁰⁵ See Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 359-61 (1991).

¹⁰⁶ See, e.g., Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 454-59 (1989) (describing how the policy preferences of the various players were key to the fashioning of the compromises necessary to secure passage of the Clean Air Act Amendments of 1977); Farber, *supra* note 99, at 62-70.

¹⁰⁷ There are many examples of this phenomenon. The most widely proclaimed was no doubt the alliance between producers of high sulfur coal and environmentalists that prompted Congress in the Clean Air Act Amendments of 1977 to require percentage removal of the amount of sulfur within the coal combusted in addition to air emission reductions. This law had the effect of reducing air pollution while also reducing the competitive advantage that the law would have otherwise provided for producers of low sulfur coal. See generally BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL, DIRTY AIR OR HOW THE CLEAR AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH SULPHUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT (1981). Another example is the alliance between environmental groups and the railroads that have successfully resisted, mostly on environmental grounds, federal support for the development of coal slurry pipelines. The railroads, which receive significant revenue from coal transportation, have an obvious economic incentive to resist the competition presented by slurry technology. See William F. Webber, *Coal Slurry Pipelines Are Ready, Willing, and Unable to Get There*, 11 ST. MARY'S L.J. 765 (1979-80). Perhaps the most notorious instance, however, is presented by the Federal Highway Beautification Act of 1964, which was so successfully coopted by commercial interests that environmental organizations have subsequently supported its repeal. The federal law provides so much protection for the billboard industry from the costs of the law's billboard restrictions that it actually makes it more difficult for state and local governments to impose such restrictions than would otherwise be the case pursuant to their police power. See Richard D. Lamm & Stephen K. Yasinow, *The Highway Beautification Act of 1965: A Case Study in Legislative Frustration*, 46 DENV. L.J. 437 (1969). A recent account of alliances between environmentalists and private economic interests advances an extremely unflattering (and controversial) view of the forces behind environmental legislation. See ENVIRONMENTAL POLITICS: PUBLIC COST, PRIVATE REWARDS (Michael S. Greve & Fred L. Smith, Jr. eds., 1992).

volvement of a multitude of special interest groups is necessary. Indeed, one major public interest participant in the negotiations required to secure passage of the Clean Air Act Amendments of 1990, which were the culmination of over a decade of debate, characterized those negotiations as "a special interest feeding frenzy."¹⁰⁸

It is not surprising, therefore, that those environmental laws enacted by Congress typically address some, but hardly all, environmental pollution problems. And, even with regard to those problems that are explicitly addressed, there are usually discrepancies and gaps within the statutory scheme. Which problems are confronted, and where the discrepancies and gaps occur, is quite naturally an expression of the priorities of those participants who wield the greatest influence and resources in the political process.

For this reason, much environmental legislation may not have focused on those pollution problems that are of greatest concern to many minority communities. For instance, air pollution control efforts typically have focussed on general ambient air quality concerns for an entire metropolitan region rather than on toxic hot spots in any one particular area. Accordingly, while there has been much progress made in improving air quality as measured by a handful of national ambient air quality standards,¹⁰⁹ there has been relatively less progress achieved over the last twenty years in the reduction of those toxic air emissions which tend to be of greater concern to persons, disproportionately minorities, who live in the immediate geographic vicinity of the toxic polluting source. For example, EPA has regulated only seven of hundreds of toxic air pollutants since Congress enacted the Clean Air Act in 1970.¹¹⁰ The vast majority of governmental resources—federal, state, and local—have instead been directed to more ambient pollution standards, such as sulfur dioxide, nitrogen oxide, and particulates. Such nonenforcement of the Act's prohibition on toxic emissions effectively nullifies the law's environmen-

¹⁰⁸ See Robert Glicksman & Christopher H. Schroeder, *EPA and the Court: Twenty Years of Change and Beyond*, 54 LAW & CONTEMP. PROBS. 241, 285 (1991) ("West Virginia and Ohio will get billions of dollars to build 'clean coal' plants. Steel mills in a few states will have 30 years to control poisonous emissions, instead of the 10 years given other industrial polluters. Florida power companies will get a \$400-million, 10-year break on pollution control costs. Senators get more than exemptions for their home state.") (quoting Michael Kranish, *Politics and Pollution*, BOSTON GLOBE, Apr. 9, 1990, at A1). Professors Robert Glicksman and Christopher Schroeder recently summed up the phenomena nicely, albeit unsympathetically:

It would appear that the senators saw little distinction between the Clean Air Act and a fight over which defense installations to close, or an appropriation for public works project. The pork tastes as good, from whichever barrel it comes. Each constitutes an opportunity to benefit the groups or interests that can in turn benefit the politician.

Glicksman & Schroeder, *supra* at 286.

¹⁰⁹ COUNCIL ON ENVIRONMENTAL QUALITY, SEVENTEENTH ANNUAL REPORT 17 (1986) (summarizing environmental protection accomplishments since 1970).

¹¹⁰ S. REP. NO. 490, 101st Cong., 2d Sess. 151 (1990).

tal protection mandate.¹¹¹

Likewise, and at the behest of mainstream environmental groups, substantial resources have also been directed to improving air and water quality in nonurban areas. Programs for the prevention of significant deteriorations in air quality, the reduction of "acid rain," and the protection of visibility in national parks and wilderness areas, all require significant financial expenditures.¹¹² Substantial resources have similarly been expended on improving the quality of water resources that are not as readily accessible to many minorities because of their historical exclusion.¹¹³ Without meaning to suggest that these programs lack merit on their own terms (for the simple reason that they possess great merit), their return in terms of overall public health may be less than pollution control programs directed at improving the environmental quality of urban America's poorer neighborhoods, including many minority communities.

Lead poisoning provides an excellent illustration of how redirection of some financial resources may go a long way toward improving the health and welfare of minorities. There seems to be a widespread consensus that black children are disproportionately victims of excessive absorption of lead, a toxic chemical.¹¹⁴ The Federal Center for Disease Control, Agency for Toxic Substances and Disease Registry (ATSDR), reported in 1988 that percentages of black children with excessive levels of lead exceeded by several orders of magnitude the percentages of white children with such levels.¹¹⁵ These differential impacts, moreover, could

¹¹¹ John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233, 277 (1990). That there may have been neutral reasons for Section 112's nonenforcement, based on the impracticability of its mandate, see, e.g., John D. Graham, *The Failure of Agency-Forcing: The Regulation of Airborne Carcinogens Under Section 112 of the Clean Air Act*, 1985 *DUKE L.J.* 100, 117-32, does not explain away the discrepancy in resource allocation. Had toxic emissions been a greater priority to majoritarian interests, it is unlikely that such nonenforcement would have been tolerated or, at the very least, that needed legislative reform of the program would have taken over thirteen years to be enacted (the time between passage of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 686, and enactment of the 1990 amendments to the law. Pub. L. No. 101-549, 104 Stat. 2468).

¹¹² Craig N. Oren, *The Clean Air Act of 1990: A Bridge to the Future*, 21 *ENVTL. L.* 1817 (1991); Craig N. Oren, *The Protection of Parklands from Air Pollution: A Look at Current Policy*, 13 *HARV. ENVTL. L. REV.* 313 (1989); see also Arnold W. Reitze, Jr., *Environmental Policy—It is Time for a New Beginning*, 14 *COLUM. J. ENVTL. L.* 111, 117-18 (1989).

¹¹³ One possible exception might be the Clean Water Act's construction grants program, which authorizes federal grants for municipal wastewater treatment, see 33 U.S.C. §§ 1281-1299 (1988), but the effectiveness of that program, to be discontinued in 1994, has long been controversial. See FREDERICK R. ANDERSON ET AL., *ENVIRONMENTAL PROTECTION—LAW AND POLICY* 461-62 (2d ed. 1990); see also Collins, *supra* note 40.

¹¹⁴ See generally *Lead Poisoning Hearings*, *supra* note 12, at 6 (describing how lead poisoning affects low-income and minority communities).

¹¹⁵ See AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, *THE NATURE AND EXTENT OF LEAD POISONING IN CHILDREN IN THE UNITED STATES: A REPORT TO CONGRESS* at V7-V16 (July 1988) [hereinafter ATSDR]; see also Marta Mahoney, *Four Million Children At Risk: Lead Paint Poisoning Victims and the Law*, 9 *STAN. ENVTL. L.J.* 46 (1990).

not be explained on economic grounds. According to the ATSDR, black children have a higher incidence of excessive levels of lead at all income levels.¹¹⁶

The absence of any systematic consideration of minority interests in environmental protection has also likely effected the implementation of environmental protection laws. The siting of hazardous waste treatment, storage, and disposal facilities is a prime example. EPA is currently placing significant pressure on states to establish licensed hazardous waste facilities with the capacity to handle hazardous wastes generated within their borders. Under the federal Superfund law, EPA is required to deny Superfund monies for remedial cleanups to states that do not meet these "capacity assurance requirements."¹¹⁷ In choosing a location, the relevant state agency, as well as any private company involved, inevitably must consider the political implications of the siting, including the potential for effective, local political opposition.¹¹⁸ Few proposals survive the volatile public review that often accompanies announcement of the recommended siting of a hazardous waste facility.¹¹⁹

Similar considerations are also likely to affect the development and implementation of environmental enforcement priorities, including the allocation of resources necessary for inspections of polluting facilities and other factfinding investigations. *Potential* and *realized* programmatic benefits and burdens are not the same. Congress may enact a statute, or an agency may promulgate a generic rule, but neither detecting the violation of an environmental statute in the first instance, nor the subsequent bringing of an enforcement action to compel compliance, automatically

¹¹⁶ See ATSDR, *supra* note 115, at V7-V13; see also Michael Weisskopf, *Minorities' Pollution Risk Is Debated*, WASH. POST, Jan. 6, 1992, at A25 (summarizing ATSDR study: "For families earning less than \$6000, 68 percent of black children have lead poisoning, compared with 36 percent of white children. In families with incomes exceeding \$15,000, the ratio spread to 38 percent of black children and 12 percent of whites.").

¹¹⁷ Pursuant to 42 U.S.C. § 9604(c)(3) (1980), "[t]he President shall not provide any remedial actions pursuant to this section unless the State in which the release occurs first enters into a contract or cooperative agreement with the President providing assurances [that] . . . the State will assure the availability of a hazardous waste disposal facility . . ." *Id.* Facilities must "have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of such contract or cooperative agreement and to be disposed of, treated, or destroyed." 42 U.S.C. § 9604(c)(9) (1980). The facilities must comply with federal environmental requirements and either be within the State "or outside the State in accordance with an interstate agreement or regional agreement or authority." *Id.* See John Holusha, *The Nation: In Some Parts the Battle Cry is "Don't Dump on Me"*, N.Y. TIMES, Sept. 8, 1991, § 4, at 5; *New York Announces Lawsuit Against EPA for Failure to Enforce Capacity Requirement*, [Current Developments] *Envtl. Rep. (BNA)* No. 2, at 1363 (Sept. 27, 1991); *State, Industry Waste Minimization Urged as Part of Capacity Assurance Plans*, [Current Developments] *Envtl. Rep. (BNA)* No. 22, at 103 (May 10, 1991).

¹¹⁸ See Hamilton, *supra* note 56.

¹¹⁹ Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis* 1 n.5 (Jan. 21, 1993) (unpublished draft manuscript, on file with author).

follows from passage of the law.¹²⁰

Whether, where, and when such detections occur, and whether, where, and when they lead to enforcement actions, are the complex product of a host of "extra-legal" variables. Significant among these variables are the complex relationships between those charged with monitoring and enforcement responsibilities, the regulated community, those adversely affected by the violation, and any watchdog organizations overseeing the law's enforcement.¹²¹ Just as these relational factors apply when the substance of an environmental statute or regulation is fashioned in the first instance, they continue to influence enforcement priorities and policies at both the regional and local level where the impact of an environmental law on environmental quality is ultimately determined.¹²²

In the environmental law context, substantial resources are generally required to discover a violation of a prescribed environmental quality standard, to bring an enforcement action against the violator, and to monitor for future violations. However, given the sheer breadth of federal environmental protection laws, any comprehensive enforcement scheme capable of ensuring compliance with the laws' requirements is wholly impractical. The federal government never has, and likely never will, allocate the resources necessary to guarantee such compliance. At best, there has been a "half-hearted" commitment of federal resources to the monitoring and enforcement of federal environmental restrictions.¹²³

Similarly, state governments have proven unwilling or unable to commit the resources or efforts to ensure such compliance.¹²⁴ And, public interest organizations have never been capable of enlisting those resources necessary to bring the huge number of citizen suit enforcement actions that would be required to fill the enforcement gap. Nor is it clear, given the needs of other competing social welfare programs, that the government's (or public interest organizations') failure to do so is incorrect from either an economic efficiency or social justice perspective. Be that as it may, what remains clear is that the allocation of those resources necessary to ensure actual compliance—whether the enforcer be the federal, state, or local governments, or a public interest organization—is a significant determinant in the distribution of benefits and burdens ultimately realized. Compliance will necessarily be greater in both

¹²⁰ Farber, *supra* note 99, at 63, 69, 75.

¹²¹ Robert L. Rabin, *Some Thoughts on the Dynamics of Continuing Relations in the Administrative Process*, 1985 WIS. L. REV. 741, 742-43.

¹²² Professors Austin and Schill recount how the absence of effective enforcement of environmental standards in a minority community in Dallas, Texas, has resulted in the long-term exposure of residents to unsafe levels of pollution from lead smelters. Austin & Schill, *supra* note 14, at 71.

¹²³ Clifford S. Russell, *Monitoring and Enforcement*, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 243, 243-70 (Paul R. Portney ed., 1990).

¹²⁴ *Id.* at 248-53; see, e.g., Sonia L. Nazario, *Pesticide Regulation, Mainly the States' Job, is Spotty and Weak*, WALL ST. J., Jan. 18, 1989, at A1.

those substantive and geographic areas where the government decides to allocate its limited investigative and enforcement resources. And, in the absence of such governmental initiative, compliance is more likely where the community members possess the resources necessary to launch an independent, citizen-based, enforcement effort.

Some evidence supports the claim that, because of inequities in the distribution of enforcement resources, environmental quality is actually less in minority than in nonminority areas.¹²⁵ This may be reflected in less generous cleanup remedies,¹²⁶ lower fines,¹²⁷ slower cleanups,¹²⁸ or

¹²⁵ See generally Marianne Lavelle & Marcia Coyle, *Unequal Protection—The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1-S12 ("A Special Investigation"). The *National Law Journal* report includes perhaps the most comprehensive empirical investigation to date regarding the existence of a disparity, based on race or income, of EPA's allocation of enforcement resources and leverage. It explains one of the possible reasons why environmental protection laws may not have resulted in disproportionately favorable improvements in environmental quality for racial minorities, notwithstanding that their communities tended to be disproportionately polluted in the first instance. See *supra* notes 36-43 and accompanying text. The *National Law Journal* may, however, overstate its findings in at least one significant respect. Rather than define white communities as those with an especially high percentage of white residents, and minority communities as those with an *equally high percentage* of racial minority residents, the authors decided to divide the communities in their sample "into four equal groups or 'quartiles,' ranging from those with the highest to those with the lowest white populations." *Id.* at S4 (Methodology). They then compared "the quartile with the highest white population to the quartile with the lowest white population." *Id.* For their Superfund data, the comparison was between communities with a white population of more than 98.3% and those with a white population of less than 84.1%. For their enforcement data, the corresponding percentages were 97.9% and 79.2%, respectively. For this reason, however, the authors' use of the term "minority community" to describe the community with the lowest white population is somewhat misleading; most of the communities falling under that label are in fact predominantly white. However, the authors point out that, in light of segregated residential patterns, even communities with an 80% white population may have a different character, or at least be perceived different than communities that are nearly 100% white. *Id.*

¹²⁶ See Lavelle & Coyle, *supra* note 125, at S2 (EPA chooses "containment" remedy—which leaves hazardous wastes on site—more often than a treatment remedy—which seeks to eliminate the waste's hazardous constituents—more frequently when the sites are located in nonwhite communities); Bullard & Wright, *The Politics of Pollution*, *supra* note 15 (contrasting governmental buyouts of hazardous waste sites located in predominately white areas of Love Canal, New York, and Times Beach, Missouri, with refusal to buy out residents in all-black town of Triana, Alabama); Lavelle & Coyle, *supra* note 125, at S2 (when hazardous waste site located in community with greater-than-average minority population, it takes 20% longer from the time the site is discovered to the time it is placed on the Superfund national priority list; EPA more often chooses controversial containment remedy rather than the treatment remedy favored by most localities when site located in area with greater-than-average minority population); see also CLEAN SITES, HAZARDOUS WASTE SITES AND THE RURAL POOR: A PRELIMINARY ASSESSMENT 17, 51-53 (1990) (hazardous waste sites in rural poor communities are less likely to be placed on Superfund National Priority List, but once on that list, no difference in cleanup achieved); John A. Hird, *Superfund Expenditures and Cleanup Priorities: Distributive Politics or the Public Interest?*, 9 J. POL'Y ANALYSIS & MGMT. 455, 466, 478 (1990) ("EPA's site-specific decisions have been made more with the public interest in mind than with the influence of key legislators." Thus, "preliminary examination suggests that the distribution of Superfund sites is consistent with the objective of maintaining a high level of congressional support.").

¹²⁷ Lavelle & Coyle, *supra* note 125, at S2 (EPA enforcement penalties between 1985 and March,

more frequent violations of pollution control laws,¹²⁹ in areas where minorities reside in greater percentages than nonminorities. For example, "nonattainment" areas under the Clean Air Act are primarily urban areas where minority populations are disproportionately high.¹³⁰ Additionally, among those reasons cited for the continuing problem of lead poisoning in minority communities are that "federal efforts to create the necessary infrastructure to abate high-priority lead hazards from paint are still essentially at ground zero, and funding for abatement activities in low-income communities is grossly inadequate."¹³¹ Finally, reportedly ninety percent of farm workers in the United States are persons of color, and those workers are routinely exposed to pesticides in their work because EPA has generally been unable to implement—as mandated by the Federal Insecticide Fungicide and Rodenticide Act¹³²—the necessary protective regulations for a majority of pesticides covered by the law.¹³³

In all events, racial minorities have had little influence on either the lawmaking or priority-setting processes at any of the legislative, regulatory, or local enforcement levels.¹³⁴ They have not been well represented

1992, were 46% higher in communities with greater white populations, as measured against communities with greater-than-average minority populations; Resource Conservation and Recovery Act penalties 506% higher).

¹²⁸ *Id.* at S4 (empirical evidence suggesting that minority and low-income communities wait longer than white and wealthy communities for Superfund cleanup and that the disparity by race is greater than the disparity by income).

¹²⁹ See *Lead Poisoning Hearings*, *supra* note 12, at 4 (testimony of Dr. Robert Bullard describing how stringent city lead ordinance was "worthless" because of lack of enforcement in its application to lead smelter polluting minority community); Felicity Barringer, *In Capital, No.2 River Is A Cause*, WASH. POST, Dec. 1, 1991, at A24 (contrasting polluted waters of Anacostia River in poorer minority communities with cleaner waters of Potomac in wealthier, nonminority communities); Barnaby Dinges, *Blacks Hit Hardest by Fly Dumping Epidemic*, 19 CHICAGO REP. 1 (1990) ("Fly dumping—illegally dumping tons of waste from a moving truck—has reached epidemic proportions in black populated wards."). In a conversation this author had with EPA enforcement personnel in New York City, one attorney volunteered that the agency tended to react less quickly to alleged environmental violations in minority communities. EPA's regional office in San Francisco recently surveyed migrant labor camp drinking water systems and found "a higher noncompliance rate than for any other category of small water systems." USEPA Fact Sheet—Cultural Diversity and Environmental Equity—U.S. EPA Initiatives (Oct. 23, 1991) (copy on file with author).

¹³⁰ Elliott, *supra* note 37, at 9-10; Wernette & Nieves, *supra* note 72; see *supra* notes 70-73, and accompanying text.

¹³¹ *Lead Poisoning Hearings*, *supra* note 12, at 6 (testimony of Fred Krupp, Executive Director, Environmental Defense Fund).

¹³² 7 U.S.C. §§ 136-136y (1988).

¹³³ Ivette Perfecto & Baldemar Velasquez, *Farm Workers: Among the Least Protected*, EPA J., March/April 1992, at 13, 13-14; see also John P. Giasor, Note, *Pesticide Safety Regulation Under the Federal Insecticide, Fungicide and Rodenticide Act: Debacle at the Environmental Protection Agency*, 1 FORDHAM ENVTL. L. REP. 47 (1989) (criticizing as ineffective the implementation of the "Special Review" administrative procedure authorized by the Federal Insecticide, Fungicide and Rodenticide Act); WILLIAM H. RODGERS, JR., 3 ENVIRONMENTAL LAW: PESTICIDES AND TOXIC SUBSTANCES at xi (1988).

¹³⁴ Reilly, *supra* note 36, at 17 (debate proceeds without participation of representatives of the urban poor).

among the interest groups lobbying and litigating before governmental authorities on environmental protection issues. Nor have they been well represented, especially at the national level, within those governmental organizations actively involved in the relevant environmental processes. Their voices have not been heard in the mainstream environmental public interest organizations that participate in the policymaking debates and that, in the absence of governmental enforcement, are behind citizen suits filling the void. Traditional civil rights organizations have historically had little interest in, and have infrequently become involved with, environmental issues.¹³⁵ At the same time, mainstream environmental organizations have historically included few minorities in policymaking positions.¹³⁶ In 1990, this fact prompted several members of various civil rights organizations and minority groups to send a widely publicized letter to the national environmental public interest organizations charging them with being isolated from minority communities. According to the letter, none of the major environmental organizations was headed by a minority, and there were virtually no minorities within their professional staffs.¹³⁷

Minorities are likewise underrepresented in those parts of the national government that dominate environmental protection policymaking. The gains minorities have made in obtaining elective office are almost exclusively at the state and local level.¹³⁸ However, it is at the national level that environmental protection policy—including the allocation of its benefits and burdens—is largely determined by Congress, by those federal agencies responsible for statutory implementation, and by the federal courts of appeals through judicial review of agency decisions.¹³⁹ Very few minorities have been elected to Congress. Until this

¹³⁵ Bullard & Wright, *Environmentalism and the Politics of Equity*, *supra* note 15, at 22-23; Reilly, *supra* note 36, at 16; Paul Ruffins, *Black America: Awakening to Ecology*, WASH. POST, Dec. 24, 1989, at C1.

¹³⁶ Pat Bryant, *Toxics and Racial Justice*, SOC. POL'Y, Summer 1989, at 48; Paul Mohai, *Public Concern and Elite Involvement in Environmental-Conservation Issues*, 66 SOC. SCI. Q. 820, 821 (1985).

¹³⁷ Maura Dolan, *Race, Poverty Issues Grow Among Environmentalists*, L.A. TIMES, Apr. 21, 1990, at A1; Philip Shabecoff, *Environmental Groups Faulted for Racism*, S.F. CHRON., Feb. 1, 1990, at A2; see BULLARD, *DUMPING IN DIXIE*, *supra* note 15, at 4, 13; WEISBROD, *supra* note 23, at 118, 136, 139.

¹³⁸ There are, at the very least, higher percentages of black elected officials at the local level because of the emergence of black majority electoral districts. Whether, however, this increasing number of black elected officials has resulted in a concomitant increase in the interests of blacks being addressed in the political process is more questionable. See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1116-34 (1991).

¹³⁹ This is, of course, somewhat of an oversimplification. Delegations to state agencies of aspects of federal programs are permitted under most federal environmental laws, and states are otherwise assigned significant implementing responsibilities by some of those laws. The state implementation planning process under the Clean Air Act, the construction grants program and NPDES permitting program under the Clean Water Act, and the siting of hazardous and solid waste disposal and treat-

year, there had been no blacks in the Senate for more than a decade,¹⁴⁰ and only a small number of blacks are elected Representatives in the House.¹⁴¹ Moreover, almost none of these few representatives has long been a major player in congressional committees and subcommittees with jurisdiction, and thus influence, over environmental protection issues.¹⁴² Until relatively recently, they have not been especially active on environmental issues.¹⁴³

ment facilities under the Resource Conservation and Recovery Act are three obvious examples. In most instances, however, federal law establishes the general framework within which state and local agencies must comply, leaving little room for the adaptation of programs more acceptable to each community.

¹⁴⁰ Carol Mosely-Braun (D. Ill.) was elected to the U.S. Senate in 1992 and is the first black Senator since Ed Brooke of Massachusetts was defeated in 1978. Additionally, newly-elected Ben Nighthorse Campbell (D. Colo.) is the first Native American to serve in the Senate in more than 60 years. The District of Columbia elects two "Senators," but because the District is not a state, neither individual has formal senatorial status.

¹⁴¹ According to one survey, the number of black officeholders increased from 1469 to 6681 between 1970 and 1987. But in 1989, there were only 23 black members of Congress, representing 5.3% of the 435 members in the House (there were no black Senators). BULLARD, *DUMPING IN DIXIE*, *supra* note 15, at 31; *see generally* BLACK ELECTED OFFICIALS—A NATIONAL ROSTER (17th ed., 1988). 1 1991 CONGRESSIONAL STAFF DIRECTORY (Ann L. Brownson ed., 1991) (indicating that in 1991 there were 31 minority representatives in the House, with 26 being members of the congressional black caucus). Last year's elections, however, saw the number of blacks elected to the House of Representatives increase to 39 with the addition of 16 new members. Jeffrey L. Katz, *Growing Black Caucus May Have New Voice*, 51 CONG. Q. 5 (1993). Additionally, nine newly-elected Hispanic representatives increase total representation for this minority group to 19 (including delegates from Puerto Rico and the U.S. Virgin Islands), its largest ever. *See* Ines Pinto Alicea, *Hispanics Gain Members, Power*, 51 CONG. Q. 7 (1993).

¹⁴² For instance, during the first session of the 102d Congress, Representative Edolphus Towns (D. N.Y.) was a member of the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce, and also of the Subcommittee on Environment, Energy, and Natural Resources of the House Committee on Government Operations; and Representatives William J. Jefferson (D. La.) and Solomon P. Ortiz (D. Tex.), who is Hispanic, were members of the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries. Representative Craig A. Washington (D. Tex.) is currently the fourth-ranking member of the Subcommittee on Energy and Power, and also serves on the Subcommittee on Health and the Environment, both of the House Committee on Energy and Commerce. Additionally, Representative John Conyers (D. Mich.) is likely one of the most active minority members of Congress on environmental matters in his current capacity as chair of the House Subcommittee primarily responsible for legislation that would elevate EPA to a cabinet agency. Representative John Lewis (D. Ga.) has likewise begun to take a more active role on environmental issues. *See infra* note 143; 1 1991 CONGRESSIONAL STAFF DIRECTORY (Ann L. Brownson ed., 1991); *Key House Member's Inaction Raises Pessimism About EPA Cabinet Bill Changes*, INSIDE EPA, Feb. 28, 1992, at 11. Finally, such historical inaction may be changing as environmental justice concerns grow with the increasing black membership in Congress. For example, at least one newly-elected representative, Carrie Meek (D. Fla.), has become a member of the Subcommittee on Energy and Water Development of the House Appropriations Committee.

¹⁴³ *See* Henry Vance Davis, *The Environmental Voting Record of the Congressional Black Caucus*, in MICHIGAN CONFERENCE PROCEEDINGS, *supra* note 37, at 84-85. By contrast, their voting record appears to be quite favorable to conservation interests. According to a League of Conservation survey for the years 1980-86, the Congressional Black Caucus "had the highest average of support of conservation issues of any group surveyed." *Id.* at 81. Recent years have also witnessed

The same pattern of underrepresentation and lack of interest appears to be repeated within the federal agencies principally charged with implementing the federal environmental protection laws. These agencies include the EPA, Department of the Interior, National Oceanic and Atmospheric Administration, and, within the Executive Office of the President itself, the Council on Environmental Quality, Office of Management and Budget, and the Domestic Policy Office. For instance, within EPA there is an Office of Civil Rights, but that Office has traditionally been almost exclusively concerned with personnel issues. It has had virtually no ongoing programmatic responsibility regarding the implementation of any environmental protection laws within the agency's jurisdiction.¹⁴⁴ The number of minorities in policymaking positions at EPA is also reportedly small.¹⁴⁵

C. *Some Possible Explanations*

Commentators offer several possible explanations for the relative absence of minority participation in the formation of environmental policy. Deliberate exclusion and racial stereotyping are two possible causes. Another explanation is that minorities are relatively less interested in environmental protection issues and, accordingly, are less likely to participate in those processes by which environmental policies are formulated. For instance, opinion surveys taken of blacks reportedly suggest that they are less concerned about the environment and, even where concern does exist, are less likely to translate that concern into action di-

greater attention to environmental issues by minority members of Congress. In June 1992, Representative John Lewis (D. Ga.) introduced the Environmental Justice Act of 1992 (co-sponsored by then-Senator Al Gore), intended to require EPA consideration of environmental justice issues. *See* S. 2806, 102d Cong., 2d Sess. (1992) (introduced by Sen. Gore (D. Tenn.), 138 CONG. REC. S7489 (June 3, 1992)); H.R. 5286, 102d Cong., 2d Sess. (1992) (introduced by Rep. Lewis (D. Ga.), 138 CONG. REC. H4157 (June 4, 1992)). More recently, Representative John Conyers (D. Mich.), Chair of the House Committee on Government Operations, announced that he would hold hearings on "environmental racism." *See* Marianne Lavelle, *Discrimination Probe Planned*, NAT'L L.J., Sept. 28, 1992, at 1.

¹⁴⁴ As described earlier, *supra* pp. 117-20, EPA has responded to recent claims of "environmental injustice" by forming an Environment and Equity working group within the agency to determine how the agency might improve its decisionmaking in this regard. Members of EPA's Office of Civil Rights are actively participating in that process. This represents a significant expansion of that Office's mandate, which has been traditionally confined to narrow matters relating to personnel. In response to its own report on environmental equity, last year EPA created an Office of Environmental Equity within the agency.

¹⁴⁵ In an internal agency memorandum, a high ranking EPA official recently described how "[t]he Agency's minority profile and hiring history are . . . not very laudable. The lack of minorities, especially in positions of influence, almost certainly has contributed to the lack of insight into equity issues that the workgroup found to be characteristic of both EPA and our traditional constituency groups." *See* Hanley Memorandum, *supra* note 64. The memorandum further stated that "EPA has proven resistant to the generic rationale for minority hiring for over two decades, and it is not clear that the Reilly initiative [to promote such hiring] will change things in any fundamental way." *Id.*

rected at those issues.¹⁴⁶ This difference in attitude, if it exists, might be related to economic considerations. Faced with a choice between increased income or improved environmental quality, those with less income tend to vote in favor of the former.¹⁴⁷ To the extent that blacks have disproportionately less income, they may not be willing or able to promote restrictions that, while improving environmental quality, may adversely affect the availability of employment or increase personal expenditures.¹⁴⁸

Another proffered explanation is that because blacks and other minorities were historically excluded from many of the "public" opportunities to enjoy the natural environment, they may still feel socially unwelcome in those areas.¹⁴⁹ Having been effectively denied the opportunity to experience and enjoy parks, wildlife, wilderness, and scenic rivers, blacks are less likely to be concerned about those resources or to become politically involved in their protection.¹⁵⁰ In support of this theory, some commentators contend that more recent studies suggesting a greater concern among blacks about environmental issues can, in fact, be explained by the federal government paying greater attention to those urban environmental issues touching more directly on the lives of black americans, including the dangers of toxic and hazardous wastes.¹⁵¹

Finally, some commentators challenge altogether the premise that

¹⁴⁶ Stephen R. Kellert, *Urban American Perceptions of Animals and the Natural Environment*, 8 URB. ECOLOGY 209, 226 (1984) ("Urban blacks had significantly lower scores on every measure of knowledge, appreciation, interest, and concern for wildlife and the natural environment. Moreover, these differences remained significant and sometimes even increased after controlling for socioeconomic status, rural background, and farming occupation among the respondents' parents."); Dorceta E. Taylor, *Blacks and the Environment: Toward an Explanation of the Concern and Action Gap Between Blacks and Whites*, 21 ENV'T & BEHAV. 175, 176-80 (1989).

¹⁴⁷ Robert Deacon & Perry Shapiro, *Private Preference for Collective Goods Revealed Through Voting on Referenda*, 65 AM. ECON. REV. 943 (1975).

¹⁴⁸ Bullard & Wright, *Environmentalism and the Politics of Equity*, *supra* note 15, at 22-23; Eric J. Dolin, *Black Americans' Attitudes Toward Wildlife*, 20 J. ENV'T'L EDUC. 17, 19 (1988); Paul Ruffins, *Blacks Suffer Health Hazards Yet Remain Inactive on Environment*, L.A. TIMES, Aug. 27, 1989, at A3; UCC STUDY, *supra* note 53, at xii. Indeed, commercial interests have even exploited this factor to defeat environmental initiatives. A business association opposed to a mandatory beverage recycling law in Washington, D.C., reportedly targeted blacks in advertisements that suggested that wealthy whites were behind the law, which would impose disproportionate burdens on blacks. See Paul Ruffins, *No Deposit, No Return: How the Politics of Race Defeated the DC Bottle Bill*, RACE, POVERTY & ENV'T, Summer 1990, at 9.

¹⁴⁹ Dolin, *supra* note 148, at 19; Taylor, *supra* note 146, at 186-89. A somewhat related explanation is that it might be because many minorities associate environmental organizations with the "establishment" that "is seen by many as condoning racism," Julian Agyeman, *Ethnic Minorities—An Environmental Issue?*, 9 ECOS 2, 3 (1988), and, in some instances, even promoting racism by endorsing environmental protection measures that have racially exclusionary effects. See *supra* note 82.

¹⁵⁰ Taylor, *supra* note 146, at 175, 176-80, 186-89, 192-93; see also Freeman, *supra* note 36, at 270-72.

¹⁵¹ Judi A. Caron, *Environmental Perspectives of Blacks: Acceptance of the "New Environmental Paradigm"*, 89 J. ENV'T'L EDUC. 21, 25-26 (1989).

minorities, including blacks, have ever been less interested in environmental issues.¹⁵² Instead of evidencing a lack of concern, these commentators suggest that the lack of minority participation in environmental issues reflects two other variables that have stifled the transformation of that concern into social activism:¹⁵³ a shortage of available resources (financial and political), and a lack of personal confidence in one's ability to induce social change. Both are disproportionately found in environmental activists.¹⁵⁴

This generic political access problem is exacerbated in the environmental law context because of the heightened difficulty of gaining access to the various environmental protection debates that take place within Congress, agencies, and the courts. These debates are invariably highly technical and complex. Those who are either unwilling or unable to expend the resources to obtain the expertise necessary to participate in the debate are effectively excluded from it.¹⁵⁵

Many within minority communities may simply conclude that their limited political and legal resources need to be devoted to other, more pressing issues that compete for their time and attention (such as education, employment, and housing).¹⁵⁶ Indeed, for many minorities, these are the more important "environmental issues" ignored by mainstream environmental groups. Not surprisingly, those who reside and work in

¹⁵² Of course, the mere appearance of little or no racial minority interest is likely, by itself, to contribute to the problem. Public and private officials trying to decide where to locate an industrial or waste treatment, storage or disposal facility may act in part on the mere appearance that racial minorities possess less environmental consciousness and are more concerned about economic growth. BULLARD, *DUMPING IN DIXIE*, *supra* note 15, at 34-36; Bullard & Wright, *Environmentalism and the Politics of Equity*, *supra* note 15, at 25. The path of least resistance is more often the one selected when, as is the case for waste disposal facilities, public and private officials are seeking to site an unpopular activity. See BULLARD, *DUMPING IN DIXIE*, *supra* note 15, at 4, 33; Rosemari Mealy, *Charles Lee on Environmental Racism . . . "Clean Environment Without Social Justice?"*, in PANOS INSTITUTE, *WE SPEAK FOR OURSELVES: SOCIAL JUSTICE, RACE AND ENVIRONMENT* 8, 10 (Dana Alston ed., 1990).

¹⁵³ Paul Mohai, *Public Concern and Elite Involvement in Environmental-Conservation Issues*, 66 *SOC. SCI. Q.* 821, 836 (1985).

¹⁵⁴ *Id.* at 823-24, 836-37.

¹⁵⁵ See Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 *STAN. L. REV.* 1529, 1554 (1989); Peter C. Yeagar, *Structural Bias in Regulatory Law Enforcement: The Case of the U.S. Environmental Protection Agency*, 34 *SOC. PROBS.* 330 (1987); see also Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 *COLUM. J. ENVTL. L.* 171, 171 (1988) (characterizing current regulatory system as being dominated by "technocratic mumbo jumbo"); Michael J. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 *YALE L.J.* 1651, 1660 (1988); Peter H. Shuck, *Regulation, Non-Market Values, and the Administrative State: A Comment on Professor Stewart*, 92 *YALE L.J.* 1602, 1612 (1983).

¹⁵⁶ See SYDNEY HOWE, *THE POTOMAC INSTITUTE, ENVIRONMENT AND EQUITY* 5 (1976) ("It is a sick society that can beat and murder black people in the streets, butcher thousands of people in Viet Nam, spend billions of dollars on arms and destroy mankind, and then come to the conclusion that pollution is America's number one problem.") (quoting an unidentified member of the Black Panther Party).

polluted urban areas place greater priority on the urban and industrial environment than do those in the environmental community who have tended to influence statutory priorities.¹⁵⁷ These urban residents and workers tend to identify "environmental" progress with improvements in housing, transportation, and air quality.¹⁵⁸ As one minority environmentalist put it, "[i]f you're only concerned with clean streams and dolphins and whales, then that limited view of environmentalism smacks people of color in the face. . . . We've been working on issues that affect our environment—health care, lead in public housing, gang violence."¹⁵⁹

IV. PURSUING ENVIRONMENTAL JUSTICE

The pursuit of "environmental justice" within the context of environmental law is necessarily problematic because to define the issue exclusively in those terms misapprehends the nature of the problem in the first instance. The distributional inequities that appear to exist in environmental protection are undoubtedly the product of broader social forces. To be sure, features endemic to the ways in which environmental protection laws have historically been fashioned may have exacerbated the problem in the environmental context. But the origins of the resulting distributional disparities do not begin, nor will they end, with reforming either the structure of environmental protection decisionmaking or the substance of environmental law itself.

Hence, while a series of measures within the environmental law arena have the potential for redressing or, at least reducing, the existing distributional inequities, their undertaking cannot be to the exclusion of more broadly directed actions. Distributional inequities are very likely rooted in past and present racial hostility, racial stereotypes, and other forms of race discrimination. The vestiges of past discrimination may be the greatest factor contributing to such disparities because of the self-perpetuating impact of such discrimination on racial minority economic

¹⁵⁷ Reportedly, a survey in 1989 of 248 CEOs and their equivalent in mainstream environmental groups showed that their interests lay primarily in the areas of conservation and preservation, with the greatest amount of their resources being devoted to fish and wildlife and public land management. See Dorceta Taylor, *Can the Environmental Movement Attract and Maintain the Support of Minorities?*, in MICHIGAN CONFERENCE PROCEEDINGS, *supra* note 37, at 41.

¹⁵⁸ Robert Gottlieb & Helen Ingram, *The New Environmentalists*, PROGRESSIVE, Aug. 1988, at 14.

¹⁵⁹ Safir Ahmed, *Building A Rainbow Coalition*, RIVERFRONT TIMES, Nov. 6-12, 1991, at 11 (quoting delegate at First National People of Color Environmental Leadership Summit); Safir Ahmed, *Seeing Red Over the Green Movement*, RIVERFRONT TIMES, Nov. 6-12, 1991, at 10 (quoting Dana Alston, Director, Panos Institute) ("We refuse the narrow definition of environmentalism. . . . It's not just ancient, old-growth forests. It is not just the spotted owl and other endangered species. Our communities and our people are an endangered species, too."); Paul Ruffins, *Environmental Commitment as if People Didn't Matter*, in ENVIRONMENTAL RACISM, *supra* note 9, at 51, (because "environment" is seldom defined as the places where people live and work[, there are] large holes in the way we deal with environmental regulation, the way we allocate money, and the way we establish environmental priorities.").

and political power. These vestiges effectively deny minorities the autonomy to choose, either by purchase or through the ballot, the level of environmental quality that they will enjoy or the amount of pollution that they will tolerate.

With that significant, threshold caveat, important reforms can nevertheless be implemented within the existing environmental law framework. These reforms could both ameliorate the inequities currently resulting from those laws and, more importantly, provide a much-needed impetus to those seeking broader social reforms. These reforms include: (1) providing environmental policymakers with a better understanding of the nature and scope of the problem; (2) litigating the associated civil rights issues as civil rights issues; (3) rethinking the substance of environmental law to take better account of distributional concerns; (4) reforming the structure of environmental policymaking to promote minority involvement and interests; and (5) reclaiming the common ground of environmentalism and civil rights. Each reform is discussed below.

A. *Providing A Better Understanding*

Both those who believe that distributional inequities exist in environmental protection, and those who remain skeptical, should be able to join in one common recommendation: the need for better empirical investigation. To date, there have been relatively few technically rigorous studies addressing the distributional issue.¹⁶⁰ Moreover, those that purport to be, such as the UCC study, advance significant conclusions but not with especially high levels of statistical confidence.¹⁶¹ Furthermore, a separate study casts some doubt on the UCC's central finding concerning the role that race plays in the distribution of environmental benefits and burdens. This study concludes that it is the ability of a community to engage in collective action, rather than either race or income, that is the statistically significant factor affecting facility decisions to expand existing hazardous waste processing capacity.¹⁶²

EPA currently collects massive amounts of information relating to environmental pollution and quality. The agency needs to correlate this data with information already available on race, ethnicity, and socioeconomic status. One obvious source of such data is the toxic release inventory, collected pursuant to the Emergency Planning and Community

¹⁶⁰ Ken Sexton, *Cause for Immediate Concern: Minorities and the Poor Clearly are More Exposed*, EPA J., Mar./Apr. 1992, at 38, 39 (author is Director of EPA's Office of Health Research) ("[T]here is a paucity of data relating class and race to specific environmental pollutants and associated health effects.").

¹⁶¹ The UCC findings were based on statistics with only a 90% confidence level. *See supra* note 56.

¹⁶² *See* Hamilton, *supra* note 56. Of course, race is not unrelated to collective action potential.

Right-to-Know Act.¹⁶³ This inventory provides an authoritative accounting of all toxic releases throughout the country.¹⁶⁴ By joining this data with existing census information, a nationwide correlation between toxic releases and race, ethnicity, and socioeconomic status should not be difficult to derive.¹⁶⁵ One pending congressional proposal that would help in this regard would require that the National Academy of Sciences study the extent to which "minority and low-income populations in the United States are disproportionately impacted by environmental health hazards" and identify the extent to which existing Federal environmental programs "adequately address the priority environmental needs of such minority and low-income populations" ¹⁶⁶

To be sure, distinguishing the effects of socioeconomic status from race will not be easy. Those two variables are themselves closely intertwined for the simple reason that the socioeconomic status of minorities is plainly tied to their racial identity. And, as previously discussed, there are a host of secondary factors ranging from diet, job-related stress, and cultural practices that are likely to affect the degree of environmental health-related risk.¹⁶⁷

The need for "better understanding" should not, however, be confined to formal empirical investigation. It must also include efforts aimed at increasing awareness among both the general public and policymakers about the potential for, and impact of, distributional inequities. As described by one minority environmentalist, who warned against addressing the problem by simply including more minority representation, "[t]here is a need for diversity not only in the makeup of the organizations, but also in how these [environmental] issues are looked at. . . . For environmental groups to consider issues like wetlands, global warming, and wilderness protection as being the only environmental issues flies in the face of reality."¹⁶⁸

B. *Litigating The Civil Rights Issue*

Litigation provides another medium for addressing the distributional issue. Two basic litigation strategies are available. First, an administrative or judicial complaint could be filed on behalf of a minority group for the purpose of preventing the siting of an unwanted facility in

¹⁶³ 42 U.S.C. §§ 11001-11050 (1988); *see supra* note 63.

¹⁶⁴ Cynthia H. Harris & Robert C. Williams, *Research Directions: The Public Health Service Looks at Hazards to Minorities*, EPA J., Mar./Apr. 1992, at 40.

¹⁶⁵ A third-year law student at Washington University in St. Louis recently undertook such an analysis in focusing on the relative amounts of toxics released in predominantly black and predominantly white neighborhoods in St. Louis. He found that substantially higher amounts of toxics were released per capita in the black neighborhoods. *See supra* note 63.

¹⁶⁶ H.R. REP. NO. 428, 101st Cong., 2d Sess. 17 (1990) (quoting H.R. 3847).

¹⁶⁷ Sexton, *supra* note 160, at 38-39.

¹⁶⁸ David Hahn-Baker, *The Need for Cultural Diversity and Environmental Equity*, in ENVIRONMENTAL RACISM, *supra* note 9, at 5, 6, 8.

its community, and the basis of the lawsuit could be the facility's non-compliance with an applicable environmental statute. The possibility of distributional inequities would not be directly relevant to the substantive merits of the administrative challenge or lawsuit. It would simply be the reason why the lawsuit was necessary and why, for example, a minority community should be entitled to a greater share of enforcement resources. Alternatively, the distributional inequities could provide the substantive basis for the lawsuit by supporting a civil rights cause of action. In other words, the cause of action would itself derive from the fact that a distributional inequity exists.

To date, minority plaintiffs appear to have favored the civil rights approach. However, virtually none of those suits has been successful. This is largely because existing equal protection doctrine, which has been the focal point of most lawsuits, has not proved hospitable to the kinds of arguments upon which environmental justice claims have depended. For this reason, federal and state environmental laws may offer the best opportunity for minority plaintiffs to ameliorate environmental inequities. Many of these statutes impose a panoply of procedural and substantive limitations on those wishing to site polluting facilities, and many confer private attorney general status on citizens aggrieved by actions that violate applicable statutory limitations. Plaintiff organizations with the necessary resources have consequently been quite successful in resisting environmentally undesirable facilities under these environmental statutes.¹⁶⁹ To the extent that such legal and technical resources are made available to minority communities, those statutes could likewise provide a basis for considerable relief from distributional inequities.¹⁷⁰

¹⁶⁹ See e.g., Marianne Lavelle, *Plant Foes Light Legal Fires*, NAT'L L.J., Feb. 8, 1993 at 1; Gerard, *supra* note 119, at 57-88.

¹⁷⁰ For instance, minority plaintiffs represented by the California Rural Legal Assistance Foundation successfully invoked the California Environmental Quality Act (CEQA) to persuade a state trial court to set aside a county board decision to permit the construction and operation of a hazardous waste incinerator in a predominantly minority community. See *El Pueblo para el Aire y Agua Limpio v. County of Kings*, [1991] 22 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,357 (Cal. App. Dep't Super. Ct. 1991). The court ruled that the county's "Final Subsequent Environmental Impact Report" did not satisfy CEQA's requirements because its analysis of air quality impacts and mitigation, agricultural impacts, cumulative air quality impacts, and project alternatives were all inadequate. *Id.*, slip op. at 2-10. Although most of the court's ruling was thus based on technical deficiencies unrelated to environmental inequity per se, the court's further ruling that the county's failure to provide a spanish translation of its formal environmental analysis violated CEQA's public participation requirement is directly related to equity concerns. *Id.*, slip op. at 10. Because almost 40% of the residents of the city in which the proposed incinerator was to be located are monolingual in spanish, the court reasoned, the absence of such a translation deprived these residents of an opportunity for "meaningful involvement" in the decisionmaking process. *Id.* Another successful environmental case brought on behalf of minority residents was *Houston v. City of Cocoa*, No. 89-92-CIV-ORL-19 (M.D. Fla. Dec. 22, 1989), in which residents of a historically black neighborhood invoked provisions of the National Environmental Policy Act, 42 U.S.C. § 4331 (1988), and the National Historic Preservation Act, 16 U.S.C. § 470 (1988), to protect the community from unwanted commercial development. See Karl S. Coplan, *Protecting Minority Communities with Environmental, Civil*

There is nonetheless substantial reason for continued emphasis on civil rights litigation aimed at redressing distributional inequities in environmental protection. Burdens of proof are difficult to overcome under existing doctrine, but if litigation efforts were to receive additional resources, some isolated successes might be achievable. In addition, the cases brought so far have relied on only a few legal theories. Several promising theories have not yet been fully explored and warrant greater attention.

Perhaps more importantly, the real value of these lawsuits extends beyond their ability to obtain a favorable decision in a given case. Indeed, the symbolic value of filing the lawsuit is itself substantial. The mere filing of a formal complaint provides a very powerful and visible statement by minorities regarding their belief that distributional inequities exist in environmental protection. The publicity that frequently surrounds the complaint's filing enhances public awareness of these concerns and thereby serves an important educational function. Should, moreover, a victory on the merits be achieved, the benefits could be tremendous. For many within the minority community it is extremely important that a formal judicial decision be obtained confirming their belief that environmental protection presents its own unique civil rights issues.

1. Equal Protection and the Problem of Discriminatory Intent.— Equal protection claims have been the principal focus of most environmental justice lawsuits brought to date.¹⁷¹ One of the earliest cases raising an environmental justice claim in the siting context, *Harrisburg Coalition Against Ruining the Environment v. Volpe*,¹⁷² was a lawsuit seeking to enjoin construction of two major highways through a public park. Brought by minority residents of a neighborhood in Harrisburg, Pennsylvania, the plaintiffs argued that the proposed highways denied "black residents of equal opportunities to housing and recreation in violation of the Fourteenth Amendment."¹⁷³ More particularly, the plaintiffs alleged that the siting of the highways through a park "was partly motivated by an awareness that the predominant use of the [p]ark was by

Rights Claims, N.Y. L.J., Aug. 20, 1991, at 1. Another case currently pending in federal district court in Tennessee provides an example of a challenge to a municipal siting decision grounded, inter alia, on alleged violations of federal and state hazardous waste laws. See Complaint at 8, 11-12, *Bordeaux Action Comm. v. Metropolitan Gov't of Nashville*, No. 90-0214 (M.D. Tenn. filed Mar. 12, 1990). Finally, a group of black residents in Wallace, Louisiana, recently stopped the siting of a \$700 million wood, paper, and rayon plant in their community. See Suro, *supra* note 12.

¹⁷¹ See generally Godsil, *supra* note 14, at 410-16 (describing two cases raising equal protection challenges against municipalities for discriminatory solid waste landfill sitings in which the courts held the evidence insufficient to establish that racial discrimination motivated the challenged official decisions).

¹⁷² *Harrisburg Coalition Against Ruining the Env't v. Volpe*, 330 F. Supp. 918 (M.D. Pa. 1971).

¹⁷³ *Id.* at 921. The plaintiffs also claimed violations of the "Civil Rights Acts of 1871 and 1964." *Id.*

the black citizens of the City.”¹⁷⁴ The court rejected the constitutional claim, finding insufficient evidence of either discriminatory motivation or results.¹⁷⁵

Courts have since rejected similar minority plaintiffs’ equal protection claims, but have done so *notwithstanding* showings of “discriminatory results” rather than because no such showing was made. In 1976, the U.S. Supreme Court made it considerably more difficult for civil rights plaintiffs to prevail on equal protection grounds by requiring that such litigants establish a “discriminatory intent” or “purpose” underlying the challenged action.¹⁷⁶ This means that plaintiffs must show that race “has been a motivating factor in the decision,” and that the decisionmaker chose or reaffirmed a given course of action “because of” its adverse effect on the group.¹⁷⁷ While some courts have diminished the harshness of this requirement by allowing for a burden shifting once disparate treatment is shown, the defendant can overcome such a showing by articulating a legitimate, nondiscriminatory motive for its behavior, which the plaintiff can in turn overcome only by a showing of mere pretext.¹⁷⁸

As commentators have long contended, the practical effect of the required “discriminatory intent” element is devastating to most civil rights claims because of the inordinate difficulty of proving the subjective, motivating intent of a decisionmaker.¹⁷⁹ In addition, where many of the existing distributional inequities are more proximately traceable to the self-perpetuating vestiges of past discrimination, the equal protection

¹⁷⁴ *Id.* at 926.

¹⁷⁵ *Id.* at 926-27.

¹⁷⁶ *Washington v. Davis*, 426 U.S. 229, 238-48 (1976).

¹⁷⁷ *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-66 (1977); *see Godsil, supra* note 14, at 409-10.

¹⁷⁸ Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 861-63 (1991). On the other hand, it is not a legitimate nondiscriminatory motive to rely on a stereotypical judgment about a racial class, even if such an inference might be supported by rational statistics. For instance, government officials or industrial owners cannot claim that their neutral motive was the desire to site the facility in a location where people were less likely to complain or less likely to mount political opposition, if their judgment that such was the case in a particular area was based on the race of the residents. It is no defense that such an inference might be supported by a rational statistical inference. Such a judgment is an impermissible racial classification. *See id.* at 862 (citing *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1531 (7th Cir. 1990)).

¹⁷⁹ Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 38, 114-17 (1977); Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978); Randall L. Kennedy, *Competing Conceptions of “Racial Discrimination”: A Response to Cooper and Graglia*, 14 HARV. J.L. & PUB. POL’Y 93, 98 (1991); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989); *cf.* Elizabeth Bartholet, *Proof of Discriminatory Intent Under Title VII: United States Board of Governors v. Aikens*, 70 CAL. L. REV. 1201 (1982). There are, of course, exceptional cases where the evidence is somehow fortuitously available to make the required showing. *See Dowdell v. Apopka*, 511 F. Supp. 1375 (M.D. Fla. 1981) (disparities in water, stormwater drainage in black/white neighborhoods motivated by discriminatory intent).

test simply cannot be met. For instance, a community may become a "minority community" only after a hazardous waste facility is located there, because of the decrease in property values caused by that siting.

A case decided just a few years after the Supreme Court's imposition of the "discriminatory intent" requirement illustrates the pitfalls of reliance on equal protection litigation theories. In *Bean v. Southwestern Waste Management Corp.*,¹⁸⁰ minority plaintiffs sought to enjoin the siting of a solid waste disposal facility within their community in Houston, Texas. The claim was brought, pursuant to 42 U.S.C. 1983, against the state agency that issued a permit for the facility and against the operators of the facility itself, and alleged an equal protection violation. The approved solid waste site was within 1700 feet of a predominantly black high school with no air conditioning and was also close to a predominantly black residential neighborhood. Plaintiffs' claim rested on two theories: (1) that the state agency's "approval of the permit was part of a pattern or practice by it of discriminating in the placement of solid waste sites,"¹⁸¹ and (2) that the state agency's "approval of the permit, in the context of the historical placement of solid waste sites and the events surrounding the application, constituted discrimination."¹⁸²

The district court denied the plaintiff's motion for a preliminary injunction,¹⁸³ and the complaint was ultimately dismissed¹⁸⁴ on the ground that the plaintiffs had failed to prove that the decision to grant the permit was attributable to an intent to discriminate on the basis of race.¹⁸⁵ While the court commented that some of the statistical data "at first blush, looks compelling,"¹⁸⁶ it ultimately concluded that the data was not sufficient to establish discriminatory intent. The size of the census tracts made it difficult to show that the approved sites were located in minority neighborhoods. Notably, while the census tracts encompassed predominantly white populations (thus undermining the discrimination charge), the approved sites were specifically located in minority neighborhoods within those larger census tracts.¹⁸⁷ However, the small

¹⁸⁰ 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without op.*, 782 F.2d 1038 (5th Cir. 1986).

¹⁸¹ *Id.* at 677.

¹⁸² *Id.* at 678.

¹⁸³ The judge who first denied plaintiff's motion for a preliminary injunction went out her way, however, to comment on the potential strength of plaintiff's claim of disparate impact and to suggest how plaintiffs might establish their entitlement to relief in the subsequent permanent injunction hearing. That same judge, who is a minority, was not the judge who later presided over the permanent injunction hearing. According to the lawyer who represented the plaintiffs in *Bean*, the transfer occurred shortly before the hearing. Linda McKeever Bullard, Remarks at the Proceedings of the First National People of Color Environmental Leadership Summit (Oct. 1991) (notes available from author).

¹⁸⁴ The court initially denied the defendants' motion to dismiss, providing the plaintiffs with an opportunity to proceed with discovery. 482 F. Supp. at 680.

¹⁸⁵ *Id.* at 677-80.

¹⁸⁶ *Id.* at 678.

¹⁸⁷ *Id.* at 677.

number of prior solid waste sites made it difficult to draw statistical inferences,¹⁸⁸ and the location of the sites could be linked to the location of industry.¹⁸⁹

Not long after *Bean*, the United States District Court for the Eastern District of North Carolina, in *NAACP v. Gorsuch*,¹⁹⁰ rejected on similar grounds a constitutional challenge to the proposed siting of a PCB disposal facility. The plaintiffs in this class action alleged that the fact that the county in which the facility would be located “has the highest percentage (at least 63.7%) of minority residents of any county in North Carolina was at least one factor in deciding to place the PCB dump there.”¹⁹¹ The district court denied the plaintiffs’ request for preliminary injunctive relief, concluding that there was “little likelihood that plaintiffs will prevail on the merits.”¹⁹² According to the court, “[t]here is not one shred of evidence that race has at any time been a motivating factor for any decision taken by any official—state, federal or local—in this long saga.”¹⁹³

Minority plaintiffs’ claims in Georgia met a similar fate in 1989. In *East Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb County Planning & Zoning Commission*,¹⁹⁴ the United States District Court for the Middle District of Georgia rejected an equal protection challenge to a local zoning board decision to permit the location of a privately owned landfill in a predominately black community. The court concluded that the plaintiffs’ evidence of disparate impact was inadequate because it relied heavily on decisions made by local authorities other than the zoning board, and because there was no evidence of “improper racial animus.”¹⁹⁵ The Eleventh Circuit affirmed.¹⁹⁶

Finally, and even more recently, the United States District Court for the Eastern District of Virginia, in *R.I.S.E. v. Kay*, rejected an equal protection challenge to the siting of a regional landfill in an area populated primarily by blacks.¹⁹⁷ The court agreed that the county’s siting of landfills over the past twenty years had had a disproportionate impact on racial minority communities¹⁹⁸ but, relying on *Arlington Heights v. Met-*

¹⁸⁸ *Id.* at 678 (“[T]here are only two sites involved here. That is not a statistically significant number.”).

¹⁸⁹ *Id.* at 679 (“But those sites, the Assistant Attorney General argues persuasively, are located in the eastern half of the city because that is where Houston’s industry is, not because that is where Houston’s minority population is.”).

¹⁹⁰ No. 82-768-CIV-5 (E.D.N.C. Aug. 10, 1982).

¹⁹¹ *Id.*, complaint at 2. The plaintiffs also raised a Title VI claim based on the allegedly adverse effects of the PCB facility on minority property values. *Id.* at 12.

¹⁹² *Id.*, slip op. at 9.

¹⁹³ *Id.* at 9-10 n.8.

¹⁹⁴ 706 F. Supp. 880 (M.D. Ga.), *aff’d*, 896 F.2d 1264 (11th Cir. 1989).

¹⁹⁵ *Id.* at 885-87.

¹⁹⁶ 896 F.2d 1264 (11th Cir. 1989).

¹⁹⁷ *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991), *aff’d*, 977 F.2d 573 (4th Cir. 1992).

¹⁹⁸ The court examined the racial composition of both the locations of the proposed, and three

*ropolitan Housing Development*¹⁹⁹ and *Washington v. Davis*,²⁰⁰ ruled that a showing of disproportionate impact is not enough; to prevail the plaintiff must go further and show discriminatory intent.²⁰¹ The Fourth Circuit affirmed.²⁰²

The existing case law, therefore, does not give minority plaintiffs much reason to be optimistic about their likelihood for successfully challenging particular actions or decisions based on an equal protection theory. What is even more striking about the uniformity of these rulings, however, is that they contrast quite sharply with decisions in a closely analogous area where courts have been far more receptive to equal protection claims. Specifically, these other cases have involved the disparate provision of municipal services. In that context, some federal courts have more readily inferred discriminatory intent based on the government's knowledge of disparate impacts stemming from the provision of governmental services.²⁰³ Theoretically, there is no obvious reason why those two types of cases should be treated differently by the courts. What is necessary to establish discriminatory intent should be the same whether the stakes are the benefits of municipal services or the burdens of undesirable environmental cleanup facilities such as landfills. One likely reason for this disparity in the case law may be that the judiciary perceives significant differences in the harm-shifting implications that arise with the type of relief sought in each kind of case.

When municipal services are at stake, the problem can seemingly be remedied by providing better or more services to those bringing the action. Significantly, there is not an immediate perception that the parties are involved in a zero-sum game where winners and losers must necessarily offset each others' gains and losses. Raising services for one group does not, in all likelihood, mean that the services of others will be compromised.²⁰⁴ However, where the question is how environmental risks

previously sited, landfills in the county, which has a population of approximately 50% black and 50% white. The court found that 100%, 95%, and 100% of the residents living in the immediate vicinity of the three previous sites were black, and that 64% of the residents within a half-mile radius of the proposed site were black. *Id.* at 1148.

¹⁹⁹ 429 U.S. 252 (1977).

²⁰⁰ 426 U.S. 229 (1976).

²⁰¹ 768 F. Supp. at 1149. The court also concluded that, notwithstanding the disproportionate impact on black communities, a "[c]areful examination of the administrative steps taken by the Board of Supervisors . . . reveals nothing unusual or suspicious. To the contrary, the Board appears to have balanced the economic, environmental, and cultural needs of the County in a responsible and conscientious manner." *Id.* at 1149-50.

²⁰² 977 F.2d 573 (4th Cir. 1992).

²⁰³ See *Ammons v. Dade City*, 783 F.2d 982 (11th Cir. 1986); *Dowdell v. City of Apopka*, 698 F.2d 1181 (11th Cir. 1983); *Baker v. City of Kissimmee*, 645 F. Supp. 571 (M.D. Fla. 1986). All three of these cases, and how the courts inferred the requisite element of discriminatory intent based on government official knowledge of existing disparities in municipal services, are discussed in *Godsil*, *supra* note 14, at 416-20.

²⁰⁴ Of course, to the extent that government revenues are fixed, this may not be true. But it is the

are to be distributed or redistributed, a court is more likely to perceive the necessary tradeoffs. In short, the risks must go somewhere. Under these circumstances, courts seem far less willing to invoke the equal protection clause to dictate to local government how harms such as environmental risks must be redistributed in a community, perhaps because the redistribution would so directly implicate the quality of the environment enjoyed by those in the community wielding great political and economic influence.²⁰⁵ Hence, the success of civil rights litigation for the pursuit of environmental justice will likely turn not just on whether attempted theories avoid the doctrinal burdens posed by equal protection, but also on whether the courts are less troubled by (or at least less focused on) the harm-shifting implications of the judicial relief being sought.

2. *Title VI of the Civil Rights Act: The Search for Federal Funds to Avoid the Intent Limitation.*—One option not yet well explored by civil rights plaintiffs in the environmental context is Title VI of the Civil Rights Act of 1964. Title VI provides that: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²⁰⁶

The principal advantage of Title VI over equal protection is that courts have not required a showing of discriminatory intent in the Title VI context; disparate impact has been enough. Hence, in *Lau v. Nichols*,²⁰⁷ where non-English-speaking Chinese students had allegedly been deprived of equal educational opportunities, the Supreme Court concluded that Title VI had been violated because of the discriminatory effect of the challenged school policies “even though no purposeful design is present.”²⁰⁸ Although the Court’s subsequent ruling in *Regents of University of California v. Bakke*²⁰⁹ casts some doubt on the continuing validity of this aspect of *Lau*,²¹⁰ the Court later reaffirmed, in *Guardians*

judicial perception of the practical consequences, rather than the actual consequences, that likely explain the differences in judicial approach.

²⁰⁵ Cf. Derrick A. Bell, Jr., *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 10 (1985) (“effective remedies for harm attributable to discrimination in society in general will not be granted to blacks if that relief involves a significant cost to whites.”).

²⁰⁶ 42 U.S.C. § 2000d (1988); see generally Charles F. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining “Discrimination”*, 70 GEO. L.J. 1 (1981) (discussing interpretations of Title VI and the role of regulatory agencies in effecting its purposes).

²⁰⁷ 414 U.S. 563 (1974).

²⁰⁸ *Id.* at 568.

²⁰⁹ 438 U.S. 265 (1978).

²¹⁰ See *id.* at 318-19 (opinion of Justice Powell), 351-52 (opinion of Justice Brennan, joined by Justices White, Marshall, and Blackmun, concurring in part and dissenting in part); see generally CHARLES F. ABERNATHY, CIVIL RIGHTS CONSTITUTIONAL LITIGATION—CASES AND MATERIALS 516-19 (2d ed. 1992) (discussing the opinions in *Bakke* and analyzing their treatment of the discriminatory effects test set out in *Lau*).

Ass'n v. Civil Service Commission,²¹¹ that discriminatory intent is not required under Title VI where that had been the view historically endorsed by applicable federal agency regulations implementing the statutory mandate. Notably, EPA's Title VI regulations embrace a discriminatory *effects* test.²¹² It is also well settled that Title VI provides an implied private right of action on behalf of individuals who have suffered discrimination deemed unlawful by Title VI.²¹³

There are, however, two limitations to Title VI. Although each is significant, Title VI's reach in the environmental protection arena remains potentially great. The first limitation is that Title VI's nondiscrimination mandate applies only to "any program or activity receiving Federal financial assistance."²¹⁴ Thus, while covering all federal agency activities, nonfederal actions are within Title VI's mandate only when a sufficient federal financial nexus can be established. Federal financial assistance for environmental protection is extensive, however, particularly assistance to state governments. Virtually all federal environmental laws, including those dealing with hazardous waste,²¹⁵ toxic substances,²¹⁶ water pollution control,²¹⁷ and clean air²¹⁸ provide funding to state programs. These state programs make many of the decisions that, when not initiated by the federal government, effectively determine the distribution of benefits and burdens from environmental protection at the state and local level. In 1986, for example, federal grants to state governments made up forty-six, thirty-three, and forty percent of the state budgets for air, water, and hazardous waste programs, respectively.²¹⁹

²¹¹ 463 U.S. 582, 584 & n.2 (1983), *cert. denied*, 463 U.S. 1228 (1983).

²¹² 40 C.F.R. § 7.35 (1991).

²¹³ 463 U.S. at 593-95.

²¹⁴ 42 U.S.C. § 2000d (1988).

²¹⁵ Both the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. II 1990), and the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1988 & Supp. II 1990) offer large amounts of federal monies. CERCLA authorizes expenditures for the cleanup of inactive and abandoned hazardous waste sites. *See* 42 U.S.C. §§ 9604, 9611 (1988 & Supp. II 1990). RCRA provides substantial financial assistance to states. *See* 42 U.S.C. §§ 6931 (assistance for "the development and implementation of authorized State hazardous waste programs"), 6947-6948 (assistance for development and implementation of federally approved state solid waste management plans), 6949 (assistance to rural communities for solid waste management facilities) (1988 & Supp. II 1990).

²¹⁶ Toxic Substances Control Act, 15 U.S.C. § 2627 (1988) (authorizing "grants to States for the establishment and operation of programs to prevent or eliminate unreasonable risks within the States to health or the environment which are associated with a chemical substance or mixture and with respect to which the Administrator is unable or is not likely to take action under this chapter").

²¹⁷ Clean Water Act, 33 U.S.C. §§ 1252(c) (comprehensive programs), 1254(b)(3), (g)(1) & (g)(3) (research, investigation, training, and information), 1255 (research and development), 1256 (for pollution control programs), 1259 (training grants and contracts), 1281(g) (publicly owned treatment works), 1281(h) (privately owned treatment works), 1282 (treatment works) (1988).

²¹⁸ Clean Air Act, 42 U.S.C. §§ 7405, 7505, 7544 (1988).

²¹⁹ U.S. EPA, A PRELIMINARY ANALYSIS OF THE PUBLIC COSTS OF ENVIRONMENTAL PROTECTION: 1981-2000, at 9 (1988).

Given this significant federal financial assistance to state environmental programs, the potential reach of Title VI is correspondingly great.

The second Title VI limitation is remedial in nature. Until recently, it appeared fairly well settled that in the absence of a showing of discriminatory intent, equitable relief was the only remedy available to redress a Title VI violation.²²⁰ Just this past Term, however, the U.S. Supreme Court unanimously ruled, in *Franklin v. Gwinnett County Public Schools*,²²¹ that a damages remedy is available in implied private rights of actions brought under Title IX of the Education Act Amendments of 1972.²²² Because the language of Title IX was expressly modeled after Title VI of the Civil Rights Act, and because the Court has frequently relied on constructions of one in interpreting the other,²²³ it would seem fair to assume that a damages remedy is now generally available for Title VI violations, even absent a showing of discriminatory intent.

To date, however, there has been very little reliance on Title VI in any of the litigated cases.²²⁴ EPA has likewise not exploited its Title VI responsibilities as it could to redress distributional inequities. There are a host of ways that EPA could implement Title VI's nondiscrimination mandate in the agency's disbursement of federal pollution control funds. A relatively modest measure would be for EPA to require the recipient of the funds to make a showing that the funds are being disbursed according to racially neutral criteria. A more aggressive approach would be to require a further showing that racial minority groups are proportionately represented among the ultimate beneficiaries of the federal funds. Such a showing could include proof that the "neutral" distribution of federal funds in no manner perpetuated the vestiges of past racial discrimination within the relevant community. For instance, in the case of a federally funded wastewater treatment facility, EPA would need to be satisfied that the community's sewage treatment program provides service to minority communities (e.g., connections to sewage treatment plants) equal to that provided to nonminority communities in the affected area.

EPA's decision to play a reduced role under Title VI seems to have

²²⁰ In *Guardians*, four justices embraced the view that Title VI, as affected by administrative regulations, forbids both intentional discrimination and "effects" discrimination, and provides a damages remedy for each type of transgression. 463 U.S. 582, 615-34 (Marshall, J., dissenting), 635-45 (Stevens, Brennan & Blackmun, JJ., dissenting) (1983). Justice White provided the fifth vote in favor of the former proposition, but concluded that the damage remedy was available only upon a showing of discriminatory intent. *Id.* at 593.

²²¹ 112 S. Ct. 1028 (1992).

²²² 20 U.S.C. §§ 1681-1688 (1988).

²²³ *E.g.*, *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. at 594 (opinion of White, J.); *Cannon v. University of Chicago*, 441 U.S. 677, 694-703 (1979).

²²⁴ In those isolated instances when a Title VI claim has been raised in the complaint, such as in *Harrisburg Coalition Against Ruining the Env't v. Volpe*, 330 F. Supp. 918 (M.D. Pa. 1971), and *NAACP v. Gorsuch*, No. 82-768-CIV-5 (E.D.N.C. Aug. 10, 1982), the plaintiffs do not appear to have pressed the issue very far. In *Gorsuch*, for example, plaintiffs raised a Title VI claim in their complaint but did not argue the issue in their memorandum in support of an injunction.

been made very early on in the agency's history. During hearings before the United States Commission on Civil Rights in 1971, just a few months after EPA's creation, EPA officials acknowledged that the agency was taking a narrow view of Title VI's relevance to its work.²²⁵ Specifically, EPA Administrator William Ruckelshaus testified that there were "limitations" on what a "regulatory agency" such as EPA could do consistent with its statutory mandate to achieve pollution control.²²⁶ In particular, Ruckelshaus explained that any denial or termination of pollution control funding to a community would cause that community to violate pollution control standards, but without necessarily prompting the community to change its racially discriminatory practices:

[I]t would not be a penalty against that community at all and it would be no incentive for them to go ahead and do what we were asking them to do, because in fact they might consider it a benefit not to have to spend that additional money for the construction of a sewage treatment plant which our matching fund would force them to spend.²²⁷

Administrator Ruckelshaus acknowledged that EPA could couple its denial of federal funding, pursuant to Title VI, with a lawsuit against the community to compel its compliance with water quality standards, but contended that such an approach was problematic because it would necessarily cause further delay in the accomplishment of national pollution control objectives pending resolution of the litigation.²²⁸ For this reason, Ruckelshaus concluded, absent a "clear violation" of Title VI, "the needs of the community" would have to be taken into account "in the determination of what mandate receives priority" in a particular case.²²⁹

In a 1975 report on federal civil rights enforcement, the United States Commission on Civil Rights faulted EPA for its lack of effort under Title VI. The Commission found that EPA

had not yet fully recognized . . . [its] . . . responsibility to ensure that conditions such as the lack of fair housing laws, absence of a fair housing agency, or the existence of exclusionary zoning ordinances do not contribute to the effective exclusion of minorities from EPA assistance by aiding their exclusion from a community which has applied for or receives EPA assistance.²³⁰

In response to EPA's defense of its Title VI efforts, the Commission

²²⁵ U.S. COMMISSION ON CIVIL RIGHTS, HEARING HELD IN WASHINGTON, D.C. 146-56 (June 14-17, 1971) (testimony of William Ruckelshaus, Administrator of the United States Environmental Protection Agency).

²²⁶ *Id.* at 147.

²²⁷ *Id.*

²²⁸ *Id.* at 151 ("there are circumstances that can arise where it would seem that our ability to achieve the purposes of the Civil Rights Act flies in the face of our mandate by Congress to insure that water quality standards are complied with.").

²²⁹ *Id.* at 1007 (Draft Statement of William D. Ruckelshaus before U.S. Civil Rights Commission, June 15, 1971).

²³⁰ 6 U.S. COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT—1974, 598-99 (1975) (footnote omitted).

stated more categorically that "EPA provides funds to municipalities without taking adequate steps to ensure that they are in compliance with Title VI, and . . . EPA has been lax in executing its Title VI mandate."²³¹ The Commission further concluded that "unless EPA takes positive steps to insure an end to the systemic discrimination which has resulted in inadequate sewer services in many minority communities, EPA will be responsible for perpetuating that discrimination."²³²

Whatever the merits of EPA's decision in 1971 to deemphasize its civil rights responsibilities, it now seems appropriate for both EPA and those parties litigating environmental justice claims to take the steps necessary to ensure a fuller realization of Title VI's environmental protection mandate. Indeed, Title VI has been an effective means of redressing distributional inequities in other related areas. For instance, minority plaintiffs have successfully utilized Title VI in administrative and judicial actions to challenge the siting of federally financed highways, prisons, hospitals, and other facilities that would tend to have a substantial adverse or beneficial impact on their communities.²³³ The gist of these Title VI legal complaints has been the disproportionate impact that the facility, or its absence, would have on a minority community. Such a showing, while not sufficient by itself to prove a Title VI violation, shifts to the recipient of federal funds the burden of articulating a legitimate, nondiscriminatory reason for the siting decision. In many instances, the recipient of the federal financial assistance meets this challenge.²³⁴ Quite often, however, the practical effect of this burden-shifting is to prompt the recipients of federal financial assistance to settle a Title VI claim. There is no apparent reason why similar Title VI claims might not be raised against federally financed facilities that impose disproportionate environmental risks on minority communities or, conversely, fail to provide such communities with a commensurate level of environmental benefits.

²³¹ *Id.* at 591.

²³² *Id.* at 595. EPA responded to the Commission report by stating that "the report should give more recognition to the fact that EPA is essentially a pollution abatement agency and, as such, is to be distinguished from an agency principally concerned with community development." *Id.* at 586 (Letter from Carol M. Thomas, Director, EPA Office of Civil Rights, to John A. Buggs, Staff Director, U.S. Commission on Civil Rights (July 8, 1975)). EPA further asserted that "[w]e do not consider it as our major responsibility to see to the sewerage of minority communities nationwide irrespective of pollution abatement considerations." *Id.* at 589. In reply, the Commission characterized EPA's position "as tantamount to saying that, in the face of environmental considerations, EPA may see fit to weaken or even abandon civil rights standards." *Id.* at 591 (U.S. Commission on Civil Rights' reply to Carol M. Thomas' letter of July 8, 1975).

²³³ *See, e.g.,* North Carolina Dep't of Transp. v. Crest Street Comm. Council, 479 U.S. 6 (1986) (highway); NAACP v. Wilmington Medical Ctr., 689 F.2d 1161 (3d Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983) (hospital).

²³⁴ *E.g.,* Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110 (S.D. Ohio 1984) (defendants rebut plaintiffs' showing of disparate impact in siting of highway by articulating legitimate, nondiscriminatory reasons for the siting determination).

Indeed, there is Title VI precedent virtually on point that has largely been ignored by those bringing environmental justice claims. These are cases where minority plaintiffs have invoked Title VI to redress distributional inequities associated with the availability of environmental amenities or quality resources, such as public parks and water quality treatment facilities. Courts have upheld Title VI challenges to these federally financed programs based on their racially disparate effects.²³⁵

In sum, Title VI provides a possible basis for civil rights litigation to redress environmental inequities and is an approach that warrants greater emphasis and attention. Most importantly, by using Title VI as a vehicle for these suits, the bugaboo of proving discriminatory intent can be avoided. And, while Title VI's federal financial assistance requirement is not insignificant, the fact that states receive so much of their environmental budgets from the federal government suggests that that limitation may not be much more practically significant than equal protection's threshold requirement that there be "state action." Finally, courts may be more willing to grant relief under Title VI than under equal protection because the focus of the lawsuit is, at least superficially, the provision of governmental benefits as opposed to the redistribution of environmental risks. To that extent, a Title VI lawsuit is more analogous to equal protection challenges concerning provision of municipal services (which have fared substantially better in the federal courts) than to those suits which more overtly seek a judicial redistribution of "harmful" environmental risks.

3. *Title VIII of the Civil Rights Act and 42 U.S.C. § 1982: The Need to Bridge Housing and the Environment.*—Two other potentially useful, but even less explored, civil rights causes of action are Title VIII of the Civil Rights Act of 1968²³⁶ and 42 U.S.C. § 1982. Title VIII makes it unlawful "[t]o discriminate against any person in the . . . sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status or national origin."²³⁷ Section 1982 provides that all United States citizens "shall have the same right . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."²³⁸

There are several threshold advantages to Title VIII's nondiscrimination mandate. Like a claim under Title VI of the Civil Rights Act of 1964, and unlike a constitutional equal protection claim, no showing of

²³⁵ See, e.g., *Johnson v. City of Arcadia*, 450 F. Supp. 1363 (M.D. Fla. 1978) (black neighborhoods not being provided with same level of municipal services as white neighborhoods). As described above, similarly based equal protection claims have been successfully advanced. See *supra* note 207 and accompanying text.

²³⁶ 42 U.S.C. §§ 3601-3619, 3631 (1988).

²³⁷ 42 U.S.C. § 3604(b) (1988).

²³⁸ 42 U.S.C. § 1982 (1988).

discriminatory intent is required under Title VIII. An unjustified, racially discriminatory impact may alone be sufficient to establish a Title VIII violation.²³⁹ Furthermore, unlike either Title VI or the equal protection clause, but like Title VII of the Civil Rights Act of 1964,²⁴⁰ Title VIII applies to some purely private conduct. A showing of federal financial assistance is not, therefore, always necessary. Finally, as under Title VI, the focus of a Title VIII complaint is the provision of governmental services, which seems to be a more favorable context within which to bring a civil rights claim.

The ultimate usefulness of Title VIII's nondiscrimination mandate in redressing environmental inequity largely turns, however, on the meaning of "provision of services or facilities" within Title VIII. In particular, what kinds of "services or facilities," and what types of providers, fall within the statute's scope? The statutory language suggests some potentially significant limitations. For example, it does not purport to bar discrimination in the distribution of services or facilities *generally*. Instead, Title VIII proscribes only those "dealing with the specific problems of fair housing opportunities"²⁴¹ and, even more specifically, the "services or facilities" restricted are those "in connection with [the] sale or rental of a dwelling."²⁴² Clearly, some issues related to environmental quality would more easily fit within this analytical framework than others.²⁴³

The significance of Title VIII's command that all federal agencies "administer their programs and activities relating to housing and urban

²³⁹ *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); *see generally* JOSEPH G. COOK & JOHN L. SOBIESKI, JR., 3 CIVIL RIGHTS ACTIONS ¶ 19.07 (1992) (examining the extent to which discriminatory effects alone can constitute a violation of Title VIII).

²⁴⁰ Pub. L. No. 88-357, 78 Stat. 253 (1964) (codified at scattered sections of 42 U.S.C. (1976 & Supp. 1991)).

²⁴¹ *Vercher v. Harrisburg Hous. Auth.*, 454 F. Supp. 423, 424-25 (M.D. Pa. 1978) ("To say that every discriminatory municipal policy is prohibited by the Fair Housing Act would be to expand that Act to a civil rights statute of general applicability. . . . We do not believe the act was intended to have such a wide scope.").

²⁴² *Laramore v. Illinois Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 1989) (rejecting Title VIII challenge to siting of a new baseball stadium that would compel black residents to move because the alleged discriminatory act was not in connection with a "sale or rental of a dwelling"). The structure of the statutory language also lends some support to the contention that the kinds of "services or facilities" to which Title VIII applies are limited to those "of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person." 42 U.S.C. § 3603(b)(1) (1988).

²⁴³ Courts have indicated that Title VIII extends to "services generally provided by governmental units such as police and fire protection or garbage collection." *Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984). But they reject the notion that Title VIII "was designed to reach every discriminatory act that might conceivably affect the availability of housing." *Mackey v. Nationwide Ins. Cos.*, 724 F.2d 419, 423-24 (4th Cir. 1984) (denying relief to plaintiff who claimed that hazard insurance was a "service in connection with dwellings" and, therefore, could not be provided discriminatorily).

development in a manner affirmatively to further the purposes of [Title VIII]" turns on similar considerations. As with Title VI, EPA has historically adhered to a narrower construction of that command than the United States Commission on Civil Rights. EPA concluded early on that its pollution control programs did not "relat[e] to housing and urban development" within the meaning of Title VIII.²⁴⁴ Hence, EPA has declined to withhold "treatment works construction grant assistance from communities which are charged with having exclusionary zoning ordinances precluding location of low cost and medium income housing within their jurisdictions."²⁴⁵ The Civil Rights Commission faulted EPA for failing to apply a "liberal construction of Title VIII" and for failing to recognize that "EPA's program for sewage treatment is essential for the development and maintenance of urban areas, and thus it is clear that even within the strictest meaning of the term 'program relating to housing and urban development,' it is covered by Title VIII."²⁴⁶

Whether Title VIII could play a significant role in helping litigants establish distributional equity in environmental programs is not yet clear. It is not a cause of action upon which environmental plaintiffs have historically relied, and EPA has not yet given any indication that it will soon adopt a broader view of its Title VIII responsibilities. One significant case raising a Title VIII claim in the environmental justice context is *El Pueblo para el Aire y Agua Limpio v. Chemical Waste Management, Inc.*, now pending in the United States District Court for the Eastern District of California.²⁴⁷ The complaint in that case, which challenges the proposed siting of a hazardous waste disposal facility in a minority community,²⁴⁸ raises several civil rights claims, including a Title VIII cause of action that advances a fairly expansive interpretation of the "provision of services or facilities" language in Title VIII.²⁴⁹

Finally, 42 U.S.C. § 1982 provides an alternative basis for a civil rights lawsuit based upon interference with property rights. Although

²⁴⁴ U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 230, at 589 (quoting Letter from Carol M. Thomas, Director, EPA Office of Civil Rights).

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *El Pueblo para el Aire y Agua Limpio v. Chemical Waste Mgmt., Inc.*, No. C-91-2083 (E.D. Cal. filed July 8, 1991).

²⁴⁸ *Id.*; see Miles Corwin, *Unusual Allies Fight Waste Incinerator*, L.A. TIMES, Feb. 24, 1991, at A3.

²⁴⁹ Complaint at 28, *El Pueblo para el Aire y Agua Limpio v. Chemical Waste Mgmt., Inc.*, No. C-91-2083 (E.D. Cal. filed July 8, 1991). Although the federal court has yet to rule on this claim, a state trial court in a parallel state law proceeding recently issued a favorable decision on one of the plaintiffs' claims. *El Pueblo para el Aire y Agua Limpio v. County of Kings*, [1991] 22 *Envtl. L. Rep. (Envtl. L. Inst.)* 20,357 (Cal. App. Dep't Super. Ct. 1991). The state court agreed with the plaintiffs that the county had violated an applicable state environmental law by failing to provide the general public with a copy of the statutorily required description of the proposed facility's environmental effects in Spanish because that was the principal language of many of those residing in the community that would be adversely affected by the facility. *Id.*

Section 1982's proscription is generally less comprehensive than Title VIII, unlike Title VIII, it extends to the mere "hold[ing]" of real and personal property. Section 1982 also applies, although not without debate, to both private and public action.²⁵⁰ Because, moreover, the U.S. Supreme Court has previously intimated that Section 1982 "might be violated by official action that depreciated the value of property owned by black citizens,"²⁵¹ it would at least seem to offer a theoretical basis for bringing an environmental justice claim based on a civil rights law.²⁵² While the issue remains unsettled, Section 1982's primary limitation is that federal courts are likely to require a showing of discriminatory intent under this statute.²⁵³

C. Rethinking The Substance Of Environmental Law To Take Better Account Of Distributional Concerns

A better accounting of the distributional implications of environmental protection will likely also require substantive reform of the federal environmental laws. This is in part because EPA has historically resisted embracing a distributional mandate in its enforcement of these laws. The agency has consistently viewed "sociological" concerns, such as distributional impacts, as outside the purview of its purely "technical" mandate of establishing technically effective, and economically efficient, pollution control standards.²⁵⁴

Notwithstanding EPA's apparent assumption, the agency's failure to take distributional equity into account has not resulted in a neutral distribution of the benefits and burdens of environmental protection. In-

²⁵⁰ *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 616 (1987); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

²⁵¹ *City of Memphis v. Greene*, 451 U.S. 100, 123 (1981).

²⁵² The viability of 42 U.S.C. § 1982 as a legitimate basis for such a claim is outlined in Colquette & Robertson, *supra* note 14, at 198-99. A 42 U.S.C. § 1982 claim is included in the complaint pending in *Bordeaux Action Comm. v. Metropolitan Gov't of Nashville*, No. 3-90-0214 (M.D. Tenn. filed Mar. 12, 1990), which challenges the siting of a sanitary landfill in a minority community.

²⁵³ The Supreme Court has not yet addressed the issue in the context of 42 U.S.C. § 1982, but the Court has ruled that 42 U.S.C. § 1981 requires a showing of discriminatory intent, *see General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 382-91 (1982), and 42 U.S.C. §§ 1981 and 1982 share common origins. *See, e.g., Terry Properties, Inc. v. Standard Oil Co. (Ind.)*, 799 F.2d 1523, 1536 (11th Cir. 1986); *see generally*, CHESTER J. ANTIEAU, *FEDERAL CIVIL RIGHTS ACTS § 48* (2d ed. 1980 & Clark Boardman Callaghan Supp. 1991).

²⁵⁴ EPA's belief that these matters were outside the proper scope of the agency's mandate is reflected in the agency's response in the early 1970s to the United States Commission on Civil Rights' criticism of the agency's failure to do more to enforce civil rights laws through environmental laws. *See supra* notes 225-32 and accompanying text. A similar attitude is evident in a high-ranking agency official's response in 1987 to claims that hazardous waste sites were disproportionately located in racial minority communities. The EPA Assistant Administrator for Solid Waste and Emergency Response reportedly stated that "[t]here's no sociology to it. It's strictly technical." *See Charles Lee, Toxic Waste and Race in the United States*, in MICHIGAN CONFERENCE PROCEEDINGS, *supra* note 37, at 25 (quoting Michael Weisskopf, *Rights Group Finds Racism in Dump Siting*, WASH. POST, Apr. 16, 1987, at A7 (quoting J. Winston Porter)).

deed, the agency's position may instead have facilitated a distributional skewing unfavorable to those persons, such as racial minorities, less able to influence the legislative, regulatory, and enforcement agendas that ultimately determine who will receive the benefits and burdens of a particular legislative initiative.

Two kinds of statutory reforms could address this problem. One possibility would be to require formal agency consideration of the distributional impacts associated with a particular decision. Such consideration could be required where the agency establishes rulemaking agendas, promulgates implementing regulations, and determines enforcement priorities. It could also be required when the agency allocates grant monies and technical assistance. The second, more ambitious, reform would be to establish equitable benchmarks that would provide standards for judging discretionary agency determinations with significant distributional impacts.²⁵⁵

Neither substantive reform is as radical a proposal as it might seem. Indeed, there is plenty of applicable precedent for infusing distributional factors into the fashioning of legal standards and agency priorities. For example, environmental impact statements, prepared pursuant to the National Environmental Policy Act,²⁵⁶ have long included discussions of the socioeconomic effects of certain proposed federal actions.²⁵⁷ Somewhat ironically, the notion of a more overt distributional inquiry finds precedential support in legislation now pending that would require federal agencies to consider the impact of their actions on private property rights.²⁵⁸ Whatever the merits of that legislative proposal, which opponents fear will chill the promulgation of needed environmental regulation,²⁵⁹ the racial minority status of a person would certainly seem to be

²⁵⁵ Representative John Lewis (D.Ga.) and then-Senator, now Vice President, Al Gore introduced environmental justice legislation in the 102nd Congress which included both types of provisions. See *supra* note 143. That legislation would have required the identification of "environmental high impact areas," mandated the allocation of enforcement resources to those areas, provided technical assistance funding to allow local communities to participate in decisionmaking processes, and imposed a moratorium on the siting or permitting of any new toxic chemical facility in an area identified as "high impact" under specified circumstances. See S. 2806, 102d Cong., 2d Sess. (1992); H.R. 5326, 102d Cong., 2d Sess. (1992).

²⁵⁶ 42 U.S.C. §§ 4321-4370a (1988 & Supp. II 1990).

²⁵⁷ See 40 C.F.R. § 1508.8(b) (1991); *but cf.* Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 776 (1983) (NEPA not concerned with human health and welfare per se, but only with effects on either resulting from a "given level of alteration of our physical environment or depletion of our natural resources.").

²⁵⁸ See 137 CONG. REC. S13,963 (daily ed. Sept 13, 1991) (debate on the amendment proposed by Senator Symms which would require federal agencies to consider whether proposed agency action will "take" private property within the meaning of the Fifth Amendment of the United States Constitution).

²⁵⁹ See Tom Kenworthy & Bill McAllister, *Environmentalists See Roadblock in "Taking" Appraisals*, WASH. POST, Nov. 6, 1991, at A23.

a more compelling trigger for such a particularized distributional accounting of agency environmental decisionmaking.

Even more broadly, federal and state natural resource laws have routinely included substantive distributional standards. The purpose of these standards was generally to ensure a fair distribution of the nation's natural resource wealth. It should be equally acceptable to ensure that the risks associated with environmental protection are also fairly distributed. For example, homestead,²⁶⁰ mining,²⁶¹ mineral leasing,²⁶² and reclamation laws²⁶³ historically included acreage limitations. These limitations were intended to promote a fair and equitable distribution of public resources. Neither economic efficiency, nor the maximization of resource production, was the overriding statutory goal to the extent that it interfered with these distinct distributional objectives.

More recent congressional enactments in the natural resources area can likewise be viewed as having an overt, progressive distributional objective. Historically, many of the nation's public land laws subsidized commercial exploitation of natural resources both by failing to charge market prices for public resources and by failing to restrict resource exploitation methods that were environmentally destructive.²⁶⁴ To the extent that more recent legislative revisions have sought to correct each of these problems, the distributional impact has been potentially progressive. For example, the increased economic rents captured by the government from competitive bidding and increased royalty rates are available for redistribution in government welfare and service programs.²⁶⁵ And, the curtailment of environmentally destructive activities on the public lands may reduce those negative externalities suffered disproportionately by certain groups.²⁶⁶

²⁶⁰ Homestead Act of 1862, 43 U.S.C. §§ 211, 212 (repealed 1976).

²⁶¹ General Mining Law of 1872, 30 U.S.C. § 23 (1988).

²⁶² Mineral Leasing Act of 1920, 30 U.S.C. § 184 (1988).

²⁶³ Reclamation Act of 1902, 43 U.S.C. § 375 (1988).

²⁶⁴ GEORGE C. COGGINS, PUBLIC NATURAL RESOURCES LAW § 2.02 (1992).

²⁶⁵ See, e.g., Federal Onshore Oil & Gas Leasing Reform Act of 1987, Pub. L. No. 100-203, tit. V, subtit. B, §§ 5101-13, 101 Stat. 1330-256 to 1330-263; Federal Oil and Gas Royalty Management Act of 1982, Pub. L. No. 97-451, 96 Stat. 2447 (codified at 30 U.S.C. §§ 1701-1757 (1988)); Federal Coal Leasing Act Amendments of 1976, Pub. L. No. 94-377, 90 Stat. 1083 (codified at 30 U.S.C. §§ 181-287 (1988)). Of course, as in the case of environmental law, commercial interests that have benefitted from natural resources laws that, in effect, confer below-market-cost benefits on them (e.g., low cost water, grazing fees), have also quite successfully resisted legislative proposals to eliminate these subsidies completely. See GEORGE C. COGGINS & CHARLES F. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 128-33, 693-94 (2d ed. 1987).

²⁶⁶ Adam Rose et al., *Assessing Who Gains and Who Loses From Natural Resource Policy—Distributional Information and the Public Participation Process*, 15 RESOURCES POL'Y 282, 287 (1989) (concluding that "[t]he groups with the highest probability of a loss [from allowing coal mining in a particular national forest] are those in the low and middle income groups since environmental damage tends to be spread more evenly than gains in personal income"). Of course, for the same reason (e.g., allocation of enforcement resources) that there seems to have been a gap between potential and

There are also instances where Congress has specifically sought to ameliorate the adverse distributional impacts caused by a shift in the nation's natural resource policies. For example, Congress enacted the Powerplant Industrial Fuel Use Act of 1978 (PIFUA) "to reduce the importation of petroleum and increase the Nation's capability to use indigenous energy resources," especially coal.²⁶⁷ In recognition of the fact that such a dramatic shift in resource emphasis would have severely adverse socio-economic impacts on certain regions of the country, Congress authorized substantial federal financial assistance to those areas.²⁶⁸

Water transfer policy provides another illustration of how distributional concerns are more routinely accounted for in natural resources law. Especially in water-scarce western States, water transfers are taking on new urgency as existing water uses, such as irrigation, do not necessarily reflect the highest and best use of the resource (often needed in urban areas). Accordingly, additional sources must be found to satisfy demand. For this reason, some states are now allowing existing water rights users to contract for the "transfer" or sale of their rights to others, even when such transfers require a diversion of the waters to a different place. Because, however, such transfers may adversely affect third parties who, as neither seller nor buyer, are unable to affect the contract's terms, both the federal government and interested states are studying the possibility of regulating such transfers in a way that takes into account third-party effects.²⁶⁹

realized benefits in other areas of environmental law, *see supra* notes 120-33 and accompanying text, that same phenomenon could occur in the implementation of these natural resource laws.

²⁶⁷ 42 U.S.C. § 8301(b)(1) (1988); *see generally* Daryl Robertson, *The Powerplant and Industrial Fuel Use Act of 1978: Fuel Replacement*, 3 HARV. ENVTL. L. REV. 214 (1979) (discusses the provisions of PIFUA and explores the disadvantages of the Act, including its disproportionate impact on certain consumers).

²⁶⁸ *See* 42 U.S.C. § 8401 (1988).

²⁶⁹ *See* NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMY OF SCIENCES, WATER TRANSFERS IN THE WEST: EFFICIENCY, EQUITY, AND THE ENVIRONMENT (1992) [hereinafter WATER TRANSFERS]; Charles T. Du Mars & Michele Minati, *New Mexico Water Law: Determining Public Welfare Values in Water Rights Allocation*, 31 ARIZ. L. REV. 817 (1989). The National Research Council of the National Academy of Science has identified several categories of third-party effects of water transfers, including "the environment," "ethnic communities and Indian tribes," and "nonagricultural rural communities." WATER TRANSFERS, *supra* at 5. The National Research Council recently studied third-party effects of a series of specific proposed water transfers.

The extent to which distributional factors can properly be taken into account under existing state law, however, is still unsettled. For instance, a New Mexico state trial court recently held unlawful a proposed change of water use from livestock and irrigation to use for a ski resort, because its third-party impacts made the change not in the "public interest." The court reasoned that "[t]he Northern New Mexico region possesses significant history, tradition and culture of recognized value, not measurable in dollars and cents," that "[t]he relationship between the people and their land and water is central to the maintenance of that culture and tradition," and that "[t]he imposition of a resort-oriented economy . . . would erode and likely destroy a distinct local culture which is several hundred years old." *Sleeper v. Ensenada Land & Water Ass'n*, No. RA 84-53(C), slip op. at 7-8 (N.M. Dist. Ct., July 2, 1985). The state court of appeals, however, reversed the trial court on the ground that public interest considerations were irrelevant to the lawfulness of the proposed change

In one notable respect, moreover, the nation's natural resources laws take explicit account of their distributional impact on an identifiable minority group: Native American tribes. The Bureau of Indian Affairs within the Department of the Interior is charged, *inter alia*, with honoring the United States' treaty obligations and general fiduciary duties to Native American tribes. The existence of that formal voice within the executive branch may, in part, explain why some federal environmental protection laws articulate specific exemptions aimed at ameliorating some of the distributional impacts that those laws may have on Native Americans, particularly when those laws adversely affect some of their subsistence ways of life.²⁷⁰

There are also state analogues in the natural resource area. Some state land use planning requirements incorporate "fair share" doctrines, requiring that certain cities share in the need to supply lower income housing.²⁷¹ California's coastal zone law, for example, originally imposed affordable housing requirements.²⁷² The result was that lower income households benefitted most from a state land conservation law.²⁷³

in water use. *See* Application of Sleeper, 760 P.2d 787 (N.M. Ct. App. 1988), *cert. quashed*, Ensenada Land & Water Ass'n v. Sleeper, 759 P.2d 200 (N.M. 1988); *see also* Shannon A. Parden, Note, *The Milagro Beanfield War Revisited in Ensenada Land & Water Assn v. Sleeper—Public Welfare Defies Transfer of Water Rights*, 29 NAT. RESOURCES J. 861 (1989). I am indebted to Dan Tarlock for bringing this latter case to my attention. *See* Tarlock, *supra* note 102, at 880-81.

²⁷⁰ *See, e.g.*, Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120 (1988) (requiring federal agency to consider the impact on "subsistence uses" prior to making any land use decision); Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a) (1988) (permitting otherwise unlawful activities "for the religious purposes of Indian tribes"); Endangered Species Act, 16 U.S.C. § 1539(e) (1988) (permitting otherwise unlawful activities when taken by "any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska"); Fur Seal Management Act, 16 U.S.C. § 1153 (1988) (exemption for Aleuts, Eskimos, and Indians); Marine Mammal Protection Act, 16 U.S.C. § 1371(b) (1988) (exemptions for Alaskan natives); National Forest Management Act, 16 U.S.C. § 543(f) (1988) (protection of traditional Indian uses in scenic areas); *see also* American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1988) (promoting the exercise of traditional religions by the American Indian, Eskimo, Aleut, and Native Hawaiians). This is not, of course, to suggest that similar problems of inequity do not exist on Native American reservations. Tribal governments have long complained that they should have greater authority and autonomy to protect the natural environments within their reservations. *See* Mary Beth West, *Natural Resources Development in Indian Reservations: Overview of Tribal, State, and Federal Jurisdictions*, 17 AM. INDIAN L. REV. 71 (1982); Richard A. Du Bey et al., *Protection of the Reservation Environment: Hazardous Waste Management on Indian Lands*, 18 ENVTL. L. 449 (1988); Douglas A. Brockman, Note, *Congressional Delegation of Environmental Regulatory Jurisdiction: Native American Control of Reservation Environment*, 41 WASH. U.J. URB. & CONTEMP. L. 133 (1992). In 1990, Congress enacted the Indian Environmental Regulatory Enhancement Act, Pub. L. No. 101-408, 104 Stat. 883 (1990), for the express purpose of granting monies to tribal governments to enhance their ability to develop and enforce environmental protection laws.

²⁷¹ Mandelker, *supra* note 47, at 2-3 (citing Southern Burlington County NAACP v. Township of Mt. Laurel, 336 A.2d 713 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975)).

²⁷² *Id.* at 4.

²⁷³ David E. Hansen & S.I. Schwartz, *Income Distributional Effects of the California Land Conservation Act*, 59 AM. J. AGR. ECON. 294 (1977). California subsequently modified the program, transferring it to local governments, with the far less demanding requirement that housing develop-

California law also generally requires that the state consider the effect of zoning ordinances on low income housing needs.²⁷⁴

Significant opportunities exist for including such distributional analysis in formal EPA decisionmaking. For example, EPA has not traditionally accounted for equitable considerations in its risk assessment analysis, which has become the linchpin of agency decisionmaking in recent years. Thus, while EPA's practice has resulted in risk minimization in the aggregate, the agency has not generally taken into account how that risk is specifically being spread.²⁷⁵ The end result may be a policy determination that minimizes the risk to society overall, but which does so at the expense of an identifiable segment of the population that ultimately receives more than its "fair share" of the risks being distributed.²⁷⁶ Such equitable concerns are a proper and necessary factor to be considered in most EPA policy decisions and rulemakings.

Indeed, rulemakings provide another opportunity for a more systematic consideration of distributional factors. EPA and other federal agencies are already required by various executive orders to account for the distributional impact of their rules on business,²⁷⁷ family,²⁷⁸ states rights,²⁷⁹ and private property.²⁸⁰ EPA could conduct similar account-

ment in the coastal zone include low and moderate income housing "whenever feasible." See Mandelker, *supra* note 47, at 4; Robert A. Johnston et al., *Inclusionary Housing in the California Coastal Zone*, 18 COASTAL MGMT. 15 (1990).

²⁷⁴ Mandelker, *supra* note 47, at 5 (citing CAL. GOV'T CODE § 65863.6 (West 1992)).

²⁷⁵ Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 593 (1992).

²⁷⁶ EPA has recently acknowledged that the agency's programs fail to "address cumulative and synergistic effects or multiple pathways of exposure." EPA ENVIRONMENTAL EQUITY REPORT, *supra* note 64, at 18, 20 ("never been a consistent EPA policy to address equity issues with respect to racial and income groups"), 27 ("[H]igh risk populations in some cases have been overlooked."). Of course, some of the environmental laws do strive to take account of persons (like the elderly, asthmatics) who might be especially sensitive to certain pollutants. The Clean Air Act, for instance, requires EPA to set standards at a level that can protect such sensitive persons from the adverse effects of air pollution. See 42 U.S.C. § 7409(b) (1988 & Supp. II 1990); *Lead Industries Ass'n v. U.S. EPA*, 647 F.2d 1130, 1146, 1152-53, 1156-60 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980). And, in that context, EPA has taken into account the distribution of risks within a particular exposed population in setting emission standards for hazardous pollutants such as benzene. See 54 Fed. Reg. 38044, 38046 (1989). But, even then, there has been no distributional accounting of the potential for cumulative risk aggregation in certain communities as a result of agency determinations under various laws and regarding various kinds of environmental risks. Professor Donald Hornstein has recently published a forceful critique of EPA's comparative risk analysis based on its inability to take account of such equitable factors. See Hornstein, *supra* note 275, at 600-04.

²⁷⁷ Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981); see Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and the Office of Management and Budget in Informal Rulemaking*, 38 ADMIN. L. REV. 181 (1986). For a much less flattering view of the operation of this executive order, see Robert U. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 LAW & CONTEMP. PROBS. 127 (1991).

²⁷⁸ Exec. Order No. 12,606, 52 Fed. Reg. 34,188 (1987).

²⁷⁹ Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (1987).

ings of the impact that its rules have on racial minorities and low-income persons. Indeed, in 1985 the U.S. Department of Energy (DOE) did just this, undertaking a study to assess how an EPA proposal to reduce leaded gasoline use would effect minority and low-income households. The DOE report concluded that a reduction

[W]ould benefit minority and low-income households proportionately more than the overall U.S. population. . . . This is due to the relatively large share of minority and low-income households living in [Standard Metropolitan Statistical Area] central cities, as well as to the relatively large share of these households with small children."²⁸¹

The report also considered the relative economic impact of the EPA proposal on those same communities, concluding that its costs would be "comparatively high" for the "Hispanic and other minority (except black) and low income households that do own vehicles [because they] have a greater than average share of vehicles that require leaded gasoline."²⁸²

State and local siting decisions are also amenable to a more routine consideration of distributional factors. In Texas, for instance, the state Department of Health reportedly requires landfill permit applicants to include socio-economic information concerning the proposed site.²⁸³ New York City's Charter now requires that rules for the selection of sites for city facilities "further the fair distribution among communities of the burdens and benefits associated with city facilities."²⁸⁴ Other jurisdictions, such as the State of New York,²⁸⁵ are considering the adoption of similar programs.²⁸⁶

Finally, because EPA is currently contemplating greater utilization

²⁸⁰ Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1989).

²⁸¹ K. ROSE ET AL., ARGONNE NAT'L LABORATORY, EFFECTS ON MINORITY AND LOW-INCOME HOUSEHOLDS OF THE EPA PROPOSAL TO REDUCE LEADED GASOLINE Use 30 (1985) (multi-year research program, concerning minority energy consumption and expenditures, conducted by Argonne National Laboratory at request of Department of Energy's Office of Minority Economic Impact).

²⁸² *Id.* at 1. For those without a vehicle, however, the costs would accordingly be disproportionately lower. *Id.*

²⁸³ The state adopted this approach in the aftermath of the *Bean* litigation, which involved an unsuccessful equal protection challenge brought against the siting of a landfill in a predominantly minority Houston community. *See supra* notes 180-89 and accompanying text. *See also* Bullard & Wright, *Environmentalism and the Politics of Equity*, *supra* note 15, at 30.

²⁸⁴ Stephen L. Kass & Michael B. Gerrard, "Fair Share" Siting of City Facilities, N.Y. L.J., June 21, 1990, at 1 (quoting N.Y. City Charter § 203(a)); Tsao, *supra* note 14, at 375-77.

²⁸⁵ *See supra* note 12.

²⁸⁶ A recent student note discusses the potential benefits of creating a state "super review" board that "would be responsible for selecting an inventory of candidate sites for commercial hazardous waste facilities," taking "into consideration the racial and socioeconomic makeup of the potential candidate sites. If existing commercial hazardous waste facilities are sited disproportionately in minority communities, the board can remove sites that are predominantly minority from the inventory." Godsil, *supra* note 14, at 426. Another possibility, discussed in the same student note, is to create a federal cause of action under RCRA requiring states and localities to demonstrate "environ-

of decentralized approaches, such as market incentives, for the accomplishment of environmental quality objectives, the need for overt distributional inquiry may be all the more pressing. Reliance on market incentives reduces the distributional inequities that result because of the enhanced political access that some enjoy to centralized decisionmakers under a command-and-control regulatory regime. But, rather than eliminate inequities, this approach more likely just shifts the cause for such distributional inequity away from a relative absence of political power at the national level to the relative absence of market power at home. For instance, the distribution of pollution under a market system of transferable pollution rights will tend to replicate existing income and property distributions that, to the extent that such distributions are themselves the product of racial discrimination, will only continue to produce and exacerbate inequitable results.²⁸⁷ The likely outcome is the further occurrence of pollution "hot spots" in racial minority communities and low income neighborhoods.²⁸⁸

This problem could be addressed in a number of ways. One approach would be to impose certain substantive limitations on the market system to guard against the likelihood of inequitable distributions. For instance, there could be fixed limits on the amount of pollution that would be permitted within any one geographic community. Another approach would be to work within the market system by leveling the playing field. Communities identified as lacking in resources might, for example, be allocated vouchers that would allow them to bargain more effectively within the pollution rights market.²⁸⁹

mental necessity" to overcome a plaintiff's showing that the siting of a proposed facility would result in a disparate impact on minority communities. *Id.* at 421-25.

²⁸⁷ Errol Meidinger, *The Politics of "Market Mechanisms" in U.S. Air Pollution Regulation: Social Structure and Regulatory Culture*, in DISTRIBUTIONAL CONFLICTS IN ENVIRONMENTAL RESOURCE POLICY 150-86 (Allan Schnaibert et al. eds., 1986).

²⁸⁸ See Manley W. Roberts, Comment, *A Remedy for the Victims of Pollution Permit Markets*, 92 YALE L.J. 1022, 1027-28 & n.40 (1983); see also Ackerman & Stewart, *supra* note 155, at 188-89.

²⁸⁹ This approach might be criticized, however, on the ground that those with fewer resources would have little meaningful choice even under this scheme but to allow themselves to be bought off by those seeking to pollute in their neighborhoods. A related proposal, susceptible to the same criticism, would be to conduct a so-called "reverse auction" in which communities would indicate how much they would be willing to be paid to accept an otherwise environmentally undesirable facility. Under that scenario, the owner of a hazardous waste facility would not have to comply with applicable environmental laws, but would additionally have to purchase, in effect, the right to locate the facility in a particular community. See Herbert Inhaber, *Of LULUs, NIMBYs, NIMTOOs*, 107 PUB. INTEREST 52 (1992). Such a regulatory regime might, of course, create a host of perverse incentives, pitting a locality's desire to regulate with its desire to increase municipal coffers. See Vicki Been, *"Exit" As A Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 594 (1991).

D. Reforming The Structure Of Environmental Policymaking To Promote Minority Involvement

Apart from the substance of environmental law, serious consideration should be given to reforming the structure of environmental policymaking so as to enhance minority access to relevant decisionmaking fora. Governmental and nongovernmental organizations that currently dominate the process need to promote minority participation in the dialogue and, even more fundamentally, they need to educate themselves about minority concerns.²⁹⁰ It is not enough to provide minorities with an opportunity to adequately represent their own interests because correction of distributional equities is not, and should not be, the sole responsibility of racial minorities. Those in positions of authority, whether or not they happen to belong to a racial minority, have an independent responsibility to work toward the fair distribution of environmental benefits and burdens.

Mainstream environmental groups need, therefore, to work towards better representation of minorities within their organizations, both as members and as professional employees.²⁹¹ They should likewise lend expertise to local communities in need of financial, legal, and technical assistance,²⁹² and should also target those communities in their educational programs.²⁹³ There are currently a host of new environmental organizations, more directly involved with environmental issues of special

²⁹⁰ At least during the recent "transition" between administrations, the Clinton administration made an effort to do so, by including two very prominent spokespersons on environmental justice matters, as members of the EPA "transition team." See Marcia Coyle et al., *Washington Brief—Justice Voices*, NAT'L L.J., Dec. 28, 1992, at 9.

²⁹¹ Paul Ruffins, *Blacks and Greens*, RACE, POVERTY & ENV'T, Summer 1990, at 5. It is probably fair to say that the mainstream environmental groups are currently more aware of the past inattention to minority concerns and now at least profess an intent to do better in their future. See, e.g., John H. Adams, *The Mainstream Environmental Movement*, EPA J., Mar./Apr. 1992, at 25; *Have Minorities Benefitted . . . ? A Forum*, EPA J., Mar./Apr. 1992, at 32-33 (comments of Michael Fischer, Executive Director of the Sierra Club).

²⁹² Taylor, *supra* note 157, at 43-52. A recent example of just such financial assistance occurred when the Natural Resources Defense Council (NRDC) and the National Wildlife Federation defrayed the expenses associated with a representative from a local minority community organization to travel to Washington, D.C. and present testimony before Congress on the impact of lead poisoning. See *Lead Poisoning Hearings*, *supra* note 12, at 4 (testimony of Rev. James R. Josey, on behalf of The Kingsley Park Coalition). Additionally, NRDC recently brought a lawsuit, along with several minority groups, challenging the siting of a sewage treatment plant in a poor neighborhood in Harlem, New York. See Suro, *supra* note 12. Another laudable example was a recent program, sponsored by the National Conference of Black Lawyers, to instruct legal service lawyers and others on the workings of environmental protection laws. See *Challenging Race Discrimination in Environmental Law and Policy Making* (Dec. 3, 1992) (unpublished conference materials, on file with author).

²⁹³ See, e.g., Maralee Schwartz & Dan Balz, *Activists Challenge Lawmakers' Claims on Environment*, WASH. POST, Apr. 22, 1990, at A9; Samara F. Swanston, *Underrepresentation of Minorities in Environmental Law Can Be Remedied*, NEW YORK STATE BAR ASS'N ENVTL. L. SEC. J., Feb./May 1991, at 7, 8.

concern to racial minorities, which could greatly benefit from the mainstream groups' sharing of available resources.²⁹⁴

Those minority environmental organizations, however, have served notice that any relationship with the mainstream organizations must be as "equals."²⁹⁵ To that end, those in the mainstream environmental movement need to appreciate what they can learn from the newer minority environmental organizations.²⁹⁶ They need to increase their awareness and understanding of the potential for inequity in the allocation of benefits and burdens from those environmental protection programs that they have historically supported.²⁹⁷ They also need to guard against their natural tendency, based on their highly successful fundraising programs, to exploit the "environmental justice" issue in a manner that enhances their own fundraising efforts at the expense of minority organizations possessing far fewer resources.²⁹⁸

The challenge of opening up existing fora to minority involvement is substantial. Many in the minority community continue to harbor a deep-seated distrust of both mainstream environmentalists, whom they view as too closely tied to industry,²⁹⁹ and of a federal government that some

²⁹⁴ These include: Black Environmental Science Trust ("to increase the participation of African Americans in the shaping of the environmental future"); Center for Environment, Commerce, and Energy ("promoting the efficient use of natural resources through education and activism, which seeks to represent minority and low income communities that suffer disproportionately from environmental hazards"); Community Environmental Health Care ("provides technical assistance to African-American, Latino and low-income communities in New York City to organize around environmental issues that affect them"); Native Americans for a Clean Environment ("works with Native American communities and Tribal governments on a variety of environmental issues ranging from waste management to protection of land and water"); and South West Organizing Project ("a multi-racial, multi-issue grassroots community organization whose mission is to empower the disenfranchised Southwest to realize social and economic justice"). See PANOS INSTITUTE, *supra* note 152, at 38-39; see also Austin & Schill, *supra* note 14, at 77-79 (describing emergence of minority grassroots environmentalism that is "anti-bourgeois, anti-racist, class conscious, populist, and participatory," and that "attacks environmental problems as being intertwined with other pressing economic, social, and political ills"); *Grass-Roots Groundswell*, EPA J., Mar./Apr. 1992, at 45-53 (six articles describing rise and progress of "grass-roots" environmental movement).

²⁹⁵ Ahmed, *Seeing Red Over the Green Movement*, *supra* note 159, at 10 (quoting Dana Alston, Director, Panos Institute) ("We refuse a paternalistic relationship. . . . If you are to form a partnership with us, it will be as equals.'").

²⁹⁶ For a thoughtful discussion of the kind of relationship needed between lawyers representing local communities and those clients, see Cole, *The Need for Environmental Poverty Law*, *supra* note 14, at 41-47.

²⁹⁷ Brian Bloom, *Pollution Prevention & Grassroots Activism*, RACE, POVERTY & ENV'T, July 1990, at 7-8, 10; Victor Lewis, *A Challenge to the Environmental Movement*, RACE, POVERTY & ENV'T, Apr. 1990, at 4, 19.

²⁹⁸ Remarks of Dana A. Alston, Director, Panos Institute, at the proceedings of The First National People of Color Environmental Leadership Summit held during October 1991 in Washington, D.C. (notes available from author).

²⁹⁹ See Eric Mann, *Environmentalism in the Corporate Climate*, 5 TIKKUN 60, 61 (1991) ("[T]he institutional matrix is frightening: corporate polluters derail environmental regulations in Congress; corporate pollution managers make lucrative deals that neither restrict polluters nor effectively clean

view as a mere "spokesperson for industry."³⁰⁰ Environmental organizations are not infrequently characterized as ignoring the legitimate needs of minority communities, valuing those needs less than they do wildlife protection and the preservation of scenic beauty.³⁰¹

In addition, some minority commentators have suggested that both mainstream environmental organizations and governmental officials bear some direct responsibility for the ultimate siting of environmentally risky facilities in minority communities. After all, it is because these same organizations have been so successful in resisting the siting of such facilities in their own neighborhoods (and in those of their membership), that many of the facilities have instead been located in minority neighborhoods.³⁰² Some minorities have also expressed suspicion of population control proposals, commonly advocated by mainstream environmental groups, based on their perception that those proposals are principally intended to limit the growing populations of persons of color.³⁰³

Finally, the advantages of a less centralized policymaking regime need to be re-examined in light of environmental justice concerns. As described above, the highly centralized nature of environmental policymaking may be one of the most significant structural causes of existing distributional inequities.³⁰⁴ There is certainly reason to suspect that racial minorities today possess more real political power in many localities, and in certain state governments, than they do within the federal government. If true, that would add yet another way in which the disadvantages of centralized authority, and the advantages of decentralized decisionmaking, may historically have been underestimated.³⁰⁵

up the toxins; government agencies set up ostensibly to protect the environment become captive to the polluters and pollution managers; and corporate boards of directors co-opt the most malleable and greedy environmentalists to clean up their image—but not their products.”).

³⁰⁰ *Former Governor Calls for Rethinking at EPA to Combat Effects of "Environmental Racism"*, [Current Developments] Env't Rep. (BNA) No. 22, at 1655, 1656 (1991) (quoting Toney Anaya, former Governor of New Mexico) ("But if it's not going to be protective of the environment, then all we're doing is giving cabinet status to a spokesperson for the industry and we're just not interested in doing that.").

³⁰¹ For example, two Ute tribes in Colorado are currently in a conflict with environmentalists because of the tribes' desire to construct a federally funded water diversion project. Environmentalists are concerned about the impact of the project on the endangered Colorado squawfish. Dirk Johnson, *Indian's Water Quest Creates New Foe: Environmentalists*, N.Y. TIMES, Dec. 28, 1991, at A1 ("'Environmentalists like to wrap themselves in Indian blankets when they can,' said Charles Wilkinson, a law professor at the University of Colorado, who works with both groups. 'And there is some natural alliance. But that alliance comes into collision in the face of such terrible poverty in Indian country.'").

³⁰² Austin & Schill, *supra* note 14, at 78.

³⁰³ See *supra* note 298.

³⁰⁴ See *supra* pp. 125-36.

³⁰⁵ Several commentators have suggested that decentralized regimes offer significant advantages over the typical centralized command-and-control regulatory approach, including the empowerment of local communities and the fostering of democratic values and cultural diversity. See Gerald Frug, *Why Neutrality?*, 92 YALE L.J. 1591, 1600 (1983); Stewart, *supra* note 103, at 1545-46; see also

*E. Reclaiming The Common Ground Shared By Environmentalists
and Civil Rights Advocates*

Environmentalists need to do more, however, than simply modify the structure of environmental lawmaking and reform its substance to take better account of distributional concerns. Environmentalists need to return to the roots of modern environmental law, reacquainting themselves with the natural relationship that exists between what is advocated by both environmentalism and civil rights. Much suspicion and resentment currently exists between the two social movements. However, the potential for claiming substantial common ground and shared values still persists, as it did in the late 1960s when the civil rights movement first spawned both the rhetoric and the tactics of modern environmentalists.³⁰⁶

Similarities between the two movements, however, run deeper than shared rhetoric or tactics. Both challenge the status quo as a means of promoting and protecting the interests of those with less political power, whether they be racial minorities, future generations of persons, or endangered species. Furthermore, to that end, both movements seek to reform those rules that tend to deny access to the institutions capable of bringing about legal reform.

More substantively, both movements are redistributive in their ultimate focus. Civil rights plainly depends on a redistribution of wealth to achieve its ends.³⁰⁷ Similarly, environmentalism requires a de-emphasis of existing absolutist notions of private property rights in natural resources, because the unrestrained exercise of such rights can create tremendous environmental degradation.³⁰⁸ Therefore, both movements

Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 340-41 (1990) (describing how command and control confers great power to federal bureaucracies and courts). Others have questioned the ability of local governments to adopt and implement socially progressive programs that benefit minority and low-income persons. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 24-58 (1990); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 405-35 (1990). In the environmental law context, I have recently joined those commentators in rebutting the thesis that restrictions on property occasioned by modern environmental and natural resources law portend a return to a hierarchical "feudal" order. See Richard J. Lazarus, *Debunking "Environmental Feudalism": Promoting the Individual Through the Collective Pursuit of Environmental Quality*, 77 IOWA L. REV. 1739 (1992).

³⁰⁶ See *supra* note 10.

³⁰⁷ See generally HACKER, *supra* note 91; see also Bell, *supra* note 205, at 11-12 & nn.27-29.

³⁰⁸ See Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 693-702 (1986); David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interests in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311 (1988); Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 STAN. L. REV. 1529, 1548 (1989).

tend to view, regardless of their legitimacy,³⁰⁹ those constitutional provisions aimed at preserving the status quo by protecting the existing distribution of private property rights as significant obstacles to the achievement of their desired ends. Indeed, some civil rights scholars suggest that the Constitution's "giving priority to the protection of property" was intended to protect property in slaves.³¹⁰ Similarly, environmentalists describe how "[t]he law is wedded to a concept of property that gives precedence to a right to change the existing biologic character of the land over increases in the owner's individual wealth. The constitutional shibboleths of the Justices could freeze the fluid stream of property law in the posture of acquisitive individualism."³¹¹

Environmentalists also need to apply ecological values closer to home. There is some painful truth to the perception of many minorities that environmentalists overlook the plight of humankind in their rush to protect nature.³¹² Indeed, in the end there is something perverse about separating out human welfare—including the poverty suffered by whole nations of persons around the world—from what it means to promote the natural environment. Perhaps the reasons for this tendency lie in the sheer tragedy of that human misery associated with the former; misery that leads many otherwise well-intentioned individuals to shy away from intertwining their own lives with such seemingly intractable and wrenching sadness.

Ecological values must recognize and embrace human welfare as an invaluable part of the natural community.³¹³ Environmentalists should, therefore, strive to redress the basic human needs of those who are wanting as part of their central mission. Environmental protection should be seen as a legitimate basis for promoting human welfare and opportunity and, in particular, for redistributing environmental amenities (and risks) more fairly among all persons.³¹⁴ The alternative, which juxtaposes the environment against humankind, is a flawed and ultimately self-defeating frame of reference for environmentalism.

Some recent scholarship suggests a possible reclamation of common ground by the environmental and civil rights movements. Commenta-

³⁰⁹ See Tarlock, *supra* note 102, at 416 (positing distinction between "legitimate" and "illegitimate" property law claims).

³¹⁰ Bell, *supra* note 205, at 6-7.

³¹¹ J. Peter Byrne, *Green Property*, 7 CONST. COMMENTARY 39, 249 (1990) ("The opinions of Scalia and Rehnquist suggest that a radical transformation of property law to reflect ecological values would encounter judicial resistance. . . . The task of green property law is both to find practical mechanisms for utopian aspirations and to criticize those elements of the legal culture that obstruct urgent reforms."); see Freyfogle, *supra* note 308, at 1544.

³¹² See *supra* notes 135-37, 159 and accompanying text.

³¹³ Cf. William H. Rodgers, Jr., *Bringing People Back: Toward A Comprehensive Theory of Takings in Natural Resources Law*, 10 ECOLOGY L.Q. 205 (1982).

³¹⁴ Lazarus, *supra* note 305; MARK SAGOFF, *THE ECONOMY OF THE EARTH—PHILOSOPHY, LAW, AND THE ENVIRONMENT* 155-58, 167-70 (1988).

tors have begun to look anew to civil rights discourse for ideas and inspiration for environmental protection law.³¹⁵ They point out the relevance in each of notions of community, empathy, egalitarianism, and interconnectedness. For example, "Ecofeminism" embodies this new tradition of cooperation in its effort to apply feminist ideology to environmental protection policy.³¹⁶

It is essential, however, that the common ground that must be seized extend beyond the inspirational or thematical and include pragmatic proposals for joining environmental protection and civil rights objectives in shared endeavors. Mass transit is a simple, yet powerful example. Our society's excessive reliance on private motor vehicles needlessly wastes natural resources and degrades the environment. Such reliance can also create a substantial economic barrier to many career and recreational opportunities. Those with fewer economic resources are less likely to have access to the private transportation required to take advantage of those opportunities.³¹⁷ Finally, billions of dollars are spent to construct highways that subsidize the lifestyles of those who choose to live in the more affluent neighborhoods outside major urban areas. For all these reasons, however, promotion of mass transit offers the potential for promoting the interests of both minority and low-income persons and environmental protection.³¹⁸ Mass transit, in short, improves the environment while simultaneously redistributing life's amenities more equitably. Environmentalists need to develop and promote other such natural unions between the two movements.³¹⁹

³¹⁵ See, e.g., Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209, 1220-21 (1991); Freyfogle, *supra* note 155, at 1547-48; A. Dan Tarlock, *Earth and Other Ethics: The Institutional Issues*, 56 TENN. L. REV. 43 (1988).

³¹⁶ See generally REWEAVING THE WORLD: THE EMERGENCE OF ECOFEMINISM (Irene Diamond & Gloria Feman Orenstein eds., 1990) (a collection of writings describing the history, philosophy, and goals of ecofeminism).

³¹⁷ See, e.g., Martha Mahoney, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251, 1279 (1990).

³¹⁸ See John Pucher et al., *Socioeconomic Characteristics of Transit Riders: Some Recent Evidence*, 35 TRAFFIC Q. 461, 480 (1981) ("[T]he poor, the elderly, minorities, and women do indeed make a significantly higher percentage of their trips by transit than does the general population of American urban areas."); see also Jonathan B. Robison, *Fares and Fairness in Urban Public Transportation: The Need for a Substantive Basis for Agency Rate Making*, 43 U. PITT. L. REV. 903, 915-16 (1982) (proposes requiring public transportation agencies to have a substantive basis, rather than simply a procedural basis, for rate-making decisions to further, among other goals, a fare system based upon rider's ability to pay).

³¹⁹ An experimental program now being tested by the Illinois Environmental Protection Agency further illustrates how the interests of minority and low-income persons may be harmonized with environmental protection goals. Dubbed the "Clunkers for Cash" program, the Illinois EPA has recently offered to buy pollution-prone older vehicles from 200 residents of Chicago's southside. Prices for the vehicles vary depending on the level of pollution emitted by the car, with higher emission vehicles bringing the owner a larger rebate. Officials hope that program participants will use the cash to purchase or use more environmentally efficient transportation. See Toby Eckert,

V. CONCLUSION

Environmental justice offers two important lessons. The first is that environmental policymakers need to take account of the distributional implications of their decisions. Environmental policymakers' two traditional inquiries — "how much pollution is acceptable," and "what kinds of legal rules would best ensure the accomplishment of that level of pollution" — ignore an essential factor: the distribution of environmental benefits and burdens needs to be an explicit and well-considered element of the environmental policy debate. The current approach, in which distributional concerns are a matter for behind-the-scenes negotiation in the forging of political compromises, has led to unacceptable distributional inequities. Only a few groups possess the substantial resources necessary for entry into those closed fora where environmental decisions are made, and the resulting distributions naturally favor these groups' own economic interests and/or value preferences.

To be sure, existing empirical evidence of distributional inequity does not yet conclusively illustrate the depth of the problem. Therefore, an immediate short term goal must be to improve the empirical data base. However, the evidence that does exist, combined with the theoretical explanations that readily suggest why such a distributional phenomenon is likely, lend substantial support to the need for exploring the possibility of more significant reforms. A theoretical analysis of the reasons why such inequities may exist, moreover, suggests that certain substantive reforms in environmental law, and structural reforms in the policymaking framework upon which it has relied, could do much to promote a fairer sharing of the benefits and burdens of environmental protection.

The more significant lesson of environmental justice lies, however, in its far broader social implications. The last two decades have witnessed a radical rewriting of the nation's laws in an effort to promote environmental protection concerns. These laws have been widely viewed as progressive in their thrust, and even excessively idealistic in their stated goals.³²⁰ It is enormously unsettling that such laws could themselves be riddled with distributional inequities, especially when the nation's modern environmental movement grew out of, and indeed was

EPA Offers to Clear Clunkers Off Road, Pollutants Out of Air: Program to Help State Comply with Air Quality Standards, CRAIN'S CHI. BUS., Oct. 12, 1992, at 36; Stevenson Swanson, *Illinois Rolls Out Best Deal on Wheels, at Right Price*, CHI. TRIB., Oct. 6, 1992, at 1. Insofar as these older vehicles are primarily owned by low-income and minority urban residents, programs like this have the potential to promote the benefits of environmental protection in the very urban areas where these residents live and work, while insuring a more equitable distribution of the economic benefits and burdens associated with such environmental protection. Significantly, such programs also provide a unique way for low-income and minority residents to participate in the cleanup of their communities. Such incentive programs may be an important impetus for these and other residents to become more involved in environmental protection generally.

³²⁰ See Dwyer, *supra* note 111.

largely inspired by, the civil rights movement that has long resisted those very inequities.

Hence, for the same reason that environmental justice cannot be effectively redressed solely within the environmental law context, its message must be understood as not being confined to that discrete area of the law. Environmental justice reinforces the continuing and compelling need for measures aimed at eliminating racial discrimination and its self-perpetuating vestiges on the broadest social scale. It confirms the pervasiveness of the distributional problems that persist and their racial origins. The problem is not one confined to a few discrete areas. The effects linger far beyond where one lives, goes to school, and works to include the price one pays for a car, the interest paid on a mortgage, and, it now appears, even the quality of the air one breathes and the water one drinks.

A full redressing of those distributional inequities that currently seem to exist in environmental protection will, therefore, necessarily occur only with a change of present attitudes, including those rooted in racial stereotypes.³²¹ It will likewise depend on effective redressing of the vestiges of past discrimination. This includes efforts directed at facilitating or enhancing minority market and political power, their access to information, educational facilities, and the other advantages of life, including enjoyment of the natural environment.³²² It may also require reform of some civil rights laws to facilitate the bringing of racial discrimination claims.³²³ The extent to which the pursuit of environmental justice furthers this far more important and ambitious undertaking should be the ultimate measure of its success.³²⁴

³²¹ Cf. Aleinikoff, *supra* note 78, at 1107-20.

³²² See CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION—RECONCEIVING THE REGULATORY STATE* 37, 39-41 (1990).

³²³ See Ayres, *supra* note 178, at 863-65; Randall L. Kennedy, *Competing Conceptions of "Racial Discrimination": A Response to Cooper and Graglia*, 104 HARV. J.L. & PUB. POL'Y 93, 98-100 (1991); see generally Bell, *supra* note 205. The extent to which the necessary causal nexus exists between past constitutional violations and current racial disparities to support continuing civil rights remedies aimed at ameliorating the latter is a matter of great contemporary contention. See *Freeman v. Pitts*, 112 S. Ct. 1430 (1992) (school desegregation).

³²⁴ There have been several significant developments since this article first went to the printer. The United States Commission on Civil Rights is investigating EPA's compliance with Title VI. Marianne Lavelle, *EPA Enforcement to be Probed: By Rights Commission*, NAT'L L.J., Apr. 5, 1993, at 3. Dr. Ben Chavis, who authored the UCC's 1987 Study, is the new Executive Director of the NAACP. See *NAACP Head Demands Environmental Action*, NAT'L L.J., May 10, 1993, at 5. Finally, the Senate recently passed legislation that would establish an "Office of Environmental Justice" in a cabinet-level EPA. 139 CONG. REC. S5342, S5362 (daily ed. May 4, 1993).