

“ENVIRONMENTAL RACISM! THAT’S WHAT IT IS.”

Richard J. Lazarus*

In this essay, Professor Lazarus discusses former NAACP director the Rev. Dr. Benjamin Chavis’s characterization of U.S. environmental policy as “environmental racism.” He first justifies this provocative topic choice and then suggests that Chavis’s allegation has transformed environmental law. Professor Lazarus next discusses the details of this transformation, arguing that Rev. Chavis has essentially reshaped the way environmental law and justice are conceived. He offers examples of various environmental programs and social and political effects traceable to Chavis’s environmental racism comment. Finally, the conclusion provides some of the author’s ruminations about the future of environmental law and policy.

The topic of this symposium—“Innovations in Environmental Policy”—lends itself to varying interpretations. As I understand it, my assignment is to identify a single idea or scholarly contribution that has had the greatest impact on modern environmental law. There are several distinct ways that this daunting question could be addressed.

One possibility is to play it straight. Although that is not my natural inclination, it would at least offer some obvious choices. Outside the domain of the law reviews, there is Garret Hardin’s *Tragedy of the Commons*,¹ Ronald Coase’s *The Problem of Social Cost*,² Aldo Leopold’s *The Sand County Almanac*,³ and J.H. Dales’s *Pollution, Property, and Prices*.⁴ Within the legal academy, there are classics such as Joe Sax’s path-

* John Carroll Research Professor of Law, Georgetown University Law Center.

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1. Garrett Hardin, *Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

2. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

3. ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* (1949).

4. J.H. DALES, *POLLUTION, PROPERTY, AND PRICES: AN ESSAY IN POLICY-MAKING AND ECONOMICS* (1968).

breaking article on the public trust doctrine⁵ and Judge Leventhal's article on the role of judicial review in environmental law.⁶ But perhaps because these choices seem so obvious, the possibility of simply being straightforward does not seem sufficiently interesting or fun.

A second possibility is to be simultaneously pragmatic and egotistical. Simply cite my own work product or, better yet, just take some of my ongoing research and make it somehow fit the subject of this symposium. Here, too, I would have an obvious choice — my current research on the use of supplemental environmental projects in the settlement of environmental enforcement actions brought by government regulators and private citizens. But, at the end of the day, because a symposium contribution is unlikely to provide me with the number of pages needed for that broader research project and a short symposium essay could unwittingly preempt my own larger project, the disadvantages of this option are similarly too great.

A third possibility is to have some fun with the assigned topic and be provocative. Most naturally attracted to this option, I could pursue a tack not unlike the law review equivalent of *Time Magazine's* naming the Ayatollah Khomeini as its 1979 "Man of the Year."⁷ There are two clear Khomeini-like candidates for environmental law: Professor Richard Epstein, based on his 1985 book on regulatory takings law,⁸ and Justice Antonin Scalia, traced back to a 1983 law review article he wrote before he joined the Supreme Court on the law of standing.⁹ Each of these scholarly works has had a profound influence on environmental law's evolution during the past decade. Epstein's book has served as a virtual blueprint for the property rights movement to persuade the Supreme Court to reinvigorate the Fifth Amendment's Takings Clause.¹⁰ Likewise, Justice Scalia, in his law review article, wrote his own blueprint for resurrecting standing barriers to citizen enforcement of federal environmental laws,¹¹ much of which he has since secured in such Supreme Court opinions as *Lujan v. National Wildlife Federation*,¹² *Lujan v. Defenders of Wildlife*,¹³ and *Steel Co. v. Citizens for a Better Environment*.¹⁴

5. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

6. See Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974).

7. See Tony Kornheiser, *Making of the Man: How Khomeini Stood the Test of Time*, WASH. POST, Jan. 1, 1980, at B1.

8. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

9. See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

10. See Charles Fried, *Protecting Property—Law and Politics*, 13 HARV. J.L. & PUB. POL'Y 44, 48–49 (1990).

11. See William Glaberson, *Novel Antipollution Tool Is Being Upset by Courts*, N.Y. TIMES, June 5, 1999, at A1.

12. 497 U.S. 871 (1990).

13. 504 U.S. 555 (1992). The Court held:

This essay instead chooses an equally—albeit very differently—controversial person as an environmental law figurehead: the Rev. Dr. Benjamin Chavis. Chavis is the former executive director of the National Association for the Advancement of Colored People (NAACP) and a long time civil-rights community organizer and activist.¹⁵ This essay's thesis is not based on any formal scholarship Chavis has authored, such as a particular book or article. It is instead based simply on an exclamation, one of those "Aha!" moments referred to by Professor Bill Rodgers in his contribution to this symposium.¹⁶ The moment was Chavis's coining the term "environmental racism." Chavis reportedly did so as he was preparing to present to the National Press Club the report that he had coauthored with Charles Lee on toxic waste sites and race in the United States: "[I] was trying to figure out how [I] could adequately describe what was going on. It came to me—*environmental racism*. That's when I coined the term. To me, that's what it is."¹⁷ It was a transforming moment for environmental law in the United States.

[If] the plaintiff is himself an object of the [government] action (or foregone action) . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed.

Id. at 561–62. Compare this holding with the view Justice Scalia expressed in his 1983 article. See Scalia, *supra* note 9, at 894 (arguing that when a plaintiff is "the very *object* of a law's requirement or prohibition," the plaintiff will "always" have standing, but when the plaintiff "is complaining of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else*," standing is not so easily shown).

14. 523 U.S. 83 (1998).

15. See Neil A. Lewis, *Seasoned by Civil Rights Struggle*, N.Y. TIMES, Apr. 11, 1993, at A20. After converting to Islam in 1997, Chavis changed his name to Benjamin Chavis Muhammad. See *New Muslim Figure Plans March in North Carolina*, N.Y. TIMES, Mar. 7, 1991, at A20. Because Benjamin Chavis Muhammad was known as Benjamin Chavis at the time of the environmental racism claim that is the topic of this essay, the essay refers to him by his former name.

16. See William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: "The Whats,"* 2000 U. ILL. L. REV. 1.

17. Karl Grossman, *The People of Color Environmental Summit*, in UNEQUAL PROTECTION—ENVIRONMENTAL JUSTICE & COMMUNITIES OF COLOR 273, 278 (Robert D. Bullard ed., 1994). The report to which Chavis was referring is one he coauthored with Charles Lee for the United Church of Christ's Commission for Racial Justice. See BENJAMIN CHAVIS & CHARLES LEE, UNITED CHURCH OF CHRIST'S COMM'N FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES (1987). Another oft-reported version of Chavis's coining of the term places it five years earlier in Warren County, North Carolina, in 1982, when Chavis yelled, "This is environmental racism!" at the very moment that he was arrested during a protest over the siting of a PCB landfill in a predominantly African American community. The author has heard this description of the origin of the term's coining repeatedly over the past few years, commencing at the First National People of Color Environmental Leadership Summit, held in Washington, D.C., in October, 1991. See Keith Schneider, *Minorities Join to Fight Polluting of Neighborhoods*, N.Y. TIMES, Oct. 25, 1991, at A20. After consultation with knowledgeable sources, including those present at the 1987 press briefing and active in the Warren County demonstrations, it appears that the 1982 version is likely apocryphal and the 1987 press briefing version the more accurate. The Warren County protest and Chavis's arrest were, nonetheless, plainly a defining moment for environmental justice. See Carita Shanklin, Comment, *Pathfinder: Environmental Justice*, 24 ECOLOGY L.Q. 333, 336–37 (1997); Eileen Maura McGurty, *The Construction of Environmental Justice: Warren County North Carolina* (1995) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign) (on file with author).

Indeed, its impact has been far greater than is generally understood, including by those in the legal academy who specialize in environmental law.¹⁸

To be sure, environmental justice does not find much formal expression in environmental law. There are no extensive statutory provisions expressly addressing environmental justice matters, as was once proposed.¹⁹ Nor does there exist a series of detailed federal environmental justice regulations to govern the distribution of environmental risks. But the absence of such statements of positive law does not mean that there has been little resulting change in environmental law.

The environmental justice movement, propelled by environmental racism claims, has led to a significant renegotiation of the terms of environmental law in a variety of subtle but significant contexts. In this respect, the movement's impact may best be understood as support for Professor Dan Farber's thesis in this same symposium, in which he proposes that many of the actual terms of environmental law result from the field's persistent renegotiation in site-specific circumstances.²⁰

The goal of this essay is to support the idea that Chavis's environmental racism accusation has had a transforming effect on environmental law. To that end, the body of this essay is divided into three parts. The first part briefly parses Chavis's statement, including the context in which it was made. The second part describes the impact of this statement on environmental legal scholarship. Next, the third part offers some general and specific examples of the positive sociopolitical effects of Chavis's environmental racism allegation. Finally, the essay concludes by assessing the progress of and future prospects for environmental law and justice in light of Chavis's transforming insight.

18. Of course, it is always historically risky and simplistic to credit one individual's coining of a phrase as a turning point. Who said precisely what first is always disputed, and any one person's statement is invariably the product of the broader community within which that person works and lives. For Benjamin Chavis, that community undoubtedly extends to a host of individuals who played significant roles in the environmental justice movement's formative moments: Dr. Charles Lee, co-author of the Toxic Waste and Race Report; Dr. Bob Bullard, the sociologist whose pathbreaking research catalyzed the environmental justice movement, *see, e.g.*, ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (1990); Vicki Bullard, an attorney who initiated early environmental justice litigation in Houston; Pat Bryant, a community organizer in Louisiana; Richard Moore, a community leader and organizer in New Mexico; and countless others whose work in their own communities was both inspired by and inspiring to the work of Chavis and other national civil rights leaders.

19. *See, e.g.*, Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Law and "Justice,"* 47 AM. U. L. REV. 221, 246 (1997) (discussing the proposed Environmental Justice Act of 1993, S. 1161, 103d Cong.).

20. *See* Daniel A. Farber, *Triangulating the Future of Reinvention: Three Emerging Models of Environmental Protection*, 2000 U. ILL. L. REV. 61; *see also* Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 305-11 (1999).

I. "ENVIRONMENTAL RACISM": PARSING ITS SIGNIFICANCE

There are at least two aspects of Chavis's 1987 declaration worthy of special emphasis. The first is that it represents a formal joining of two social movements—the civil rights and environmental movements. The statement deliberately does not simply reference economic concerns. It likewise deliberately eschews the more neutral rhetoric of equity in favor of the far more volatile claim of racism.²¹

Chavis's statement has been criticized by those who argue that this racism charge is not adequately supported.²² My own view is that such criticism is mostly unfair because there is sufficient historical basis for the racism proffer, especially in light of the problems inherent in making analytical distinctions between racial and economic factors.²³ But that view is not the focus of this essay. It is instead that Chavis's race-oriented claim has had a transforming effect on environmental law. If environmental justice had not been so cast in terms of race, it is quite doubtful that the movement would have enjoyed such a strong political half-life.²⁴

In this respect, my assessment of Chavis's choice of words is not unlike that of Professor Carol Rose in her recent analysis of Professor Joseph Sax's rhetorical strategy in proposing the public trust doctrine in the

21. Although "environmental justice" represents common usage today, the term "environmental equity" dominated much of the discussion in the late 1980s and early 1990s. See, e.g., ENVIRONMENTAL EQUITY WORKGROUP, EPA, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES, WORKGROUP REPORT TO THE ADMINISTRATOR 2 (1992); KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE: READINGS AND COMMENTARY ON ENVIRONMENTAL LAW AND PRACTICE 155 (1995); R. Gregory Roberts, Comment, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 48 AM. U. L. REV. 229, 231 n.8 (1998). This term was understandably rejected by activists because of concerns that its goal—equitable amounts of pollution—was too neutral and not sufficiently aspirational. See Colin Crawford, *Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits*, 74 B.U. L. REV. 267, 268 n.1 (1994); Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219, 1266–71 (1998); see also Eileen Guana, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 29 (1995) ("Risk elimination rather than risk redistribution is a key component of the environmental justice perspective. In short, argue environmental justice activists, 'environmental equity' misses the point.").

22. See, e.g., Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994); Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75 (1996); Daniel Kevin, "Environmental Racism" and Locally Undesirable Land Uses: A Critique of Environmental Justice Theories and Remedies, 8 VILL. ENVTL. L.J. 121 (1997); see also CHRISTOPHER H. FOREMAN, THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE 122–26 (1998) (discussing how the need for empirical analysis and evidence is often hindered by complex and ambiguous interactions). Notably, Professor Been's initial publications, which questioned whether hazardous waste facilities were disproportionately sited in minority communities, were themselves called into question by her analysis, which "did find evidence that the facilities were sited in areas that were disproportionately Hispanic at the time of the siting." Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 9 (1997). Professor Been's subsequent analysis, however, found no comparable correlation for African American communities or for the poor. See *id.*

23. See Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 795 n.87 (1998).

24. See Evans, *supra* note 21, at 1272.

early 1970s as an effective basis for judicial intervention on behalf of environmental protection.²⁵ Rose posits that one significant reason why the public trust doctrine has had such a profound and persistent impact is simply its name: public trust.²⁶ The name provides the doctrine with moral force, which in turn promotes its embrace and proliferation. The same is true for environmental racism and the broader umbrella of environmental justice.

The second significant insight is the *object* of Chavis's accusation. It is that environmental law—here the environmental law governing the location of hazardous waste sites—may itself be part of the problem rather than the solution.²⁷ Herein lies Chavis's truly extraordinary intuition on the workings of environmental law.

The relationship of environmental law to civil rights law previously had been the subject of discussion. There had long been claims that polluting facilities were disproportionately located in communities of color.²⁸ There were also concerns that the economic costs of pollution control disproportionately hurt the poor and minority populations.²⁹ Finally, some black leaders made the unsettling claim in the early 1970s that the environmental movement was itself a diversionary tactic designed to shift the nation's attention from the plight of African Americans and other racial minorities to wealthy white Americans' elitist concerns about the natural environment.³⁰

What Benjamin Chavis was raising was a distinct, ultimately even more troubling claim. His assertion was that the environmental laws were themselves racist in their implementation and application. Laws assumed to be at worst distributionally neutral and likely progressive for the poor, were, according to Chavis, making matters worse along racial lines.

Chavis's environmental racism accusation has profoundly affected the evolution of environmental law. After two decades, however, this

25. See Sax, *supra* note 5.

26. See Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 *ECOLOGY L.Q.* 351, 351 (1998) ("Public trust": what an arresting phrase. Perhaps it is not quite the equal of 'the tragedy of the commons,' but it catches the attention in a far more positive way, with its intimations of guardianship, responsibility, and community.").

27. See Sheila Foster, *Race(ial) Matters: The Question for Environmental Justice*, 20 *ECOLOGY L.Q.* 721, 729–30 (1993) ("Ultimately, however, it is the 'success' of environmental laws that leads to the racially disparate outcomes in the distribution of environmental hazards.").

28. See, e.g., 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 [some] air pollutants than does the average family (black or white) with an income under \$3,000.").

29. See, e.g., Nancy C. Dorfman & Arthur Snow, *Who Will Pay for Pollution Control?—The Distribution by Income of the Burden of the National Environmental Protection Program 1972–1980*, 28 *NAT'L TAX J.* 101, 115 (1975); Leonard P. Gianessi & Henry M. Peskin, *The Distribution of the Costs of Federal Water Pollution Control Policy*, 56 *LAND ECON.* 85, 97 (1980).

30. See Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 *Nw. U. L. REV.* 787, 788–89 (1993).

impact has not yet realized its full potential. The remainder of this essay provides some suggestion of the scope of Chavis's impact, drawing examples from legal scholarship and environmental law's renegotiation.

II. THE RACISM CHARGE'S IMPACT ON ENVIRONMENTAL LAW SCHOLARSHIP

The impact of Chavis's charge of environmental racism was relatively immediate. Throughout the 1970s and 1980s, there appears to have been no mention of the issues related to environmental justice in law schools, even though those issues were, in fact, raised very early on by the affected communities and were the subject of academic inquiry in other disciplines.³¹ Neither environmental law courses nor their casebooks raised the issue.³² There were *no* law review articles on the topic. Nor were there any related law school conferences or symposia. Although other university programs were paying heed—most notably sociology departments³³—the nation's law schools were not.

The contrast with the end of the 1990s is striking. All the major environmental law casebooks now devote substantial attention to the issue,³⁴ as do the two leading environmental anthologies.³⁵ There have been at least ten formal law review symposia on environmental justice,³⁶ and the total number of conferences can be fairly estimated as several-fold greater.³⁷ There have also been at least three hundred law review articles published during the 1990s that primarily address environmental

31. *See id.* at 788–91.

32. *See, e.g.*, FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY (1984); JOHN E. BONINE & THOMAS O. MCGARITY, THE LAW OF ENVIRONMENTAL PROTECTION: CASES, LEGISLATION, POLICIES (1984); THOMAS J. SCHOENBAUM, ENVIRONMENTAL POLICY LAW: CASES, READINGS, AND TEXT (1985).

33. *See* Lazarus, *supra* note 30, at 790.

34. *See, e.g.*, FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW & POLICY 19–21 (3d ed. 1999); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, & POLICY 24–27 (2d ed. 1996); ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 52–54 (2d ed. 1998).

35. *See* AN ENVIRONMENTAL LAW ANTHOLOGY 46–64 (Robert L. Fishman et al. eds., 1996); FOUNDATIONS OF ENVIRONMENTAL LAW AND POLICY 102–29 (Richard L. Revesz ed., 1997).

36. *See* Symposium, *Urban Environmental Justice*, 21 FORDHAM URB. L.J. 425 (1994); Symposium, *Urban Environmental Issues in the Bay Area*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 371 (1996); Symposium, *Environmental Justice: Paradigms and Legal Strategies*, 9 J. ENVTL. L. & LITIG. 309 (1994); Symposium, *Environmental Equity in the 1990s: Pollution, Poverty and Political Empowerment*, 1 KAN. J.L. & PUB. POL'Y 14 (1991); Symposium, *Environmental Justice*, 5 MD. J. CONTEMP. LEGAL ISSUES 1 (1994); Symposium, *Environmental Justice: The Merging of Civil Rights and Environmental Activism*, 9 ST. JOHN'S J. LEGAL COMMENT. 437 (1994); Symposium, *Class, Race and Environmental Regulation*, 63 U. COLO. L. REV. 839 (1992); Symposium, *Environmental Justice: The New Wave*, 14 VA. ENVTL. L.J. 567 (1995); Symposium, *Public Wrongs, Private Rights: Private Attorneys General for Civil Rights*, 9 VILL. ENVTL. L.J. 321 (1998); Symposium, *Essays on Environmental Justice*, 96 W. VA. L. REV. 1017 (1994); Symposium, *Earth Rights and Responsibilities: Human Rights and Environmental Protection*, 18 YALE J. INT'L L. 213 (1993).

37. The author has himself participated in at least three environmental justice law school conferences for every one symposium in which he has contributed a law review article.

justice issues³⁸ and undoubtedly far more that at least discuss the issue. In 1994 alone, law reviews published approximately seventy articles largely concerned with environmental justice.³⁹ Finally, there are several new law school clinics addressing environmental justice matters.⁴⁰

No other single idea has had such a transforming effect on environmental legal scholarship and the teaching of environmental law during the past three decades. To be sure, some of that significant legal scholarship has been sharply critical of claims of environmental racism.⁴¹ That criticism, however, has served less to dent the significance of the central claim of environmental racism than to underscore it.

The impact of the environmental racism charge is not unlike the impact on legal scholarship of Judge Richard Posner. Judge Posner is forever publishing new books on wide-ranging topics seemingly outside any conceivable notion of his own academic expertise.⁴² His book on sex and the law is an obvious example.⁴³ Judge Posner's publications invariably trigger an avalanche of criticism, including by some who may (unlike Judge Posner) actually possess some formal indicia of academic expertise in the underlying subject matter.⁴⁴ But Judge Posner remains unde-

38. This count is based on a listing of all environmental justice articles published between 1991 and mid-1999 researched via Lexis and Westlaw. I have spared the reader (and the *University of Illinois Law Review* editors) a precise listing here of all of those articles.

39. See discussion *supra* note 38.

40. See Hope Babcock, *Environmental Justice Clinics: Visible Models of Justice*, 14 STAN. ENVTL. L.J. 3, 6 n.10 (1995). The proliferation of law-school-based environmental justice clinics in the San Francisco Bay Area prompted environmental justice organizations to send a cautionary letter to each of those law schools about the need to establish lawyer/client relations that empower the client communities. See *An Open Letter from Bay Area Environmental Justice Activists to Environmental Law Clinic Proponents at Boalt Hall Law School, Golden Gate Law School and Stanford Law School*, 5 RACE, POVERTY & ENV'T 55 (1994-95). A 1995 survey found a number of law school clinics with a significant environmental justice focus, including Boalt Hall (Berkeley), Boston College, Georgetown University, Golden Gate, Hawaii, Maryland, Rutgers (Newark), Stanford, State University of New York (Buffalo), Texas Southern University, Tulane University, and the University of Baltimore. See generally Joel Fletcher, *Clinical Education in Environmental Law: A Survey of Internships, Externships and In-House Clinics* (1995) (unpublished student paper, Washington University School of Law) (on file with author). These law school clinics have achieved some remarkable success in their efforts on behalf of environmental justice clients, including in two cases described later in this article. See *infra* notes 80 (describing the Shintech litigation brought by the Tulane University School of Law environmental clinic on behalf of community representatives) and 81 (describing section 404 litigation brought by the Georgetown University Law Center environmental clinic on behalf of a Native American tribe).

41. See *supra* note 22.

42. See, e.g., RICHARD A. POSNER, *AGING AND OLD AGE* (1995); RICHARD A. POSNER, *LAW AND LITERATURE* (1998); RICHARD A. POSNER, *SEX AND REASON* (1992) [hereinafter POSNER, *SEX AND REASON*].

43. See POSNER, *SEX AND REASON*, *supra* note 42.

44. See, e.g., Martha Ertman, *Denying the Secret of Joy: A Critique of Posner's Theory of Sexuality*, 45 STAN. L. REV. 1485 (1993); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Towards a Gaylegal Agenda*, 102 YALE L.J. 333 (1992); Carol Sanger, *He's Gotta Have It*, 66 S. CAL. L. REV. 1221 (1993); Robin West, *Sex, Reason, and a Taste for the Absurd*, 81 GEO. L.J. 2413 (1993); Martin Zelder, *Incompletely Reasoned Sex: A Review of Posner's Somewhat Misleading Guide to the Economic Analysis of Sex and Family Law*, 91 MICH. L. REV. 1584 (1993).

terred,⁴⁵ and, even more importantly, his ideas have staying power. He successfully redefines the terms of the debate. And it is ultimately only an incidental matter if several, many, or even most of his specific claims prove unpersuasive. Judge Posner's general thesis remains influential.

The same is true for the environmental justice movement and the closely related claims of environmental racism—and for sounder reasons. They have made the entire environmental law profession—law professors, law students, practicing lawyers with both public sector and private sector clients, the regulated community, and policymakers—think about environmental law quite differently. They have compelled us to think about the distributional dimension of environmental law more thoughtfully, more systematically, and more thoroughly. They have made those of us who write and teach about environmental law better scholars and better teachers. This is not an instance where a racism charge clouded clarity. The charge instead served a positive role in focusing attention on issues too long ignored in environmental law.

III. RENEGOTIATING ENVIRONMENTAL LAW AND POLICY

The true touchstone of an idea's impact on environmental law does not, of course, ultimately turn on its effect on legal scholarship. It turns on the environmental protection requirements themselves and, more particularly, on levels and distribution of environmental protection resulting from those requirements. In the case of environmental racism, the impact has been widespread but relatively invisible to most observers.

Neither Congress nor any of the states have passed any generic environmental justice laws that impose new responsibilities on government and the regulated community or otherwise confer new rights on members of environmental justice communities.⁴⁶ There have likewise not been any amendments to any of the individual environmental protection laws, including the Clean Air or Clean Water Acts,⁴⁷ Solid Waste Disposal Act,⁴⁸ Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁴⁹ Toxic Substances Control Act,⁵⁰ and Safe Drinking Water Act.⁵¹ Nor has the environmental justice movement yet

45. See Richard A. Posner, *The Radical Feminist Critique of Sex and Reason*, 25 CONN. L. REV. 515 (1993).

46. The most notable single exception is likely Executive Order 12,898, 3 C.F.R. 859 (1995), reprinted in 42 U.S.C. § 4321 (1994), which governs actions by executive branch agencies but, under section 6-609 of the executive order, is not judicially enforceable. See *id.* at 863; Gary A. Abraham, Note, *Review of Actions Under President Clinton's Executive Order on Environmental Justice*, 5 BUFF. ENVTL. L.J. 79, 86-87 (1997).

47. Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994); Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994).

48. 42 U.S.C. §§ 6901-6992.

49. *Id.* §§ 9601-9674.

50. 15 U.S.C. §§ 2601-2692 (1994).

51. 42 U.S.C. §§ 300f-300j-26.

resulted in any major judicial rulings embracing claims of racism and inequity and, on that basis, awarding plaintiffs substantial relief.⁵²

Any such formal indicia would provide strong evidence of a significant impact on environmental law. But none is necessary for such an impact to have occurred. Indeed, the presence of such indicia might create a false impression of an impact where, in fact, none existed. Environmental laws that promise much on their face may in reality deliver very little in terms of actual improvement in environmental quality.⁵³

Environmental justice provides the contrasting example. There is far more, rather than far less, occurring in this field than meets the macroscopic eyes of most legal academics. This disparity is not a matter of mere happenstance. It is instead quite consistent with environmental justice's core theme, which favors decentralized approaches to the problems communities face.

An apt analogy can be drawn here between the impact of environmental justice on environmental law and the impact of the public trust doctrine on Mono Lake in California. There, the significance of the public trust doctrine has not depended on a judicial ruling that the doctrine serves as some absolute limit on withdrawals from the lake's feeder streams, including those Los Angeles has conducted.⁵⁴ What was necessary for the doctrine to have significant impact was judicial recognition of the threshold legitimacy of the public trust doctrine as a possible basis for limiting private property rights in water resources. Such recognition, standing alone, has had a substantial impact by providing a legal and political basis for the renegotiation of the water rights relevant to the Mono Lake Basin.⁵⁵

A similar process of renegotiation has been occurring throughout the United States as a result of claims of environmental injustice and racism. The claims themselves have had sufficient legitimacy to provide communities of color and low-income communities with leverage never

52. Instead there have been several adverse judicial rulings. See, e.g., *South Bronx for Clean Air v. Conroy*, 20 F. Supp. 2d 565, 573 (E.D.N.Y. 1998); *Goshen Road Env'tl. Action v. United States Dep't of Agric.*, 891 F. Supp. 1126, 1134 (E.D.N.C. 1995), *aff'd*, 103 F.3d 117 (4th Cir. 1999); *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1150 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992); *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Comm'n*, 706 F. Supp. 880, 887 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); *Coalition of Concerned Citizens Against I-670 v. Damian*, 608 F. Supp. 110, 113 (S.D. Ohio 1984); *Bean v. SouthWest Waste Management Corp.*, 482 F. Supp. 673, 674 (S.D. Tex. 1979); *Harrisburg Coalition Against Ruining the Env't v. Volpe*, 330 F. Supp. 918, 921 (M.D. Penn. 1971).

53. See John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233, 233-34 (1990); Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 *LAW & CONTEMP. PROBS.* 311, 323-30 (1991).

54. The California Supreme Court's opinion in *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983), considered the extent to which the public trust doctrine limited the City of Los Angeles's water rights in the feeder streams of Mono Lake. See generally Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 *ARIZ. L. REV.* 701 (1995); Cynthia L. Koehler, *Water Rights and the Public Trust Doctrine: Resolution of the Mono Lake Controversy*, 22 *ECOLOGY L.Q.* 541 (1995).

55. See Blumm & Schwartz, *supra* note 54, at 715-20; Koehler, *supra* note 54, at 572-77.

previously possessed, whether dealing with polluting facilities within or desired to be within the community or dealing with federal and state regulators. The leverage is sometimes legal. And it is sometimes wholly political. The practical effect can be the same in either case.

The changes occurring in environmental law fall within several categories. For the purposes of this essay, just a few are outlined, with some examples provided for each. The categories include changes in enforcement policy, standard setting, public participation, the environmental law profession, and facility siting.

Enforcement Policy: One of the most longstanding environmental justice claims has been that there is too little enforcement of existing environmental protection requirements in communities of color and low-income communities.⁵⁶ Whether consciously or unconsciously, enforcement personnel ignore or discount the needs of such communities in overseeing the operation of polluting facilities. The result is fewer enforcement actions, less meaningful remedies when enforcement actions are maintained, and higher rates of noncompliance.⁵⁷

Changes in government enforcement policies are occurring, including changes in federal government policies respecting the setting of priorities. The EPA now expressly considers environmental justice factors in a variety of settings when targeting facilities and geographic areas for enforcement.⁵⁸ Change is also reflected in enforcement policies related to remedy selection.⁵⁹ The EPA's new guidance for supplemental environmental projects,⁶⁰ obtained through settlement of environmental enforcement actions, now includes policies designed to promote projects that further environmental justice concerns.⁶¹ The EPA's brownfields

56. See Robert R. Kuehn, *Remedying the Unequal Enforcement of Environmental Laws*, 9 ST. JOHN'S J. LEGAL COMMENT. 625, 627-42 (1994).

57. See *id.*; Lazarus, *supra* note 30, at 818-19; Joe Robertson, *Failure to Clean Up Site Called "Racist,"* TULSA WORLD, Apr. 16, 1999, at A7.

58. See EPA, REGION 6 ENVTL. JUST. ANN. REP. 4 (Feb. 1, 1999 Addendum) ("Those areas in Region 6 with higher Human Health and Environmental Justice Index Scores are targeted for inspection and enforcement activities."); OFFICE OF ENVTL. JUST., EPA, ENVTL. JUST.: 1996 ANN. REP. 57 (1997) [hereinafter 1996 EPA EJ ANN. REP.] (Region 8 environmental justice protocols for inspection targeting); EPA, ENVIRONMENTAL JUSTICE INITIATIVES 1993, at 9-10 (1994); Sam Agpawa & Roy Ford, EPA Region IX Air Division, Environmental Justice Strategy 8-9 (1998) (unpublished paper) (on file with author) ("Action Plan: . . . Identify areas that have potential EJ [environmental justice] concerns and take into consideration for EJ concerns when targeting inspections or enforcement.").

59. Remedy selection under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1994), can be more or less sensitive to environmental justice concerns. For example, it was largely in response to concerns raised by environmental justice advocates that the EPA decided to relocate 358 low-income, African American families in Pensacola, Florida, because of their close proximity to a hazardous waste site. See 1996 EPA EJ ANN. REP., *supra* note 58, at 14. Another example can be found in the EPA's building environmental justice criteria into award fee plans for all CERCLA Response Action Contracts. See EPA, DOC. NO. 540/R-95/058, WASTE PROGRAMS ENVIRONMENTAL JUSTICE ACCOMPLISHMENTS REPORT EXECUTIVE SUMMARY (1996 Update).

60. See EPA Supplemental Environmental Projects Policy Issued, 63 Fed. Reg. 24,796 (1998).

61. See *id.* at 24,797, 24,802-03. For example, in 1997 Sherwin Williams settled an environmental enforcement action brought against a resin and paint manufacturing facility by agreeing, inter alia, to

program, moreover, is very much a product of an effort instigated by environmental justice advocates to secure cleanup remedies that promote both the environmental protection and economic concerns of their communities.⁶²

Environmental Protection Standards: Another area witnessing significant change is in the setting of environmental protection standards. The EPA has striven to pay closer heed to the impacts of pollution on vulnerable subpopulations, which are quite often environmental justice communities. The Agency's promulgation of revised national ambient air quality standards for particulate matter and ozone is an obvious example.⁶³ So, too, are the Agency's programs for curbing toxic hotspots under section 112 of the Clean Air Act in inner cities⁶⁴ and for reducing vehicle miles traveled pursuant to that same law.⁶⁵ The latter responds to environmental justice demands by redirecting transportation funds that subsidize the commuting needs of suburban dwellers to increase instead funding to offset the costs for those dependent on more environmentally friendly mass transit options.⁶⁶

pay a \$4.7 million penalty and \$1.1 million for brownfields and wetland restoration supplemental environmental projects. See 1996 EPA EJ ANN. REP., *supra* note 58, at 24.

62. See CHARLES LEE, NATIONAL ENVTL. JUSTICE ADVISORY COUNCIL, ENVIRONMENTAL JUSTICE, URBAN REVITALIZATION, AND BROWNFIELDS: THE SEARCH FOR AUTHENTIC SIGNS OF HOPE (1996); 1996 EPA EJ ANN. REP., *supra* note 58, at 20; Kirsten H. Engel, *Brownfields Initiatives and Environmental Justice: Second-Class Cleanups or Market-Based Equity*, 13 J. NAT. RES. & ENVTL. L. 317, 319 (1997-98); Stephen M. Johnson, *The Brownfields Action Agenda: A Model for Future Federal/State Cooperation in the Quest for Environmental Justice?*, 37 SANTA CLARA L. REV. 85, 95 (1996).

63. These more stringent national air quality standards for ozone and particulate matter, promulgated by the EPA in July 1997, 40 C.F.R. § 50.9 (1999) (ozone), 40 C.F.R. § 50.10 (1999) (particulate matter), and recently invalidated by a surprising D.C. Circuit ruling, *American Trucking Association v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999), were strongly supported by environmental justice organizations because of the high incidence of asthma and other respiratory problems inner city residents suffered. See EPA, DOC. NO. 402-F-95-001, ASTHMA, AIR QUALITY, AND ENVIRONMENTAL JUSTICE—EPA'S ROLE IN ASTHMA EDUCATION AND PREVENTION (1995); Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 48 (1998).

64. See 42 U.S.C. § 7412(k)(3) (1994); see also EPA, PUB. NO. 200-R-93-001, ENVIRONMENTAL JUSTICE INITIATIVES 1993 (1994); Draft Integrated of Urban Air Toxics Strategy to Comply with Section 112(k), 112(c)(3) and Section 202(1) of the Clean Air Act, 63 Fed. Reg. 49,240, 49,442-43 (1998) ("[W]e intend to seek collaborative relationships with State and local agencies, minority and economically disadvantaged communities, and affected industries to assure [sic] our actions are responsive to health concerns while promoting environmental justice . . ."); *id.* at 49,252 ("In order to facilitate the development of a strategy which will be responsive to these environmental justice concerns, we are actively encouraging community groups not only to comment on the strategy, but also to work actively with us in developing a program that can address their concerns.").

65. See 42 U.S.C. § 7506(c)(1).

66. Illustrative is the consent decree the City of Los Angeles Metropolitan Transportation Authority (MTA) entered into in 1994 to settle a civil rights suit by local community organizations. That decree was entered into following entry of a preliminary injunction and district court findings that past MTA policies, including rate structures and funding policies, disproportionately benefited white ridership and disproportionately burdened minority bus riders. Implementation of the consent decree is actively supported by environmental groups such as the Environmental Defense Fund because of the positive environmental benefits of a less discriminatory mass transit policy. See Memorandum for Amicus Curiae Environmental Defense Fund, Labor/Community Strategy Ctr. v. Los An-

The EPA is also beginning to pay more attention in standard setting to cumulative impacts, including those rooted in different diets and eating habits,⁶⁷ and to study in greater detail the synergistic effects related to the mixing of different pollutants.⁶⁸ Environmental justice has also catalyzed the Agency's efforts to promote pollution prevention techniques that reduce sources of pollution within environmental justice communities that experience higher exposures to toxic pollution than the general population.⁶⁹ The Agency's efforts might still be fairly characterized as fledgling, but at least the number of efforts and their apparent seriousness suggests that environmental justice claims have resulted in heightened attention and resources.⁷⁰

geles County Metro. Transp. Auth., No. CV 94-5936 TJH (MCx) (C.D. Cal., filed Apr. 28, 1999) (copy on file with author).

67. See EPA, ENVIRONMENTAL JUSTICE INITIATIVES, *supra* note 64.

68. Demonstrative of these efforts and the role of environmental justice advocacy organizations in their creation is "The Chicago Cumulative Risk Initiative." The Initiative resulted from a petition filed by 11 environmental and community organizations, all represented by the Chicago Legal Clinic, with the EPA pursuant to section 21 of the Toxic Substances Control Act, 15 U.S.C. § 2620 (1994). The EPA responded to the petition by meeting with petitioners and agreeing to work with them in the development of a model for the assessment of cumulative environmental risks in the Chicago area, with a particular focus on the risks faced by children. See Keith Harley, *The Chicago Cumulative Risk Initiative*, 7 DEPAUL ENVTL. L. DIG. 6, 6 (1996); see also 1 EPA, CHICAGO CUMULATIVE RISK INITIATIVE (1998 Update). Professor Robert Kuehn thoughtfully describes the reasons why methods for quantitative risk assessment require reform in response to environmental justice concerns. See Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103, 116-39.

69. See OFFICE OF POLLUTION PREVENTION & TOXICS, EPA, ENVIRONMENTAL JUSTICE THROUGH POLLUTION PREVENTION GRANT GUIDANCE 1998 (1998). Many of these successful programs—some sponsored by pollution prevention grants, the environmental justice small grants program, and former community/university partnership grants—are described in annual reports published by the EPA's Office of Environmental Justice:

Since 1993, over \$7 million in grant awards of \$20,000 have been made to approximately 500 local community recipients. Grant recipients are addressing, among other issues, childhood lead poisoning, asthma management in children, radon testing in low-income homes, fish contamination in subsistence populations, water quality and pesticide issues in rural communities.

Examples include:

- In Region III, a university conducted a project that trained local community members to test for and cleanup lead debris and dust. The project successfully reduced lead contamination in the homes of community residents, thereby reducing exposure to vulnerable children.
- In Region V, universities conducted training workshops for 450 Cambodian, Hmong and Laotian residents on ways to reduce levels of lead, radon, carbon monoxide and moisture/molds in indoor home environments.

1996 EPA EJ ANN. REP., *supra* note 58, at 23.

70. A recent report issued by the National Academy of Sciences' Institute of Medicine on environmental justice underscores the seriousness with which the health concerns are now, finally, being considered. See COMM. ON ENVTL. JUSTICE, NATIONAL ACADEMY OF SCIENCES' INST. OF MED., TOWARD ENVIRONMENTAL JUSTICE—RESEARCH, EDUCATION, AND HEALTH POLICY NEEDS (1999). The report concludes that it is

clear that inequities related to environmental and occupational hazards do exist.... [C]ommunities of concern... experience a certain type of double jeopardy in the sense that they (1) experience higher levels of exposure to environmental stressors in terms of both frequency and magnitude and (2) are less able to deal with these hazards as a result of limited knowledge of exposures and disenfranchisement from the political process.

Id. at 5-6. The Institute recommended, accordingly, that a series of affirmative steps be taken toward the establishment of a public health program for "dealing with the environmental health problems of disadvantaged communities," including several research initiatives, educational efforts for health care

Environmental justice concerns have also improved environmental protection standard setting in yet another way. Many commentators have long advocated greater use of market incentives, such as tradable emission rights, to achieve environmental protection at lower costs.⁷¹ The linchpin of any such tradable emission scheme, however, must be the geographic fungibility of those emissions being traded; that is, what matters is the amount of pollution emitted within a specified area rather than precisely where within that area the pollution occurs. So long as that premise holds true, tradable emissions programs may offer a viable mechanism for meeting pollution controls goals (e.g., by setting a pollution cap for the relevant area) while promoting reductions at those specific sources that may do so at the lowest cost.

Environmental justice's renewed emphasis on the distributional dimension of environmental protection can call that premise into question by revealing how unrestricted trading may not be neutral in its impact. Unanticipated aggregation and unwanted hot spots may occur.⁷² For that same reason, however, the distributional focus of environmental justice can lead to the development of more carefully constructed and effective market incentive trading programs.

Public Participation: A third category where major changes are both necessary and are occurring is public participation.⁷³ Because local envi-

professionals and the general public, and changes in national health policy. *See id.* at 6–9.

71. *See generally* DALES, *supra* note 4; Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985).

72. Tradable emissions programs proposed in both southern and northern California have recently fallen victim to such environmental justice concerns. The program applicable to portions of southern California allowed, until its subsequent withdrawal, certain stationary sources of volatile organic compounds to increase emissions in return for the retirement of older motor vehicles that otherwise would emit such compounds. *See* Marla Cone, *Smog Panel to Overhaul Car Buyback Program*, L.A. TIMES, Apr. 25, 1998, at A25. As originally proposed, the program proposed for northern California would have allowed sources to trade not only between sources of the same pollutant but also between different pollutants from the same and different sources. *See* Bay Area Air Quality Management Dist., Regulation 2, Rule 9 (1998), available in *Interchangeable Emission Reduction Credits* (last modified Apr. 7, 1999) <<http://www.baaqmd.gov/regs/rg0209.pdf>> [hereinafter *Interchangeable Emission Reduction Credits*]. Environmental justice advocates attacked both programs believing the resulting trades would make their communities worse off by concentrating more actual emissions in those communities (in return for emission decreases likely to be more fictional than actual). *See* Letter from Julia E. May, Communities for a Better Environment, to Greg Stone, Bay Area Quality Management District (Feb. 27, 1998) (on file with author); Letter from Richard Toshiyuku Drury et al., Communities for a Better Environment, to Michael P. Kenny, California Air Resources Board (Feb. 13, 1993) (on file with author). The Bay Area District responded to environmental justice concerns by dramatically scaling back its proposed credits program. *See Interchangeable Emission Reduction Credits, supra*. Both the northern and southern California tradable emissions programs, as originally proposed, assumed a fungibility in emission trades between different pollutants and different geographic locations—an assumption called into question by the type of more distributionally sensitive inquiry demanded by environmental justice. Many of the documents for these state and regional air initiatives are included in a wonderful series of environmental law case studies Stanford Law School has prepared for classroom teaching. The case studies are available on the Internet. *See Stanford Law School Case Studies* (visited Oct. 1, 1999) <<http://www.stanford.edu/group/law/library/casestudies>>.

73. Professor Eileen Guana, however, persuasively asserts that there is an inherent “mismatch” between environmental law and policy-making processes and environmental justice because the former’s “[d]ecision-making paradigms rest on foundations that promote environmental injustice,” over-

ronmental justice community groups are demanding the opportunity to participate in decision-making fora, federal, state, and local regulators have been expanding such opportunities.⁷⁴ They are also, albeit in response to past criticism, seeking to be more sensitive to the special needs (e.g., language barriers) and the resource limitations that warrant redress for meaningful public participation to occur. The EPA's environmental justice small grants programs, providing direct financial assistance to environmental justice community groups to enable their participation in decision-making fora and oversight compliance, may well have been one of the Agency's most significant initiatives.⁷⁵

Environmental Law Profession: Changes have also resulted in the environmental law practicing bar. The environmental bar has historically been dominated by government counsel, in-house corporate counsel, attorneys from large law firms, and attorneys from national environmental public interest organizations. In the wake of the environmental justice movement, both legal service clinics and civil rights lawyers have become active members of the environmental law profession.⁷⁶ Some of the most significant environmental law cases are those that legal service clinics are now bringing. It was likewise the national civil rights organizations, rather than the national environmental groups, that first acknowledged and responded to claims of possible environmental racism.

Another noteworthy shift in the profession has been the increase in tort lawyers. These attorneys represent plaintiffs in environmental justice communities and seek to join environmental statutory requirements with tort liability theories for money damages.⁷⁷ The objects of these tort law-

come only by a "transformation" in agency attitudes toward the role of the public in agency decision-making. Eileen Guana, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 72 (1998).

74. For instance, the EPA responded to environmental justice concerns by revising its guidance respecting compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1994), especially in terms of ensuring meaningful public participation by members of environmental justice communities. See OFFICE OF FED. ACTIVITIES, EPA, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSIS (1998). The President's executive order on environmental justice, see *supra* note 46, also appears to have a positive effect on the public's participatory rights in seeking to influence environmental decisionmaking. See Abraham, *supra* note 46, at 97-99; Anne K. No, Comment, *Environmental Justice: Concentration on Education and Public Participation as an Alternative Solution to Legislation*, 20 WM. & MARY ENVTL. L. & POL'Y REV. 373, 389-91, 399-400 (1996).

75. Each year since 1994, the EPA has conferred small grants of up \$20,000 to local environmental justice organizations to assist those organizations' efforts. See Office of Env'tl. Justice, EPA, *Environmental Justice Grants* (visited June 9, 1999) <<http://es.epa.gov/oeca/oej/ejgrantf.html>>. During fiscal year 1999, the EPA provided a total of \$1.6 million in small grants. See *id.* Until recently, the EPA had also provided grants totaling several millions of dollars to address environmental justice concerns through active partnerships between community organizations and institutions for higher education. See *id.*; 1996 EPA EJ ANN. REP., *supra* note 56, at 24.

76. See Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 654-60, 670-73 (1992); Keith Harley, *Demystifying Environmental Legal Services*, CLEARINGHOUSE REV. 371 (Special Issue 1995).

77. See, e.g., *Parties Reach Tentative \$8 Million Accord in Texas Environmental Racism Litigation*, [Current Developments] Env't Rep. (BNA) No. 67, at 2538 (Mar. 16, 1999); Milo Geyelin, *Legal Beat: Pollution Suits Tied to Poor Areas Increasingly Raise Issue of Racism*, WALL ST. J., Oct. 27, 1997,

suits are facilities that may or may not be in compliance with applicable environmental statutory requirements. At least with regard to federal environmental law, statutory compliance does not purport to preempt the viability of a common law cause of action sounding in tort for damages.⁷⁸

Facility Siting: The final category involves the siting of facilities that emit pollutants to the surrounding communities or otherwise degrade their environmental quality. The dynamics surrounding the siting of these facilities have changed dramatically in the face of claims of environmental injustice in general and environmental racism in particular.⁷⁹

Because communities now have stronger voices, deals surrounding siting determinations are being dramatically restructured. Sometimes, companies seeking permits simply abandon their plans altogether in the face of organized, knowledgeable, and effective community opposition.⁸⁰ Other times, federal and state regulatory agencies deny the necessary environmental permit altogether. They may do so on express environmental justice grounds.⁸¹ But what more typically occurs is that the denial

at B3.

78. See 33 U.S.C. § 1365(e) (Clean Water Act); 42 U.S.C. § 7604(e) (Clean Air Act); see also *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987).

79. See David Warner & James Worsham, *The EPA's New Reach—The Federal Agency's Policy on Environmental Justice Could Affect Your Firm or Your Community*, NATION'S BUS., Oct. 1998, at 12–19.

80. For example, Louisiana Energy Services abandoned its plans to locate a uranium enrichment plant largely because of the intense opposition to the facility generated by charges of environmental injustice. See *In re Louisiana Energy Servs.*, 47 N.R.C. 113 (1998); Arnold, *supra* note 63, at 47–48. The most publicized recent instance, however, of a company abandoning its plans to locate an industrial facility because of environmental justice-based local community opposition involved the Shintech facility in Convent, Louisiana. See *Company Evades 'Environmental Racism' Test*, N.Y. TIMES, Sept. 20, 1998, at A42.

81. Although there are no express “environmental justice” statutory requirements, the language in many environmental laws permitting provisions is sufficiently broad to authorize permit-issuing authorities to consider such factors in their issuance decisions. See Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 ECOLOGY L.Q. 617, 625–50 (1999); Agpawa & Ford, *supra* note 58, at 4 (“Task: To make EJ an integral factor in evaluating a proposed project to the extent permitted by law, and to encourage the permitting authorities to evaluate EJ issues as an element of, and within the boundaries of the . . . Prevention of Significant Deterioration (PSD) permitting process.”). For example, in response to objections filed on behalf of Mattaponi Indians by a Georgetown University Law Center law clinic, a district office for the U.S. Army Corps of Engineers recently denied a section 404 permit application the City of Newport News submitted for the construction of a reservoir with a raw water intake based, inter alia, on the “potential for a disproportionately high and adverse effect to an American Indian minority population.” See Letter from Colonel Allan B. Carroll, District Engineer, Norfolk District, U.S. Army Corps of Engineers, to R.W. Hildebrandt, Assistant City Manager, City of Newport News (June 4, 1999) (copy on file with author). Apart from federal environmental law per se, civil rights law imposes nondiscrimination obligations on government agencies. In particular, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, imposes nondiscrimination obligations on all recipients of federal financial assistance, including federally funded state and local environmental regulatory programs. Last year, the EPA issued interim guidelines regarding those obligations, and, in response to actual and threatened Title VI lawsuits, state and local permitting agencies are now more seriously considering the possible discriminatory impact of their siting decisions, as is the EPA in its role as a Title VI compliance officer. See EPA, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998); Terry L. Schnell & Kathleen J. Davies, *The Increased Significance of Environmental*

is simply on environmental grounds absent any distinct environmental justice nexus.⁸²

Neither permit abandonment nor denial, however, occurs in the vast majority of instances. What typically *does* occur is that the deals surrounding the permit decision are negotiated on terms far more favorable to the community than historically has occurred.⁸³ This may include jobs for community members or even direct monetary payments in support of community programs. The effect of these negotiations is not incidental. They may involve many millions of dollars in resources to affected communities.⁸⁴

Three recent settlements are illustrative. In September 1999, an environmental justice community organization in Hartford, Connecticut, settled its five-year dispute with a landfill operator over the operator's proposal to expand the size of the landfill.⁸⁵ The settlement occurred only after the operator spent \$13.5 million for health studies and technological improvements at the facility and had further agreed to pay \$9.7 million for community programs and another \$11 million for city projects.⁸⁶

In California, also in September 1999, an environmental justice organization settled with one oil refinery a lawsuit that the organization had brought in 1997 against several oil companies, alleging that proposed pollution trading would violate civil rights and environmental protection laws.⁸⁷ The settling oil refinery agreed to reduce emissions resulting from the loading of oil tankers by ninety-five percent, not to use auto scraping activities to earn credits toward pollution abatement requirements,

Justice in Facility Siting, Permitting, [Current Developments] Env't Rep. (BNA) No. 29, at 528 (July 3, 1998); see also Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1, 18 (1999). As of early 1999, the EPA had received 68 Title VI administrative complaints; of that number, the Agency had rejected or dismissed 33, accepted 17 for further investigation, and taken no action on the remaining 18 complaints. See Fax from Jim Boles, EPA Office of Civil Rights, to Richard Lazarus (Feb. 16, 1999) (on file with author) (summarizing data on Title VI environmental justice complaints). A recent federal district court decision, calling into question the enforceability of the EPA's Title VI regulations through private lawsuits against recipients of federal financial assistance, simultaneously casts a cloud on the potential effectiveness of those regulations and renders the Agency's own implementations all the more important. See *New York City Env'tl. Justice Alliance v. Giuliani*, 50 F. Supp. 2d 250 (1999).

82. In 1998, Pennsylvania's environmental agency mooted its own case before the Supreme Court by revoking a previously issued permit for a waste treatment facility to be located in Chester, Pennsylvania. See *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 974 (1998); Mank, *supra* note 81, at 50-52.

83. These terms may be reflected in conditions formally included within the express terms of the permit or through a private settlement agreement reached between the permit applicant and concerned community citizens not necessarily reflected in the permit issued by the relevant governmental agency. For a discussion of the scope that permit-issuing agencies (including the EPA) may have under federal environmental law to impose permit conditions that further environmental justice concerns, see Lazarus & Tai, *supra* note 81.

84. See Blais, *supra* note 22, at 142-43.

85. See Johnny Mason, *Group's Stamina Yields Settlement*, HARTFORD COURANT, Sept. 26, 1999, at B1.

86. See *id.*

87. See *Ultramar Agrees to Cut Pollution*, L.A. TIMES, Sept. 24, 1999, at B4.

to install \$400,000 in new pollution reduction equipment, and to donate \$100,000 to local nonprofit organizations.⁸⁸

Finally, in August 1999, California's transportation agency settled a Title VI administrative complaint filed by a neighborhood association that had alleged that the state had discriminated against the community by not adequately remediating contaminated soil near a freeway construction site.⁸⁹ The state agreed to construct a new park at the site (including the replacement of contaminated soil with 7000 cubic yards of new topsoil), to apply more stringent environmental standards to the site, to pay for the lodging and food expenses of those living nearby choosing to relocate temporarily during the soil removal activities, to require trucks to use less disruptive routes, and to publish the results of daily testing of the soil through a bilingual hotline and community billboard.⁹⁰

The bargaining process is more often the stuff of politics than it is strictly of "law." To be sure, the legal parameters supplied by existing law play a critical role in deciding whether a permit is issued and, if it is, what the terms of that permit are. But law is not applied in a political vacuum, especially at the local level. Its application turns on the predilections and backgrounds of individual governmental officials and the influence exercised by shifting political coalitions upon those officials. For that reason, the environmental justice's ultimate success may well turn as much on its ability to transform local politics as on its ability to obtain formal changes in positive law.⁹¹

Not surprisingly, the bargaining process causes conflict within the community.⁹² That is, after all, the inevitable result of efforts to strike a bargain in a multiparty context. As negotiations continue in an effort to establish an equilibrium among competing economic and political interests, the terms of succeeding proposals will necessarily satisfy some before others. Indeed, effective negotiators frequently seek to create just such divisions within the other negotiating teams.

What is nonetheless surprising is that some people, including academics, mistake those conflicts within communities as evidence that the claims of environmental racism and environmental injustice lack merit or that the market, without significant changes in the administration of en-

88. *See id.*

89. *See* Matthew Yi, *Caltrans Oks "Clean" Park for West Oakland*, S.F. EXAMINER, Aug. 12, 1999, at A19.

90. *See id.*

91. *See* Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 819-24, 838-41 (1998).

92. *See, e.g.*, Christopher Boerner & Thomas Lambert, *Environmental Injustice*, 118 PUB. INTEREST 61, 74-75 (1995); Lis Harris, *Banana Kelly's Toughest Fight*, NEW YORKER, July 24, 1995, at 32, 36; George Johnson, *Nuclear Waste Dump Gets Tribe's Approval in Re-Vote*, N.Y. TIMES, Mar. 11, 1995, at A6; Keith Schneider, *Blacks Fighting Blacks on Plan for Dump Sites*, N.Y. TIMES, Dec. 13, 1993, at A12; Matthew L. Wald, *Tribe in Utah Fights for Nuclear Waste Dump*, N.Y. TIMES, Apr. 18, 1999, at A16.

vironmental law, will lead to a just and fair result.⁹³ The more accurate assessment is that the increase in the number of conflicts reflects the successes of the environmental justice movement rather than its failures. The compensation programs many of these commentators support are the product of the environmental justice movement and would not have occurred absent their effective advocacy. These conflicts also typically raise their own challenging issues of equity and representative fairness, which make community leaders justifiably wary. In all events, the resulting community conflicts are simply the necessary and natural result of efforts to strike a new equilibrium in environmental deal making.⁹⁴

It is wholly illogical, therefore, if not perverse, to construe the progress that has resulted in many communities as evidence that the environmental justice movement is somehow misguided. That progress has occurred because of the environmental justice movement, including the environmental racism charge. Hence, community deal making, including associated conflict, underscores rather than undermines the legitimacy of the movement.

IV. CONCLUSION

The success of the environmental justice movement, in terms of its impact on environmental law, has been considerable. Does this mean that there is now environmental justice? Of course not. Nor does it mean that there is less conflict in environmental justice communities than before. There may well be more, especially now that expectations within affected communities have justifiably risen, and there exist efforts to address some but not all of those expectations.

Nor, clearly, was the Rev. Dr. Benjamin Chavis's environmental racism hypothesis as scholarly or precisely put as Ronald Coase's *The Problem of Social Cost* or Garrett Hardin's *The Tragedy of the Commons*. Nor does it possess the simple, inspirational eloquence of Aldo Leopold's *The Sand County Almanac* or the theoretical force of J.H. Dales's *Pollution, Property, and Prices*.

But Chavis's assertion and the broader social movement that it represents can fairly be placed alongside the contributions of Coase, Hardin, Leopold, and Dales as one of the most influential ideas affecting modern environmental law's evolution. No other single idea has so transformed environmental law during the 1990s. It has both restored passion to the

93. See, e.g., Blais, *supra* note 22, at 100–15; Boerner & Lambert, *supra* note 92, at 75–76.

94. A simultaneously wonderful and frustrating example is presented by the efforts of the Natural Resources Defense Council, which joined a south Bronx community development group to locate an environmentally sound de-inking and pulp manufacturing plant in south Bronx. Notwithstanding the strong environmentalist credentials of many associated with the project and their apparently concerted efforts to involve the community in a effort that they conceived of as marrying environmental protection and the community's need for economic benefits, the project inevitably generated community opposition. See Harris, *supra* note 92, at 32–40.

environmental movement and presented environmental law with yet another daunting challenge.⁹⁵

95. See J.B. Ruhl, *The Co-Evolution of Sustainable Development and Environmental Justice: Cooperation, Then Competition, Then Conflict*, 9 DUKE ENVTL. L. & POL'Y F. 161, 182-84 (1999).