

ESSAY

FAIRNESS IN ENVIRONMENTAL LAW

By

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In an earlier life, I worked as a bartender.¹ A bartender's principal occupation, of course, is to serve beverages. Yet a bartender spends substantial time listening to customer grievances: not about the quality of the service, but about the unfairness each has been dealt in life.

The perhaps unfortunate truth, however, is that a bartender can rarely hear anything the customer is saying. The music (live or recorded) invariably drowns out the tales of woe. A bartender must accordingly discern when it is appropriate to nod, laugh, or shake one's head sympathetically. It can be a risky business.

Although now more than twenty years ago, I still recall one night in the late fall of 1975 when, unfortunately, I could hear what my customer was saying. He was a high ranking corporate officer for a local manufacturing facility. The facility was likely the single largest source of air pollution in our small Midwestern town. Indeed, other than the power plant, the

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¹ Like many of the law students at Lewis and Clark, I attended law school in order to be an environmental lawyer. My undergraduate studies were similarly directed. I pursued two bachelor degrees, a B.S. in chemistry and a B.A. in economics, because of their relevance to environmental law. While my interests in environmental law were long term, I soon discovered that my training in chemistry and economics also qualified me for a shorter-term position as a bartender during my senior year at the University of Illinois (where consumer demand makes bartenders one of the more essential professions). My training in chemistry made me expert in the quantitative transfer of liquid organic compounds and their precise mixing. And my training in economics qualified me for a careful accounting of monies expended and received.

manufacturing plant was likely the only major source of industrial air pollution in the area. After learning about my plan to become an environmental lawyer, he wryly responded that environmental law was a "dying field" and a mere "flash in the pan."

Happily, he was wrong. But, I appreciate now much more than I did then that he had reason to believe so. Perhaps even more reason than I did at the time to silently label him a fool. The passage of time adds perspective often lacking in youthful confidence.

In late 1975, federal environmental law was far younger than I then appreciated. Indeed, it was hardly walking. It was mostly aspirational, and certainly more theoretical than applied. The National Environmental Policy Act of 1969,² Clean Water Act (then Federal Water Pollution Control Act Amendments of 1972),³ and Clean Air Act⁴ were each fairly new. Just a few years before, there had been virtually no federal environmental law. And there had been no United States Environmental Protection Agency (EPA).⁵

There were also indications that the nation's interest in environmental protection was waning. The energy crisis of the mid-1970s commanded public attention, and many perceived an inherent (though ultimately false) irreconcilable conflict between environmental protection and energy concerns.⁶ A worsening economy marked by high unemployment threatened to lower the popularity of laws, like federal environmental protection requirements; that imposed substantial costs on businesses.⁷

Yet, contrary to the "wisdom" of the soothsayers of the day, environmental law did not fade. Quite the opposite occurred. It emerged from this period of challenge not only relatively intact, but surprisingly even more ambitious in scope and substance. The Toxic Substances Control Act⁸ and Resource Conservation and Recovery Act of 1976⁹ added two new important regulatory programs. Congressional comprehensive amendments one

² 42 U.S.C. §§ 4321-4370d (1994).

³ 33 U.S.C. §§ 1251-1387 (1994).

⁴ 42 U.S.C. §§ 7401-7671q (1994).

⁵ President Nixon established EPA in December 1970. See Reorganization Plan No. 3 of 1970, 5 U.S.C. app. at 1551 (1994).

⁶ See, e.g., *Environmental Showdown*, THE NEW REPUBLIC, Apr. 13, 1974 at 5-7 ("Environmentalists and energy businessmen have begun to see one another in a new, harsh light, and positions are hardening."); Gladwin Hill, *Energy Shortage Both Favoring and Hampering Improvements in Nation's Environment*, N.Y. TIMES, Mar. 29, 1974, at 12:2 ("Anti-environmental 'backlash' sentiment is disrupting legislative progress in fields ranging from strip mining controls to land use planning. It is also intensifying pressures to weaken the National Environmental Policy Act."); *Losses—and Gains—for the Environment*, TIME, Feb. 4, 1974, at 37 ("The argument is often heard from high-powered lobbyists in Washington—and not in jest—that the best way to stay warm this winter would be to burn the environmental protection laws."); Jack McWethy, *Now, Second Thoughts About Cleaning Up The Environment*, U.S. NEWS & WORLD REP., Jan. 19, 1976, at 52 ("It is evident that the [Environmental Protection] Agency no longer rides the crest of a nationwide ground swell for a cleaner environment.")

⁷ See, e.g., McWethy, *supra* note 6, at 52, 53.

⁸ Pub. L. No. 94-469, 90 Stat. 2003-51 (1976).

⁹ Pub. L. No. 94-580, 90 Stat. 2795-841 (1976).

year later to both the Clean Air Act¹⁰ and Clean Water Act¹¹ significantly expanded and ultimately strengthened both those laws.

This has been the story of environmental law during the past twenty five years: extraordinary volatility marked by stubborn persistence. There has been an inexorable quality about environmental law; a defiance of the odds and conventional wisdom regarding the often ephemeral nature of political movements.

The early 1980s witnessed a similar siege, similarly repelled. Presidential candidate Ronald Reagan campaigned in part against what he perceived to be excessive environmental regulation.¹² With President Reagan's election in November 1980 coupled with his Republican Party seizing majority control away from the Democrats in the Senate, who had spearheaded many of the laws in the 1970s,¹³ environmentalists had substantial reason to anticipate a significant rollback.¹⁴

Again, however, precisely the opposite immediately occurred. In December 1980, before the Senate leadership and White House changed hands, Congress enacted two of the most important environmental protection laws ever: the Comprehensive Environmental Response, Compensation, and Liability Act (popularly referred to as "Superfund")¹⁵ and the Alaska National Interest Lands Conservation Act.¹⁶ With its extraordinarily unforgiving and sweeping liability program, the Superfund statute dramatically made the minimization of environmental contamination an urgent priority for business. No law before or since Superfund has had greater impact on pollution control efforts.¹⁷ In terms of resource conservation, however, the Alaska legislation is no-less significant. That one statutory enactment almost tripled the acreage of both national parks and

¹⁰ Pub. L. No. 95-95, 91 Stat. 685 (1977).

¹¹ Pub. L. No. 95-217, 91 Stat. 1566 (1977).

¹² David E. Rosenbaum, *Campaign Fog Obscures the Sharp Contrast on Most Issues*, N.Y. TIMES, Nov. 2, 1980, at § 4, 1:1; *The Environment and the Stump*, N.Y. TIMES, Oct. 22, 1980, at A30:1.

¹³ Senator Edmund Muskie (D-Me.) was no doubt the champion of environmentalists in the 1960s and 1970s, though other Democrats and a few Republicans played significant roles in the 1970s and on into the 1980s. See Robert F. Blomquist, "To Stir Up Public Interest": Edmund S. Muskie and the U.S. Senate Special Subcommittee's Water Pollution Investigations and Legislative Activities, 1969-66: A Case Study in Early Congressional Environmental Policy Development, 22 COLUM. J. ENVTL. L. 1 (1997); Philip Shabecoff, *Candidates for Title "Mr. Clean,"* N.Y. TIMES, July 10, 1982, at § 1, 9:3.

¹⁴ Philip Shabecoff, *Effort to Soften Coal Seems Likely*, N.Y. TIMES, Nov. 17, 1980, at D1:3; Philip Shabecoff, *Environmental Action Enters New Era*, N.Y. TIMES, Jan. 20, 1981, at A28:4.

¹⁵ Pub. L. No. 96-510, 94 Stat. 2767 (1980).

¹⁶ Pub. L. No. 96-487, 94 Stat. 2374 (1980).

¹⁷ I can still recall that first meeting with potentially responsible parties in the early 1980s while serving as a Justice Department attorney in the first round of negotiations in the *United States v. Chem-Dyne* litigation in the early 1980s. At that time, of course, no court had yet endorsed the government's theory of joint and several liability under CERCLA, although the court in *Chem-Dyne* was to be the first to do so. See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). The industry reaction in those negotiations to the government's claim that joint and several liability would apply could be generously described as incredulous.

national wildlife refuges, and quadrupled the amount of wilderness lands.¹⁸

Federal environmental protection law similarly survived a massive effort during President Reagan's first term at regulatory reduction. Persons working for Office and Management Budget Director David Stockman interviewed candidates to head EPA in search of someone willing to "bring EPA to its knees."¹⁹ And Stockman's choice, Ann Gorsuch, sought to accomplish that task through a series of proposed budget cuts and agency reorganizations.²⁰ But the resulting congressional and public backlash prompted yet more dramatic expansion.

President Reagan forced Gorsuch's departure from EPA, and during the next ten years of Republican presidential administrations, EPA was led by a series of administrators with moderate, more mainstream, and even environmentalist credentials: Bill Ruckelshaus, Lee Thomas, and Bill Reilly. Congress enacted even more ambitious laws, including the Hazardous and Solid Waste Act Amendments of 1984,²¹ Superfund Amendments and Reauthorization Act of 1986,²² Water Quality Act of 1987,²³ and the Clean Air Act of 1990.²⁴ Literally hundreds of pages of strict environmental protection laws were added to the United States Code.

There was a concomitant expansion in both the public and private sectors. Virtually every major law firm added or substantially expanded their environmental practice.²⁵ Major corporations added environmental vice presidents and in-house environmental law experts.²⁶ Government at all levels added environmental protection specialists.²⁷ While there were only approximately fourteen environmental enforcement lawyers in the Department of Justice by the end of the Carter Administration in 1980, there were approximately 112 and 162 enforcement lawyers by the end of the Reagan and Bush Administrations, respectively.²⁸

Finally, federal environmental protection law seems to have survived yet another broadside challenge just recently during the 104th Congress. This time, the executive and legislative branches switched ideological roles. The 1994 elections eliminated from positions of power in Congress

¹⁸ GEORGE CAMERON COGGINS, ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 144 (1993).

¹⁹ ANNE BURFORD, *ARE YOU TOUGH ENOUGH?* 84 (1986).

²⁰ J. Clarence Davies, *Environmental Institutions and the Reagan Administration*, in *ENVIRONMENTAL POLICY IN THE 1980S: REAGAN'S NEW AGENDA* 148-49 (Norman J. Vig & Michael E. Kraft eds., 1984).

²¹ Pub. L. No. 98-616, 98 Stat. 3221 (1984).

²² Pub. L. No. 99-499, 100 Stat. 1613 (1986).

²³ Pub. L. No. 100-4, 101 Stat. 7 (1987).

²⁴ Pub. L. 101-549, 104 Stat. 2399 (1990).

²⁵ Rorie Sherman, *The "In" Specialty This Year: Big Business Seeks Environmental Lawyers*, NAT'L L. J., May 22, 1989, at 1; Robert Reinhold, *Coming of Age of the Environmental Lawyer*, N.Y. TIMES, April 29, 1988, at B5:3.

²⁶ Sherman, *supra* note 25, at 1.

²⁷ *Id.*

²⁸ Telephone Conversation of Andrea Blander with Phylliss Wolfeich, Personnel Liaison Specialist, Environment and Natural Resources Division, U.S. Department of Justice (April 24, 1997).

the main proponents of the existing laws. With one notable exception (Senator John Chafee (R-R.I.)), those members who had resisted previous reform efforts by the executive branch and effectively "reversed" losses before an increasingly conservative federal judiciary,²⁹ lost their positions of authority in congressional committees.³⁰ The new committee chairs were frequently quite explicitly hostile to the existing stringent environmental protection and resource conservation laws.³¹

During the 104th Congress, many members echoed the regulatory reform and budget reduction themes of the executive branch during President Reagan's first term. The "Contract with America," including its property rights protection program, unfunded mandates provision, rights compensation proposals, cost benefit analysis requirements, and budget cutbacks, appeared disproportionately aimed at reducing federal environmental protection requirements.³² Somewhat ironically, the executive branch during this round responded with accusations that were strikingly reminiscent of those launched in the opposite direction by Congress at an earlier time.³³ The claims now were that Congress, at industry's behest,

²⁹ See, e.g., Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505 (1992) (overriding Supreme Court's decision in *United States Dept. of Energy v. Ohio*, 503 U.S. 607 (1992), by expressly waiving federal governmental immunity from civil penalties for RCRA violations).

³⁰ See *Recent Developments—In the Congress*, 25 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,400, 10,040-41 (Jan. 1995); *Recent Developments—In the Congress*, 25 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,152, 10,152-53 (Feb. 1995); James E. Satterfield, *High Hopes and Failed Expectations: The Environmental Record of the 103d Congress*, 25 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,089, 10,089 (Feb. 1995).

³¹ Richard Layco, *This Land Is Whose Land?* TIME, Oct. 23, 1995, at 68-71.

³² See Victor Flatt, *Environmental "Contraction" for America? (Or How I Stopped Worrying and Learned to Love the EPA)*, 29 LOY. L.A. L. REV. 583 (1996); Robert Glicksman & Stephen B. Chapman, *Regulatory Reform and (Breach of) the Contract with America*, 5 KANSAS J. L. & PUB. POLICY 1 (1996); Zygmunt J.B. Plater, *Environmental Law as a Mirror of the Future: Civic Values Confronting Market Force Dynamics in a Time of Counter-Revolution*, 23 B. C. ENV'TL AFF. L. REV. 733 (1996); see also Jay Michaelson, Note, *Rethinking Regulatory Reform: Toxics, Politics, and Ethics*, 105 YALE L. J. 1891, 1907-22 (1996); John H. Cushman, Jr., *Congressional Republicans Take Aim at an Extensive List of Environmental Statutes*, N.Y. TIMES, Feb. 21, 1995, at A14:1; John H. Cushman, Jr., *The 104th Congress: The Environment; House Approves Sweeping Changes on Regulations*, N.Y. TIMES, Mar. 1, 1995, at A1:6; John H. Cushman, Jr., *The 104th Congress: Property Rights; House Clears More Limits on Environmental Rules*, N.Y. TIMES, Mar. 3, 1995, at A19:5; John H. Cushman, Jr. *Senator, in Fury, Advances Regulatory Bill*, N.Y. TIMES, Apr. 28, 1995, at A16:4; *GOP's War on Nature*, N.Y. TIMES, May 31, 1995, at A20:1.

³³ Compare Sandra Blakeslee, *Babbitt Likens Move to Kill Science Agencies to "Book Burning"*, N.Y. TIMES, Feb. 17, 1995, at A16:1; John H. Cushman, Jr., *The 104th Congress: The Environment; House Approves Sweeping Changes on Regulations*, N.Y. TIMES, Mar. 1, 1995, at A1:6; John H. Cushman, Jr., *House Votes Sweeping Changes in Clean Water Act*, N.Y. TIMES, May 17, 1995, at A17:1; John H. Cushman, Jr., *Congressional Roundup; Backed by Business, G.O.P. Takes Steps to Overhaul Environmental Regulations*, N.Y. TIMES, Feb. 10, 1996, at A22:4; John H. Cushman, Jr. & Timothy Egan, *Battles on Conservation Are Reaping Dividends*, N.Y. TIMES, July 31, 1996, at A1:1; and Todd S. Purdum, *President Warns Congress to Drop Some Budget Cuts*, N.Y. TIMES, Oct. 29, 1995, at § 1, 1:6 with Dale Russakoff, *EPA Chief is Assailed at Hearing; Gorsuch Decries "Political" Goals Behind Criticism*, WASH. POST, Feb. 16, 1983, at A1; Dale Russakoff, *EPA Woes Dramatize the Struggle Over Pollution Policy*, WASH. POST, Mar. 6, 1983, at A4; Philip Shabecoff, *Congress Report Faults*

was seeking to undermine environmental protection laws essential for public health and welfare.³⁴

The switch in sides yielded the same result: virtually none of the reform efforts resulted in legislative change. Congress enacted an extremely watered-down version of the unfunded mandates requirements.³⁵ President Clinton vetoed the more extreme proposed EPA budget cuts,³⁶ and most of the sweeping proposals for reform never reached the President at all.³⁷ The "Salvage Rider," authorizing the harvesting of millions of board-feet of timber in the Pacific Northwest,³⁸ was the only narrow, yet significant exception. The longer-term effect was that the 104th Congress worked hard in its waning months to reestablish its environmental credentials by passing somewhat expansive amendments to both federal pesticide³⁹ and safe drinking water laws.⁴⁰

For those who share the basic policy priorities and values reflected in the various federal environmental protection laws, it is plainly a time for celebration. Or, at least for a hearty sigh of relief. But the celebrants should not blind themselves to the notion that the half-life of the sentiments that spawned the reform efforts of the 104th Congress is far from spent.

Otherwise, those who celebrate today are likely to repeat the mistakes of the 104th Congress. The leaders of that Congress mistook concern about the fairness of some aspects of environmental law for a public desire to jettison wholesale much of the federal environmental protection framework. Those who support the basic philosophy and goals of federal environmental law should not mistake the public's rejection of the 104th congressional agenda for the absence of concerns about unfairness in environmental law.

U.S. Drive in Waste Cleanup, N.Y. TIMES, June 18, 1988, at § 1, 1:3; and Henry A. Waxman, *The Environmental Pollution President*, N.Y. TIMES, Apr. 29, 1992, at A25:1.

³⁴ See, e.g., John H. Cushman, Jr., *House Votes Sweeping Changes in Clean Water Act*, N.Y. TIMES, May 17, 1995, at A17:1 ("The Republican leadership in the House and Senate is evidently trying to insure that this Congress will go down in history as the most anti-environmental Congress ever" (quoting Vice President Albert Gore)); John H. Cushman, Jr., *The 104th Congress: The Environment; House Approves Sweeping Changes on Regulations*, N.Y. TIMES, Mar. 1, 1995, at A1:6 ("This legislation is not reform, it is a full frontal assault on protecting public health and the environment." (quoting Carol M. Browner, EPA Administrator)).

³⁵ Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (1995).

³⁶ *Remarks on Vetoing Departments of Interior, Veterans Affairs, and Housing and Urban Development Appropriations Legislation and an Exchange with Reporters*, 31 WEEKLY COMP. PRES. DOC. 2195 (Dec. 18, 1995); *Remarks on Vetoing Budget Reconciliation Legislation and Exchange with Reporters*, 31 WEEKLY COMP. PRES. DOC. 2139 (Dec. 6, 1995).

³⁷ John H. Cushman, Jr., *Battles on Conservation are Reaping Dividends*, N.Y. TIMES, July 31, 1996, at A1:1.

³⁸ Supplemental Appropriations for Disaster Assistance and Rescissions Act, Pub. L. No. 104-19, § 2001(k), 109 Stat. 194, 240-47 (1995); see *Northwest Forest Resource Council v. Glickman*, 97 F.3d 1161 (9th Cir. 1996).

³⁹ Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489 (1996).

⁴⁰ Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (1996).

Those concerns about unfairness persist. They are substantial. Unless answered and appropriately redressed, they will continue to percolate. The political momentum that caught the environmental community off guard at the outset of the 104th Congress will return. The rhetorical force of those concerns may generate far more reform and of a far different nature than warranted.

My thesis is fairly simple: fairness matters and requires significant reform. Environmentalists should be willing to defend environmental protection laws on fairness grounds. They should be prepared to acknowledge and redress instances of unfairness. It would be a serious blunder not to do so.

This essay will focus on three areas of concern with fairness that warrant significant reform of environmental law. They range from the easiest to swallow to the far more difficult. Each is introduced by a personal, related anecdote. The first is environmental justice; the second is private property rights; and the third is environmental crime.

These seemingly disparate topics nonetheless ring a common chord:⁴¹ claims of fundamental unfairness resulting from environmental law's implementation. For those advocating environmental justice, it is unfairness in the distribution of the benefits and costs, including risks, of environmental protection laws. For those advocating greater protection of private property rights, it is the unfairness of being singled out for restrictions on the use of privately owned land in order to maintain, at private expense, environmental benefits for the public at large. And, for those seeking reform of environmental criminal laws, it is the unfairness of promoting compliance by subjecting to possible felony incarceration individuals who lack the mens rea historically associated with such severe societal sanctions. The focal point is neither economic cost nor environmental risk. It is personal liberty and social stigma.

All three are concerned primarily with distributional fairness—not allocational efficiency, the issue that tends, oddly, to dominate most law and economic analysis of environmental law. Nor do they concern, in the first instance, institutional matters such as federalism, judicial review, standing, i.e., the kinds of issues that tend to dominate academic writings on environmental law. The three topics discussed in this article raise fairness issues that matter to people generally, rather than to legal scholars in particular, which explains their ongoing evolutionary force in environmental law.

⁴¹ These are all issues about which I have previously written. See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L. J. 2407 (1995); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787 (1993); Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411 (1993). This essay seeks to identify and discuss themes cutting across the three seemingly disparate topics.

I. ENVIRONMENTAL JUSTICE

My introduction to environmental justice is revealing. I did not become conscious of the issue until the fall of 1990, when an African American third-year law student enrolled in my federal hazardous waste regulation seminar brought it to my attention. Notwithstanding my preoccupation with environmental issues during college and since, I had never considered the possibly adverse distributional impacts of environmental law on low income communities and communities of color.

My ignorance was not for lack of opportunity. It is now obvious to me that those disadvantaged communities were not silent during those years.⁴² They simply were not heard by those, like myself, active in environmental law and policy making fora. Like most of my peers engaged with environmental law at the national level, I had simply ignored the issue, somehow treating such distributional matters as outside the purview of environmental law. In retrospect, that view is plainly indefensible, but it is nonetheless reflective of beliefs that are only now beginning to change.

Environmental justice concerns distributional fairness in environmental law. I choose the word "in" deliberately. Environmental justice is not concerned solely with claims that poor communities and communities of color are disproportionately subject to pollution. It refers more broadly to the role that environmental law itself has played both in failing to redress that initial disproportionality and, indeed, in perpetuating and deepening existing inequities.

Questions of constitutional law—claims that the siting of hazardous waste facilities violate equal protection guarantees—tended to be the context within which environmental justice advocates first raised the nation's consciousness.⁴³ But that is not where the issue and debates on the merits and significance of environmental justice now remain. Environmental law is itself part of the problem. By not adequately accounting for distributional equity, environmental law has promoted inequity.

Consider three paths of inequity. Some result from omission: a failure of accounting. Others result from commission: affirmative acts that, unwittingly or not, exacerbate existing injustice.

First, the environmental protection standards themselves do not adequately reflect differences between subpopulations. In particular, they do

⁴² See generally ENVIRONMENTAL QUALITY AND SOCIAL JUSTICE IN URBAN AMERICA (James N. Smith ed., 1974).

⁴³ See, e.g., *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd without opinion*, 782 F.2d 1038 (5th Cir. 1986); *NAACP v. Gorsuch*, No. 82-768-CIV-5 (E.D.N.C. Aug. 10, 1982); *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga. 1987), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); *R.I.S.E. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992); see generally ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (1990) (exploring the thesis that black communities are routinely and discriminatorily targeted for the siting of hazardous waste facilities); Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991) (addressing the equity issues that arise in the siting of hazardous waste facilities and the potential use of the Equal Protection clause in challenges to facility siting).

not account for aggregation of environmental risks arising from the cumulative impact of different pollutants and through different environmental media. Most laws focus on one pollutant at a time and, sometimes, one medium at a time.⁴⁴ Even putting aside issues of possible synergistic effects, this approach ignores the very real aggregation of risks that occurs in some communities, including low income communities and communities of color, where there is basis for concern that such risk aggregation routinely occurs.⁴⁵ EPA's Project XL is designed to allow a facility to consider its total pollutant load on the ecosystem and to develop means of achieving overall reductions at less cost.⁴⁶ It would seem at least reasonable, if not far more compelling, to embrace a parallel approach towards aggregation that considers in the first instance the interest of those exposed to pollutants, rather than only the interest of those who emit pollution.

Second, there has historically been little systematic effort to focus enforcement on those locations with the greatest noncompliance problems.⁴⁷ Enforcement, albeit in good faith, has more likely occurred in those areas where concerned communities were able to attract the attention of federal, state, or local enforcement officers. These were the same communities where inspections and monitoring were more likely to occur in the first instance.

Low income communities and communities of color historically lacked the resources and the necessary access and clout, and so could not secure a share of scarce enforcement resources commensurate with their environmental problems—not from the government, not from the national environmental organizations, not from national civil rights organizations, and not, until relatively recently, from most legal services organizations,⁴⁸

⁴⁴ E.g., Clean Air Act provisions for ozone nonattainment areas, 42 U.S.C. § 7511 (1994), and for carbon monoxide nonattainment areas, 42 U.S.C. § 7512 (1994).

⁴⁵ See Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103, 118-21. "Grandfather clauses" in environmental laws, which exempt rather than phase in existing sources from more stringent controls, may exacerbate existing conditions by discouraging their replacement with new, cleaner, sources. See Heidi Gorovitz Robertson, *If Your Grandfather Could Pollute, So Can You: Environmental "Grandfather Clauses" and their Role in Environmental Inequity*, 45 CATH. U. L. REV. 131, 134-35 (1995).

⁴⁶ See Rena I. Steinzor, *Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes*, 26 ENVTL. L. REP. (ENVTL. L. INST.) 10,527 (Oct. 1996).

⁴⁷ ACHIEVING ENVIRONMENTAL PROTECTION: COMPLIANCE, ENFORCEMENT AND ENVIRONMENTAL JUSTICE, REPORT OF THE SUBCOMMITTEE ON ENFORCEMENT OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL TO THE OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. EPA (DECEMBER 1995) [hereinafter REPORT OF THE SUBCOMMITTEE ON ENFORCEMENT].

⁴⁸ Ralph Santiago Abascal & Luke W. Cole, *The Struggle for Environmental Justice: Legal Services Advocates Tackle Environmental Poverty Law*, 29 CLEARINGHOUSE REV. J. OF POV. L. 459 (1995); Luke W. Cole, *Community-Based Administrative Advocacy Under Civil Rights Law: A Potential Environmental Justice Tool for Legal Services Advocates*, 29 CLEARINGHOUSE REV. J. OF POVERTY. L. 360 (1995); Luke W. Cole, *Legal Services, Public Participation, and Environmental Justice*, 29 CLEARINGHOUSE REV. J. OF POVERTY. L. 449 (1995); Keith Harley, *Demystifying Environmental Legal Services*, 29 CLEARINGHOUSE REV. J. OF POV. L. 371 (1995); Enrique Valdivia, *How Legal Services Clients Become Neighborhood Ac-*

which did not perceive environmental law as within their purview. The upshot has been that those areas where pollution was most likely to result, and noncompliance most likely to be greatest, were nonetheless historically least likely to be the places where scarce enforcement resources were committed.⁴⁹

The third pathway to distributional unfairness highlighted by environmental justice is likely the most unsettling: the environmental laws may themselves exacerbate existing inequities by promoting a regressive redistribution of environmental risk towards low income communities and communities of color. Environmental protection standards do not, of course, eliminate pollution. They reduce pollution. They reduce risks. Environmental protection laws, however, also necessarily prompt a redistribution of risks. As pollution is reduced, not eliminated, one kind of pollution is traded off for a different kind of pollution, hopefully of a lesser degree: air to water, water to land, land to air, water to air. Pollution control activities, whether they be landfills or incinerators, necessarily generate their own environmental risks: from landfills, substances leak into groundwater supplies; from incinerators, potentially toxic emissions flow into the air.

Environmental "injustice" occurs when the redistributed risks generated by pollution control end up disproportionately in low income communities and communities of color. Racial animus is one possible explanation. Another is stereotypical judgments regarding whether certain races or low income populations "care" about environmental issues. But, far more broadly, there is reason to expect that such disproportionality will occur, even in the absence of explicit racial animus or stereotypical judgments. Like water searching for its natural stream bed, so too pollution in our regulatory environment finds the pathway of least resistance. It finds those places where the laws are least enforced and least understood.

Environmental justice presents environmentalists with issues of unfairness that are especially unsettling because of their racial dimension. Many environmentalists believe that they care about racial and social justice. Claims of environmental justice sound disturbingly reminiscent of accusations of elitism that environmental activists have long heard and long discounted. Turning a deaf ear was relatively easy when the dominant source of those accusations was interest groups obviously associated with economic concerns who feared losing the huge subsidy they had long enjoyed in the absence of effective pollution controls. Many environmentalists felt that environmental law could deal only with environmental protection. It could not deal with unfairness caused by racism or by income distribution. Such matters were the province of civil rights law, or social welfare law, not environmental law. But when the accusing voices increasingly came from grassroots civil rights and community organizations, even the tinniest ear ultimately felt the force of their claims. It was

tivists: Three Tales of Texas Environmental Justice, 29 CLEARINGHOUSE REV. J. OF ENV. L. 418 (1995).

⁴⁹ REPORT OF THE SUBCOMMITTEE ON ENFORCEMENT, *supra* note 47, at 4.

no longer a sufficient answer to claim that such distributional concerns were outside the scope of environmental law.

Distribution is environmental law's problem. One cannot pretend that environmental law is not driven by distributional issues. The substance of virtually every environmental statute, with the possible exception of NEPA (if one puts aside the exemptions contained in individual appropriation riders), is riddled with clauses responding to the distributional needs of affected interests.⁵⁰ If they were not, the laws would likely not have been enacted.

Hence, the Clean Air Act allocates to existing power plants valuable tradeable emission rights;⁵¹ the Clean Water Act exempts irrigation return flows from point source regulation;⁵² and the Resource Conservation and Recovery Act contains a limited exemption for certain drilling wastes from Subchapter C hazardous waste regulation.⁵³ Each of these clauses was intended to provide a distributional advantage to part of the regulated community: either by excusing or delaying compliance or by providing, in effect, a positive transfer payment to assist in their compliance.

The case for accounting for distributional concerns highlighted by environmental justice is far more compelling. For quite often the need is to strengthen, not relax environmental laws on behalf of distributional concerns. It is to provide subsidies to allow those affected communities to ensure industry compliance, rather than to excuse their noncompliance.

Environmental law is evolving in response to environmental justice's claims of distributional unfairness, although seemingly not with all due deliberate speed. Congress, to date, has taken no action to reform environmental laws to address environmental justice concerns. Significant reforms are nonetheless underway simply because those who administer the laws within the executive branch of the federal and state governments are beginning to account for the fairness concerns raised by environmental justice.

Some officials are doing so by their own initiative. Some are doing so because of a Presidential order that makes such considerations mandatory in the federal executive.⁵⁴ And some are doing so because of oversight on environmental justice matters by community groups,⁵⁵ frequently led by

⁵⁰ See, e.g., Linda M. Bolduan, Comment, *The Hatfield Riders: Eliminating the Role of the Courts in Environmental Decisionmaking*, 20 ENVTL. L. 329 (1990).

⁵¹ 42 U.S.C. § 7651c (Table A) (1994).

⁵² 33 U.S.C. § 1362(14) (1994).

⁵³ 42 U.S.C. § 6921(b)(2)(A) (1994).

⁵⁴ Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994); see Report to the President on Implementation of the Environmental Justice Strategy (July 1996) (compilation of individual agency annual reports on implementation of Exec. Order 12,898).

⁵⁵ See, e.g., Videotape: R. Bahar & G. McCollough, Laid to Waste—A Chester Neighborhood Fights for its Future (1996) (on file with author) (presentation on community environmental justice efforts in Chester, Pennsylvania); Letter from Luke Cole and Ralph Santiago Abascal, Center on Race, Poverty & the Environment, Anne E. Simon and Leticia Alcantar, Environmental Law Community Clinic, Susana Almanza, Director, People Organized to Defend Earth and her Resources, LaNell Anderson, Phyllis Glazer, President, Mothers Organized to Stop Environmental Sins, Grover Hankins, Thurgood Marshall School of Law, to

women,⁵⁶ civil rights organizations,⁵⁷ and, belatedly and with difficulty, by the national environmental and conservation organizations.⁵⁸

It is a time of broadening horizons in government decisionmaking, reminiscent of NEPA's extraordinary impact on "the vast hallways of the federal bureaucracy" in the 1970s.⁵⁹ The difference now is that environmentalism is the object of, rather than the impetus for, more expansive consideration. Environmental policy makers are thinking about the meaning of, and requirements for, environmental protection and its effects more expansively than before.

The Brownfields initiative is plainly the Agency's most visible effort to marry the concerns of environmental protection and environmental justice.⁶⁰ Not coincidentally, though, it is environmental justice's concern with economic costs, namely urban decline, and not its concern with environmental risk, that has been successful in prompting meaningful reform. It is far easier to devise a coalition to relax environmental laws in the name of environmental justice than it is to strengthen those laws.

There are many yet-to-be-tapped opportunities. One worth highlighting is EPA and state authority under existing federal environmental laws to exercise their permitting authority in a manner more responsive to environmental justice. The issue is not just what EPA and the states must do under applicable law. It is instead what they have the authority to do, but are not yet doing.

The history of environmental law is replete with instances in which broadly worded statutes or regulations have been successfully enlisted in support of arguments that government has authority, or even responsibilities, beyond that initially contemplated by the regulated entities, environmentalists, affected communities, or even the government itself.⁶¹ The

Carol Browner, U.S. EPA Administrator (Oct. 14, 1996) (letter requesting EPA address backlog of administrative complaints filed with the Agency alleging violations of Title VI of the Civil Rights Act of 1964 by recipients of federal financial assistance).

⁵⁶ Robert R.M. Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, 19 HARV. WOMEN'S L. J. 23, 27-30 (1996) (describing the dominant role that women have played in the grassroots environmental justice movement).

⁵⁷ Valerie Burgher, *Fight the Power (Plant): East New Yorkers Kick a Little Ash*, VILLAGE VOICE, Oct. 24, 1995, at 16.

⁵⁸ See Victoria Slind-Flor, *Amid Board Rancor, Sierra Club LDF Loses 2d Black*, NAT'L L. J., Oct. 20, 1995, at A6; Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Law and 'Justice'*, 47 AM. U. L. REV. (forthcoming 1997).

⁵⁹ See *Calvert Cliffs Coordinating Committee v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

⁶⁰ See *Brownfields Grants from \$90,000 to \$200,000 Awarded to 16 Blighted Urban Industrial Areas*, 27 Env't Rep. Current Developments (BNA) 1241 (Oct. 4, 1996); National Environmental Justice Advisory Council Waste and Facility Siting Subcommittee, *Environmental Justice, Urban Revitalization and Brownfields: The Search for Authentic Signs of Hope—A Report on the "Public Dialogues on Urban Revitalization and Brownfields: Envisioning Healthy and Sustainable Communities"* (EPA 500-R-96-002) (Dec. 1996).

⁶¹ See Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases That Changed the American Landscape*, 70 TULANE L. REV. 2279 (1996). The awakening of these statutory sleepers, however, can cause the destabilization of investment-backed expectations and the lack of notice problem that underlies the fairness concerns raised in the private property and environmental crime contexts. See *infra* Parts II and III.

Refuse Act's restrictions on water pollution,⁶² NEPA's strict procedural requirements,⁶³ the 1897 Forest Service Organic Act,⁶⁴ the Clean Air Act's PSD program,⁶⁵ and, more recently, Section 401 of the Clean Water Act,⁶⁶ are all products of innovative and expansive interpretations of existing statutory language. At the time of their enactment and original implementation, no one foresaw the tremendous programmatic impact they would have.

Can existing statutory and regulatory language be similarly resurrected on behalf of environmental justice? Many EPA permitting authorities and their state analogues appear to assume that existing laws provide them with little, if any, authority to take environmental justice into account in exercising their permitting and standard-setting functions. A cursory examination of the statutory language of just one law—the Clean Air Act⁶⁷—suggests that there may well be many opportunities.⁶⁸ The examples below are illustrative only, not exhaustive of the possibilities. Nor do I doubt that a few might prove problematic in application.⁶⁹

⁶² *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960) (holding discharge of industrial solids into a navigable river creates an obstruction forbidden by the Rivers and Harbors Act of 1899); *United States v. Standard Oil Co.*, 384 U.S. 224 (1966) (holding "refuse" discharge into navigable waters includes all foreign substances and pollutants, whether they are usable products or not; gasoline is not exempt by virtue of being commercially valuable product discharged accidentally).

⁶³ *Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971) (stating that the courts have power to require compliance with NEPA procedural directions. Atomic Energy Commission could not limit consideration of nonradiological environmental issues in pending cases).

⁶⁴ *West Virginia Div. of the Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975) (holding Forest Service Organic Act requires that the service identify each individual tree authorized to be cut on national forest land. Contracts designating an area for clear cut and allowing sale of all merchantable timber in the area without designating individual trees violated the Act).

⁶⁵ *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd by an equally divided Court*, 412 U.S. 541 (1973) (holding regulation permitting states to submit plans allowing air pollution levels to rise was contrary to Congress' intent in passing the Clean Air Act).

⁶⁶ *Public Utility Dist. No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994) (holding States may impose conditions on water quality certifications to protect uses in their water quality standards; limitations do not need to be specifically tied to a "discharge").

⁶⁷ 42 U.S.C. §§ 7401-7671q (1994).

⁶⁸ For instance, subsequent to my talk at Lewis and Clark, and prior to this publication, the Atomic Safety and Licensing Board of the Nuclear Regulatory Commission denied a license to enrich uranium at a proposed facility based on environmental justice concerns. See Stan Millan, *Enviro-Bias is a Hot Topic in Facility Siting*, NAT'L L.J. 88 (June 23, 1997).

⁶⁹ In preparing for my talk at Northwestern School of Law of Lewis & Clark, I drafted a lengthier memorandum describing statutory authorities relevant to environmental justice under various federal environmental laws. I drafted the memorandum—Memorandum On Integrating Environmental Justice Into EPA Permitting Authority (1996) (on file with author)—for the Enforcement Subcommittee of the United States Environmental Protection Agency National Environmental Justice Advisory Council, on which I have served since 1994 as a member of both the Subcommittee and Council. The discussion in this essay is based on that memorandum.

At the outset, there appear to be many opportunities to infuse environmental justice concerns into the Clean Air Act's substantive standards to a greater extent than the EPA has historically done. For instance, determination of National Ambient Air Quality Standards (NAAQS) under Section 109 is supposed to be based on subpopulations that are especially sensitive to the adverse effects of pollutants.⁷⁰ Looking more to the subpopulations having the characteristics of those residing in low-income communities and communities of color, which often have the most sensitive subpopulations, would make those air pollution control standards more responsive to the teachings of environmental justice.

Air quality criteria, upon which the NAAQS are based, are supposed to include information on "those variable factors . . . which of themselves or in combination with other factors may alter the effects on public health or welfare."⁷¹ These "variable factors" should include many of the characteristics of communities relevant to environmental justice that render the harmful effects of pollutants on those already environmentally stressed communities even more harmful. Pursuant to Section 109(d) of the Clean Air Act, EPA is required to revise air quality criteria and the standards themselves at a minimum of every five years as needed to ensure their adequacy in light of new information and changing circumstances.⁷² Environmental justice factors could be considered in present and future revisions of air quality criteria under existing statutory authority.

The Clean Air Act's nonattainment provisions also offer several opportunities. An explicit objective of the Subchapter D's Nonattainment Program is "to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of *all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.*"⁷³ Prior to any redesignation of any nonattainment area, there must be notice and a public hearing in the areas proposed to be redesignated.⁷⁴ And, prior to that hearing, "a satisfactory description and analysis of the health, environmental, economic, *social*, and energy effects of the proposed redesignation shall be prepared."⁷⁵ Environmental justice concerns naturally fall within the legitimate scope of such analysis. Sanctions for failure to meet nonattainment requirements would likewise seem to offer a basis for redressing environmental justice concerns. Such sanctions extend to "such additional measures as the Administrator may reasonably prescribe," which seems sufficiently open-ended to extend to environmental justice concerns in appropriate circumstances.⁷⁶

⁷⁰ See 42 U.S.C. § 7409 (1994); *Lead Industries Assoc. v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980).

⁷¹ 42 U.S.C. § 7408.

⁷² *Id.* § 7409(d).

⁷³ *Id.* § 7470 (emphasis added).

⁷⁴ *Id.* § 7474(b)(1)(A).

⁷⁵ *Id.* § 7470 (emphasis added).

⁷⁶ *Id.* § 7509(d)(2).

Another example of a Clean Air Act provision which potentially allows for greater importation of environmental justice's concern with risk aggregation is the waiver provision for innovative technological systems of continuous emission reduction applicable to Section 111's new source performance standards.⁷⁷ A condition for determining whether an applicant for a waiver from certain requirements otherwise applicable to a new source is "demonstrat[ion] to the satisfaction of the Administrator that the proposed system *will not cause or contribute to unreasonable risk to public health.*"⁷⁸ The statutory emphasis on public health and inclusion of "contribute to" would seem to permit the Administrator to take into account the cumulative public health impact of the facility on the affected community.

The Act's nonattainment provisions offer further potential authority for environmental justice considerations. Section 173 describes the requirements for a nonattainment permit.⁷⁹ One explicit permit requirement is that "an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and *social costs imposed as a result of its location, construction, or modification.*"⁸⁰ The references both to "social costs" and to "location" supply a strong basis for EPA's assertion of statutory authority to take environmental justice concerns into account in evaluating the "location" of a facility seeking a nonattainment permit.⁸¹

⁷⁷ *Id.* § 7411.

⁷⁸ *Id.* § 7411(j)(1)(A)(iii) (emphasis added).

⁷⁹ *Id.* § 7503.

⁸⁰ *Id.* § 7503(a)(5) (emphasis added).

⁸¹ Another Clean Air Act provision that expressly authorizes consideration of facility "location" can be found in section 112(r)(7) program for the prevention of accidental releases of hazardous air pollutants. *See* 42 U.S.C. § 7412(r)(7). Section 112(r)(7) provides:

In order to prevent accidental releases of regulated substances, the Administrator is authorized to promulgate release prevention, detection, and correction requirements which may include monitoring, record-keeping, reporting, training, vapor recovery, secondary containment, and other design, equipment, work practice, and operational requirements. Regulations promulgated under this paragraph may make distinctions between various types, classes, and kinds of facilities, devices and systems taking into consideration factors including, but not limited to, the size, *location*, process, process controls, quantity of substances handled, potency of substances, and response capabilities present at any stationary source.

42 U.S.C. § 7412(r)(7) (emphasis added). This authority is not directly tied to the issuance of a permit, but presumably EPA could somehow incorporate into its permits the regulations authorized by this provision.

Section 112 also includes two other subsections of potential relevance—section 112(c)(3) and section 112(k). Both provide the Agency with authority to consider the aggregate effects of multiple sources of hazardous air pollutants, especially in urban areas. Section 112(c)(3) provides that the "Administrator shall list . . . each category or subcategory of area sources which the Administrator finds presents a threat of adverse effects to human health or the environment *by such sources individually or in the aggregate* warranting regulation under this section." 42 U.S.C. § 7412(c)(3) (1994) (emphasis added). The Administrator must list "sufficient categories or subcategories of area sources to ensure that area sources representing 90 percent of the area source emissions of the 30 hazardous air pollu-

Yet another Clean Air Act provision that expressly authorizes the Agency to promulgate regulations concerned with the siting or location of polluting facilities is Section 129(a)(3), which is concerned with the siting of solid waste incinerators.⁸² Section 129(a)(3) provides that standards promulgated under CAA Sections 111 and 129 applicable to solid waste incineration units shall "incorporate for new units *siting requirements that minimize, on a site specific basis, to the maximum extent practicable, potential risks to public health or the environment.*"⁸³ Such "siting requirements" could possibly extend to environmental justice matters.

EPA's enforcement authority under the Clean Air Act likewise allows the Agency to take account of environmental justice in allocating its enforcement resources.⁸⁴ EPA's decision to maintain a civil or criminal enforcement action is generally a matter of administrative agency discretion to exercise as the Administrator deems appropriate.⁸⁵ There is reason to believe that historically federal and state enforcement of environmental protection laws has not occurred at a level commensurate with the environmental risks presented in environmental justice communities. Under the statute, EPA has the discretion to reallocate its enforcement resources in a manner that more actively targets those communities for government oversight and enforcement.

Even more specifically, the Clean Air Act's penalty assessment criteria would seem to allow the Administrator or the courts to take account of the special need for a credible enforcement threat in those communities that have not generally benefited from enforcement in the past. Section 113(e) provides that "in determining the amount of any penalty to be assessed," the Administrator or court shall take into consideration several specific factors and "such other factors as justice may require."⁸⁶ The use of "justice" in this context confers on EPA considerable discretionary authority beyond that provided in those instances where the exclusive statutory touchstone is "health and the environment." Environmental justice's distinct concern with disproportionality and equity easily falls within the "justice" rubric.

tants that present the greatest threat to public health in the largest number of urban areas are subject to regulation under this section." *Id.* Section 112(k) further calls for EPA's creation within five years after November 15, 1990, of "a comprehensive strategy to control emissions of hazardous air pollutants from area sources in urban areas." 42 U.S.C. § 7412(k) (1994). Included in the strategy is identification of no fewer than 30 hazardous air pollutants that present the greatest threat in urban areas, the source categories or subcategories that emit such pollutants and "a schedule of specific actions to substantially reduce the public health risks posed by the release of hazardous air pollutants from area sources that will be implemented by the Administrator under the authority of this and other laws . . . or by the States." *Id.* The statute mandates that the "strategy shall achieve a reduction in the incidence of cancer attributable to exposure to hazardous air pollutants of not less than 75 per centum . . ." *Id.*

⁸² 42 U.S.C. § 7429(a)(3) (emphasis added).

⁸³ *Id.* (emphasis added).

⁸⁴ *Id.* § 7413.

⁸⁵ *Id.* § 7413(a)(3).

⁸⁶ *Id.* § 7413(e).

The Clean Air Act provisions of greatest interest, however, are those that may allow permitting authorities greater discretion to take into account environmental justice concerns in the permitting process,⁸⁷ including use of the permitting process to build local community enforcement capacity. Section 504 would seem to confer on EPA just such authority.⁸⁸ Subsection (a) provides that "[e]ach permit issued under this subchapter shall include . . . such other conditions as are necessary to assure compliance with applicable requirements of this chapter."⁸⁹ A major component for achieving compliance assurance under the Clean Air Act is the citizen suit component of that statute.⁹⁰ For absent a credible enforcement threat, there will be no compliance assurance.

Subsection (a), therefore, would seem to authorize EPA to impose as a condition on those receiving Clean Air Act permits that they take certain steps in order to enhance the affected community's ability to ensure the permitted facility's compliance with applicable environmental protection laws. Steps could range from simply providing more ready access to the information necessary to oversee the permitted facility's operation and compliance to even perhaps working to enhance the resources of a citizen group charged with overseeing environmental enforcement and compliance assurance. To that same effect, subsection (b) authorizes the Administrator to "prescribe procedures and methods for determining compliance" and subsection c requires that "each permit "set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assurance compliance."⁹¹ EPA could make the enhancement of community enforcement capacity an explicit objective of the requirements that the Agency establishes pursuant to these subsections.

Finally, Section 128 of the Act provides the Administrator with authority to ensure that state permitting boards and pollution control enforcement authorities are more likely to take environmental justice concerns into account.⁹² Section 128 mandates that state implementation plans require that "any board or body which approves permits or enforcement orders under this chapter shall have at least a majority of members who represent the public interest"⁹³ The "public interest" standard could allow the Administrator to require that persons with concerns about environmental justice and/or representatives of those communities be included on state boards or bodies with permitting or enforcement authority.

These are just a few examples of opportunities existing under just one federal environmental law. The broader lesson is that the environmen-

⁸⁷ See SAMARA F. SWANSTON, ET. AL., WORK PLAN FOR CITIZEN PARTICIPATION IN CLEAN AIR ACT TITLE V PERMITTING (Center for Constitutional Rights Environmental Justice Project 1996).

⁸⁸ 42 U.S.C. § 7661c.

⁸⁹ *Id.* § 7661c(a).

⁹⁰ *Id.* § 7604.

⁹¹ *Id.* § 7661c(b).

⁹² *Id.* § 7428.

⁹³ *Id.*

tal justice movement has revealed the need to reexamine existing environmental law to ensure its basic fairness. Such fairness cannot be presumed. We need to consider the discrete distributional and participatory implications of the existing laws, appreciate the possibility of their fundamental unfairness, and reform them accordingly, which to some extent may be possible through innovative interpretation of existing statutory language.

But, notwithstanding the urgency of that task and its attendant difficulties, environmental justice should be the easy case for reforming environmental law.⁹⁴ The harder cases of unfairness in environmental law are private property rights and environmental crimes. Those are the two areas to which I next turn.

II. PRIVATE PROPERTY

My first environmental case was a regulatory takings case in the summer of 1977. A local developer had filed a complaint against the Town of Brookhaven, on Long Island, claiming that the town's development restrictions amounted to an unconstitutional taking of private property. I had just completed my first year of law school, and my first assignment as a summer law clerk for the Environmental Defense Fund (EDF) was to prepare a motion for EDF to intervene on behalf of the town. Upon graduation from law school two years later, my first case as a Department of Justice lawyer was another regulatory takings case—*Aguins v. City of Tiburon*.⁹⁵ Ever since, my legal career has been dogged by the regulatory takings issue, representing the United States as amicus curiae in *San Diego Gas & Electric v. City of San Diego*⁹⁶ and *Nollan v. California Coastal Commission*,⁹⁷ the South Carolina Coastal Council in *Lucas v. South Carolina Coastal Council*,⁹⁸ the City of Tigard in *Dolan v. City of Tigard*,⁹⁹ and, just this Term, the Tahoe Regional Planning Agency in *Suitum v. Tahoe Regional Planning Agency*.¹⁰⁰

This is not mere happenstance. Nor is it a coincidence that the property rights movement has risen during the past twenty years and focused its attack on environmental law. It is the same reason the Supreme Court created the regulatory takings doctrine, in the absence of any supporting

⁹⁴ Of course, no area of environmental law is "easily" reformed. No matter how widespread the seeming consensus, the sheer number of affected interests and their tendency to exploit any opportunity to their advantage makes achieving significant reform problematic. For example, legislation elevating EPA to cabinet status has, even with bipartisan support, repeatedly failed. See generally Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 360-61 & n. 314 (1991).

⁹⁵ 447 U.S. 255 (1980).

⁹⁶ 450 U.S. 621 (1981).

⁹⁷ 483 U.S. 825 (1987).

⁹⁸ 505 U.S. 1003 (1992).

⁹⁹ 512 U.S. 374 (1994).

¹⁰⁰ 117 S.Ct. 1659 (1997).

historical precedent,¹⁰¹ in an environmental case: *Pennsylvania Coal v. Mahon*.¹⁰²

Environmental law undermines absolutist views of private property rights, especially in land and other natural resources. It restricts what one person may do with his or her property because of the potentially adverse effects of the action.¹⁰³ The restrictions frequently preclude an owner of property from realizing the maximum economic gain otherwise possible.

The effect on private property rights in natural resources has been substantial. The historical text is now the modern footnote and the historical footnote now the modern text. Historically, the notion that you could not use your property in a way that injured others was the somewhat incidental caveat to the broader notion that you could do what you wish with your property—after all, that is the essence of ownership. But as our ability both to exploit the natural environment and to perceive causal relationships within natural ecosystems have increased—as has the value we place upon their preservation—environmental law has converted that seemingly incidental caveat into a ballooning set of limitations on the private use of natural resources. Private property rights in natural resources become more and more qualified.¹⁰⁴

To be sure, there is no doubt much truth to the notion that private property rights in natural resources were never absolute. The common law significantly limited the exercise of private property rights. And, common law doctrine even extended so far as to impose affirmative obligations on private landowners on behalf of the public at large.¹⁰⁵

But it also cannot be gainsaid that modern environmental law goes far beyond common law doctrine. Indeed, it is the very pace of change—measured by the accelerating gap between the common law and environmental statutory law—that is the principal catalyst of the private property movement's attack on environmental law. When changes in legal norms occur relatively slowly, their impact is naturally dissipated. Time allows expectations to adjust slowly. Property rights change, as they always have, but the impact of that change on individual owners can be dampened. A dramatic effect may be virtually imperceptible when dissipated over time. There are few concentrated winners and losers.

But, of course, that is not the story of environmental law, which is why there has been such a pronounced property rights backlash. Property rights have not slowly and incrementally evolved. Environmental law has

¹⁰¹ See generally William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995). But see Kris W. Korbach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211 (1996).

¹⁰² 260 U.S. 393 (1922).

¹⁰³ See Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 U.C.L.A. L. REV. 77, 121-27 (1995); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1442-44 (1993).

¹⁰⁴ Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 488 (1983).

¹⁰⁵ Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STAN. ENVTL. L. J. 247 (1996); John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).

not acted like an imperceptible ripple, ultimately assimilated by other forces.¹⁰⁶ Environmental law has instead acted like a tidal wave during a single generation, paying little heed to other competing forces. Private expectations in exploitation of certain natural resources were dashed just at a time when those expectations—because of advancing technology—had otherwise been expanding.

Wetlands are no doubt the paradigmatic example.¹⁰⁷ In earlier times, their filling was not only permitted but desired by many.¹⁰⁸ There was widespread fear that wetlands were a source of disease, especially malaria.¹⁰⁹ Moreover, because of their physical proximity to water, wetlands also offered economic gain to the extent that they could be filled and converted to dry land. Proximity to water makes properties extremely valuable for both commercial and residential development.¹¹⁰

Environmentally based restrictions on such development, however, have severely frustrated those very same expectations. There was no masking of the impact over time, no dissipation, and little opportunity for acclimation. There have accordingly been concentrated losses during short periods of time.

The perceived losses resulting from environmental law have likely been far greater, however, than the actual losses. The regulated community often complains that the public wrongly attributes all cancers to environmental pollution. The desire to discover a single responsible cause for an injury resulting from multiple causes can lead to a vast overestimation of the harm caused by that one identifiable cause. A source of pollution that may be responsible for only few additional cancer deaths may be assigned responsibility for all.¹¹¹

The same is true for environmental law and private property rights. There is a natural tendency to blame identifiable environmental protection restrictions for disappointed economic expectations that are more likely due to a variety of less discernible market forces and economic trends. Environmental protection restrictions, however, become the favored target, especially when those other causes do not offer the possibility of monetary compensation.

¹⁰⁶ See ENVIRONMENTAL LAW § 1.2, at 25, § 4.1, at 247, § 7.1, at 531-32 (William H. Rodgers ed., 1994); Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOY. L.A. L. REV. 791 (1994).

¹⁰⁷ Bosselman, *supra* note 105; Freyfogle, *supra* note 103, at 80-84.

¹⁰⁸ Betsy Mendelsohn, *Wetlands Eradication: Law in Action* (unpublished paper presented at the biennial conference of the American Society for Environmental History, Baltimore, Maryland, March 1997).

¹⁰⁹ Bosselman, *supra* note 105, at 269-70; see Richard C. Ausness, *Regulatory Takings and Wetland Protection in the Post-Lucas Era*, 30 LAND & WATER L. REV. 349, 354-55 (1995); Royal C. Gardner, *Banking on Entrepreneurs: Wetlands, Mitigation Banking, and Takings*, 81 IOWA L. REV. 527, 534 (1996).

¹¹⁰ See ENVIRONMENTAL AND REGULATION OF LAND USE §§ 2.02, 4.02[2], 4.02[3] (Linda A. Malone, ed., 1990); Oliver A. Houck, *Ending the War: A Strategy to Save America's Coastal Zone*, 47 MD. L. REV. 358, 360, 369-72 (1988).

¹¹¹ See PETER W. HUBER, *GALILEO'S REVENGE—JUNK SCIENCE IN THE COURTROOM* 139-43 (1991).

Of course, environmental law is sometimes the principal cause. Environmental restrictions on private property rights in natural resources undeniably have an adverse effect on the market value of those rights. Indeed, environmental law often simultaneously creates and destroys economic expectations. Many properties, such as wetlands and coastal zone areas, that were the object of mounting environmental restrictions were also those properties that because of the highly prized nature of proximity to nature's beauty, were the subject of rocketing economic expectations.¹¹² Environmentalism both created economic value and then prompted laws that frustrated the landowner's realization of those heightened values. It served, ironically, as both the boomer and the buster of some property values.

The common theme of the environmental justice movement and the property rights movement is distributional fairness.¹¹³ Each claims that environmental law has imposed unfair, disproportionate burdens on their respective affected communities. That superficial similarity fades, however, upon closer examination. While each type of distributional unfairness may be entitled to redress, the fairness challenge brought against environmental law by disappointed property owners is fundamentally different from that raised by environmental justice advocates. These differences call for different kinds and degrees of redress.

First, the redistributive effect of environmental law on private property interests is not an unintended or incidental effect. Environmental law *must* restrict the exercise of those private property rights to accomplish its environmental protection goals. In that regard, environmental law is purposefully and necessarily redistributive in a manner antagonistic to some private property interests.

No such natural antagonism exists between environmental law and environmental justice; quite the opposite is true. Environmental justice teaches that environmental law cannot effectively or fairly accomplish its environmental protection goals unless it makes a better accounting of the needs of low income communities and communities of color. If environmental justice is not a consideration in environmental protection, risk aggregation will not be redressed, and enforcement will not occur in those communities where the risk of noncompliance is likely to be greatest.

Second, there is a tendency towards progressivity in restricting private property rights, compared to a natural regressivity in failing to account for environmental injustice. Generally, but certainly not without exceptions, those who complain about private property rights are those who historically have had those economically valuable rights. They tend to be those in society who are better off. To the extent, therefore, that environmental law decreases their wealth on behalf of society generally, the net effect could be seen as progressive.

¹¹² See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

¹¹³ William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 873 (1995).

Environmental justice advocates, by contrast, are complaining about the regressive tendencies of environmental law—*i.e.*, the possibility that those already worse off are sometimes made that much more so by environmental law. Environmental laws are not enforced on their behalf. And, the net effect within their communities is more pollution as more stringent laws aggregate residual environmental risks in those localities least able to resist them.

The third difference is the transitional nature of the private property rights movement's charges of unfairness. Rule changes, including changes in the rules regarding use of private rights in natural resources, adversely affect those caught in between—persons who invested with settled expectations based on one set of rules and now find those expectations dashed by a change in the rules. But, for that same reason, that injury should dissipate over time as new expectations develop that take into account the new legal rules.

Notice, in effect, prospectively eliminates unfairness resulting from the absence of notice in the past. For example, those who acquired their private property rights in wetlands without knowing or having reason to know that those rights would be severely restricted may have forceful claims of unfairness. Those who acquired their rights in wetlands knowing of those restrictions cannot make the same claims. The "reasonableness" of their expectations that they would be able to develop the land is necessarily less than those who purchased prior to the change in the law.¹¹⁴

Environmental justice concerns do not possess a similarly transitory quality. They will not dissipate over time. If left unredressed, they will be more malignant than benign.

For these reasons, much of the property rights movement agenda is far less compelling than that of the environmental justice movement.¹¹⁵ But *some* of its claims are nonetheless compelling. The environmental community has largely sidestepped these fairness issues by succumbing to the temptation to focus on the more extreme elements of the property rights movement: those who espouse nonsensical views of the Fifth Amendment's Just Compensation Clause or advance equally misguided legislative compensation schemes; and those who, using the shibboleth of property rights, seek to accomplish the wholesale rollback of environmental legislation that they have unsuccessfully sought to achieve through direct appeals to the public.

Criticism of these extreme elements is well deserved, but the exclusive focus is not. There are legitimate issues of unfairness regarding the impact on private property rights of environmental laws. They warrant se-

¹¹⁴ *Gazza v. N. Y. Dept. of Environmental Conservation*, 679 N.E.2d 1035, 1041 (1997) ("Property interests owned by the petitioner are defined by those State laws enacted and in effect at the time he took title."); *Alegria v. Keeney*, 687 A.2d 1249, 1254 (R.I. 1997) ("Any investment-backed expectation to develop the property as though wetlands were not present, however, was unreasonable in light of this state's pervasive wetlands regulations."); see also Freyfogle, *supra* note 103, at 127-31.

¹¹⁵ Cf. Treanor, *supra* note 113, at 875-76.

rious consideration. And they deserve constitutional redress in narrow circumstances and statutory redress more broadly.

One need not share Justice Brennan's view of the self-executing nature of the Just Compensation Clause in *San Diego Gas & Electric v. City of San Diego*¹¹⁶ to recognize the validity of his belief that environmental regulators are not immune from the kinds of abuses of authority that occur elsewhere in government. His abandonment of environmentalists in *San Diego Gas & Electric* is not some anomaly to be discounted. It should serve instead as a ready reminder that fairness must be considered.

Likewise instructive is Justice Stevens' dissent in *Penn Central Transportation Co. v. City of New York*.¹¹⁷ Justice Stevens is the author of virtually every takings opinion favorable to environmental regulation: the majority opinion in *Keystone Bituminous Coal Ass'n v. De Benedictis*,¹¹⁸ concurring opinion in *Williamson County Regional Planning Comm'n v. Hamilton Bank*,¹¹⁹ and dissents in *First English Evangelical Lutheran Church v. County of Los Angeles*,¹²⁰ *Nollan v. California Coastal Comm'n*,¹²¹ *Dolan v. City of Tigard*,¹²² and *Lucas v. South Carolina Coastal Council*.¹²³ But in *Penn Central*, Justice Stevens joined then-Justice Rehnquist's dissent. Why? It is tempting to just see Stevens' vote as an aberration: an example of his celebrated quirkiness.¹²⁴ Think again. The vote may more likely be a product of the focused burdens associated with a historic landmark designation. It may also be because historic preservation, while extremely important, is possibly a governmental objective entitled to less weight in a takings analysis than programs more closely linked to core concerns of public health and safety. Those of us who defend environmental regulations need to consider seriously the claims of property rights advocates, both as a matter of constitutional law, and as a matter of legislative policy.

¹¹⁶ 450 U.S. 621, 653 (1981) (Brennan, J., dissenting) The California Court of Appeals denied San Diego Gas and Electric's claim that the city had taken its property by rezoning an industrial area to parkland. Appeal to the U.S. Supreme Court was dismissed on procedural grounds, but Justice Brennan in his dissent reached the merits, saying, "In my view, once a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation" *Id.*

¹¹⁷ 438 U.S. 104, 138 (Rehnquist, J., joined by Burger, C.J., and Stevens, J., dissenting) Penn Central Transportation Company appealed New York City's designation of Grand Central station as a historic landmark, which prohibited further development and required Penn Central to keep the building in good repair while maintaining its original appearance. "Appellants are not free to use their property as they see fit within broad outer boundaries but must strictly adhere to their past use except where appellees conclude that alternative uses would not detract from the landmark." *Id.*

¹¹⁸ 480 U.S. 470 (1987).

¹¹⁹ 473 U.S. 172, 202 (1985).

¹²⁰ 482 U.S. 304, 322 (1987) (Stevens, J., dissenting).

¹²¹ 483 U.S. at 866 (Stevens, J., dissenting).

¹²² 512 U.S. at 396 (Stevens, J., dissenting).

¹²³ 505 U.S. at 1061 (Stevens, J., dissenting).

¹²⁴ William D. Popkin, *A Common Law Lawyer on The Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L. J. 1087, 1088 (1989).

With regard to constitutional analysis, the answer need not be "never compensation" any more than "always compensation." One can learn from the *Lucas* framework,¹²⁵ which provides the wrong answer to the right question, and improve upon the *Penn Central* analysis,¹²⁶ which offers too little guidance to property owners, regulators, and courts alike. What is needed is an analytic framework that first better identifies those property owners with the strongest claims of unfairness and then permits the government to demonstrate that the burdens that form the basis of those complaints are nonetheless not undue.

In moving towards that framework, the environmental community and government regulators are going to need to make two important concessions. First, all environmental protection standards are not entitled to equal weight in takings analysis. In *Penn Central*, governmental regulators tried to have their cake and eat it too; but they did so at a cost. They jettisoned the noxious use rationale in order to extend protection to historic preservation.¹²⁷ While defending historic preservation from takings claims, environmentalists need to acknowledge that all legislative purposes are not equal in takings analysis.¹²⁸

Environmental laws that are more closely tied to public health and safety, and to the heightened physical interdependencies present in especially fragile ecosystems, are entitled to greater weight in takings analysis. Such restrictions will generally not require compensation even in those circumstances where the impact on a specific property owner is focused and severe, even including an economic wipe out. Laws lacking that nexus, however, cannot so readily justify isolating a few property owners for wholly disproportionate burdens.

Second, environmental restrictions that impose especially heavy burdens on isolable property owners must demonstrate that the means of regulation is reasonable as well as the ends.¹²⁹ This includes demonstrating a causal relationship between the activity being restricted and the social evil the regulation seeks to remedy. There must be a reasonable fit between the object of the regulation and its purpose. And, there must not be any readily available, far less burdensome alternative means of achieving the stated goal.

The burden to justify environmental regulation will necessarily increase. But it is a burden that can be satisfied and ultimately a dialogue that the environmental community should welcome. A happy incident of the property rights movement has been that the environmental community has been compelled to make a stronger case in favor of environmental

¹²⁵ 505 U.S. 1003 (1992).

¹²⁶ 438 U.S. 104 (1978).

¹²⁷ See *Penn Central*, 438 U.S. at 133-34.

¹²⁸ See Freyfogle, *supra* note 103, at 121-27.

¹²⁹ *Id.* at 132-135; cf. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring) ("[T]he means, as well as the ends, of regulation must accord with the owner's reasonable expectations.").

regulation—to demonstrate that environmental regulation generally promotes rather than degrades property rights.¹³⁰

Some of the most important commentary of the past two years has been the effort of the environmental community to describe in detail the harm redressed by environmental restrictions, and the real costs of eliminating those restrictions to persons whose livelihoods—indeed sometimes their very lives—depend on environmental protection.¹³¹ Environmentalists have gained by being required to explain how the nation's environmental laws are not taking private property, but are instead often more accurately viewed as preventing the private taking of public common resources that had long been allowed to subsidize private development. Environmental restrictions simply eliminate that subsidy, rather than take private property.¹³²

The property rights movement forced governments and the environmental community to justify its restrictions; to make a better accounting of the adverse effects being redressed; and to think twice and seek to minimize the adverse redistributive impacts on others of environmental restrictions. Environmental law has matured as a result.

Beyond expanding its constitutional analysis of the takings clause, the environmental community must also be more ready to accept the propriety of legislative measures intended to help property owners through transitional hardships resulting from environmental restrictions. Such transitional measures are not constitutionally compelled. They would instead be offered as a matter of legislative grace, to satisfy basic fairness concerns. Just as the constitutional dimension to environmental justice is ultimately not the most important issue,¹³³ so, too the constitutional dimension to the property rights movement should not be the sole inquiry. The most important issue is not what we must do or must not do as a matter of constitutional law. It is what we should do as a matter of just and fair social policy.

To that end, the environmental community should commence to support carefully targeted hardship exemptions in federal environmental laws

¹³⁰ See, e.g., *The Right to Own Property*, Hearing Before the Senate Comm. on the Judiciary, 104th Cong. 172-80 (1995) (testimony of Joseph L. Sax, Counselor to the Secretary of the Interior) [hereinafter *Right to Own Property Hearing*]; *Private Property Protection Act of 1993*, Hearing on H161-25 before the Subcomm. on Department Operations and Nutrition of the House Committee on Agriculture, 103d Cong. 48-50, 119-38 (1993); *Private Property Rights and Environmental Laws*, Hearing before the Senate Comm. on the Environment and Public Works, 104th Cong. 163-65, 203-09 (1995) (testimony of C. Ford Runge, Professor, University of Minnesota); *Federal Wetlands Regulation*, Hearing before the Senate Comm. on Small Business, 102d Cong. 31-32 (1991) (testimony of James T.B. Tripp, General Counsel, Environmental Defense Fund) [hereinafter *Federal Wetlands Regulation Hearing*]; Glenn P. Sugamelli, *Takings Bills Would Destroy Protections for Property and People*, IRON PRESS (Initiative and Referendum Organizers' Newsletter) Jan. 1996; *Don't Get Taken by "Takings" & Other "Property Rights" Scams*, TALKING BACK ADVISORY #5, (The Certain Trumpet Program) Feb. 29, 1996.

¹³¹ *Federal Wetlands Regulation Hearing*, *supra* note 130.

¹³² Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1, 13-16 (1996).

¹³³ See *infra* text accompanying note 43.

and other means of tempering the economic wipeouts that may result from unanticipated environmental regulations.¹³⁴ This would not, of course, require endorsing the kind of misguided, blunderbuss property rights legislation before the 104th Congress. That was a complete giveaway, with no pretense of selecting out those individuals suffering undue hardship.

More narrowly directed provisions would be better suited: statute-specific and aimed at the peculiar kinds of hardships that might be raised under that specific law.¹³⁵ These might include offering conditional carrots instead of just sticks, for example, subsidies with conditions attached for hardship cases. The government might also make available in appropriate circumstances partial or temporary exemptions to ease transitions. Finally, regulators should strive to be more site-specific in considering how the regulated activity should be restricted.¹³⁶

By creating such hardship provisions for those likely to absorb the impact of the laws most acutely, the dissipation of losses that would normally occur over time can be more effectively restored in environmental programs. Losses can be spread, and economic expectations can better adjust to the changes in legal rules.

The relative cost of such transitional remedies should be small so long as they are confined to those among the regulated community for whom the adverse economic impact is likely to be the most severe: the small landowner, the homeowner, and the truly small business. These hardship cases likely reflect a very small percentage of pollution regulated by environmental laws—they are not the major pollution control or natural resource preservation cases. But, left unredressed, they occupy a disproportionate amount of time, feed a reform effort that can lead to excessive deregulation, and sap environmental law of some of its essential moral force.

Environmental law does not advance its cause when, as in *Lucas v. South Carolina Coastal Council*,¹³⁷ it enacts stringent restrictions on small plots of land historically zoned for residential use, without providing for any possible variance procedure. By failing to account for the possibil-

¹³⁴ Some environmental groups, notably the Environmental Defense Fund, have supported limited programs for providing compensation to some small landowners in narrowly defined circumstances. See *Takings, Compensation, and Pending Wetlands Legislation: Hearing Before the Subcommittees on Fisheries and Wildlife Conservation and the Environment and on Oceanography, Great Lakes and the Outer Continental Shelf of the House Comm. on Merchant Marine and Fisheries*, 102d Cong., 2d Sess. 104, 120 (May 21, 1992).

¹³⁵ Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1451 (1993).

¹³⁶ The Department of the Interior, probably partly in response to the threat of private property rights legislation, has recently fashioned several finely-tuned measures designed to diminish the adverse economic impacts of Endangered Species Act restrictions on small landowners. See *Right to Own Property Hearing*, *supra* note 130, at 181-85 (Testimony of Joseph L. Sax). Similar reform efforts are underway for federal wetlands regulation. See *id.* at 186-90 (appending Annual Report of the White House Interagency Wetlands Working Group).

¹³⁷ 505 U.S. 1003 (1992).

ity that the incremental environmental impact of the restriction may not justify the concentrated losses on one landowner, environmental law ultimately undermines its efforts. *Lucas* was not an instance where the Constitution should have been deemed to compel compensation. It was not even a case with an especially sympathetic individual plaintiff: Lucas was a land use speculator. But it nonetheless was likely an instance where a legislative remedy, such as the variance provision that was ultimately adopted,¹³⁸ was warranted.

The most recent Supreme Court regulatory takings case, *Suitum v. Tahoe Regional Planning Agency*,¹³⁹ suggests a more appropriate approach to governmental regulation. As in *Lucas*, the burdens of land use regulation are substantial. The landowner in *Suitum* is an eighty-two year old wheelchair-bound widow who wants to build a home on her 18,300 square foot lot of land, which is surrounded on three sides by previously-constructed homes.¹⁴⁰ The applicable land use restriction prohibits the construction of a home or any other similar permanent structure on her property. The justification for the restriction is the impact such development would have on Lake Tahoe; impermeable coverage of certain kinds of land in the basin, referred to as "stream environment zones," cause polluted runoff to contaminate the Lake. These stream environment zones naturally filter out contaminants and are a major reason why Lake Tahoe's waters enjoy such extraordinary clarity.¹⁴¹

But, here the similarities with *Lucas* abruptly end. Unlike in *Lucas*, the relevant governmental agency (the Tahoe Regional Planning Agency) has strived to ensure that the landowner's property retains substantial economic value. The government has conferred on all property owners in the Tahoe Basin, including those subject to building restrictions, the right to sever development rights and sell them for application to eligible parcels in the Basin not similarly restricted. As a result, the landowner in *Suitum* retains substantial economic value—as much as \$56,000—based on the marketability of her transferable development rights.¹⁴² In addition, as the trial court found,¹⁴³ her land itself retains potentially significant economic value even restricted in its use. The State of Nevada and federal agencies have offered to purchase the land for significant sums,¹⁴⁴ and the

¹³⁸ See *id.* at 1010-11.

¹³⁹ 117 S.Ct. 1659 (1997) (argued Feb. 26, 1997). The author served as counsel of record for respondent Tahoe Regional Planning Agency in the *Suitum* case before the Court. My views on the case are inevitably slanted. The Supreme Court ruled in *Suitum* just as this article was going to press.

¹⁴⁰ Frank Clifford, *Woman's Suit Tests Law on Environmental Protection*, L.A. TIMES, Feb. 19, 1997, at A4:1.

¹⁴¹ See Brief for the Tahoe Regional Planning Agency at 7-11, *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997) (No. 96-243).

¹⁴² See Joint Appendix, *Suitum v. Tahoe Regional Planning Agency* at 123-32, 139-43, *Suitum* No. 96-243.

¹⁴³ Appendix to Petition for a Writ of Certiorari, *Suitum v. Tahoe Regional Planning Agency*, No. 96-243 at C3.

¹⁴⁴ See Brief for the United States as Amicus Curiae in Support of Respondent at 203, *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997) (No. 96-243); Brief for the

property retains potentially significant market value to neighbors interested in expanding the size of the land surrounding their existing homes.¹⁴⁵ These are the kinds of non-constitutionally compelled governmental initiatives that enhance environmental law's fairness.

To be sure, the individual's property would likely be worth more if development were not restricted. But, because of the regulatory agency's innovative use of transferable development rights, the combined effect of her property rights are substantial. Indeed, because property values in the Tahoe Basin have likely increased *because* development is beginning to be controlled, it is far from certain that her property would be worth more now had the government never imposed the development restrictions that she is challenging as a taking.

III. ENVIRONMENTAL CRIME

Like most environmental lawyers and environmental law academics, my understanding of criminal law is relatively thin. Nonetheless, almost immediately out of law school, one of my initial assignments as a Department of Justice lawyer was to work with the Senate Judiciary Committee in support of then-pending proposals to make criminal violations of environmental laws subject to felony penalties. Environmental violations had previously been subject only to misdemeanor sanctions, which made such prosecutions quite a low priority for both federal criminal investigators and prosecutors.¹⁴⁶ Although Congress took several years to act, the legislature eventually raised almost all environmental crimes to felony status.¹⁴⁷

I next returned to the issue of environmental crime thirteen years later while serving in December 1992 on the Presidential Transition Team for the Environment and Natural Resources Division of the United States Department of Justice. The Transition Team's principal task was the preparation of a report detailing the Environment Division's immediate and long term problems and opportunities for the incoming Administration. Because at that time, three separate congressional subcommittees were investigating claims of corruption and malfeasance directed at the operations of the Division's environmental crimes section,¹⁴⁸ the federal envi-

League to Save Lake Tahoe in Support of Respondent Tahoe Regional Planning Agency at 18, 26, *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659 (1997) (No. 96-243).

¹⁴⁵ See Joint Appendix at 123-32, 139-45, *Suitum* No. 96-243.

¹⁴⁶ See Judson W. Starr, *Environmental Crime: Turbulent Times at Justice and EPA: The Origins of Environmental Prosecutions and the Work That Remains*, 59 GEO. WASH. L. REV. 900, 909 (1991).

¹⁴⁷ See, e.g., Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 701, § 133(c), 104 Stat. 2399, 2672-77 (1990); Hazardous and Solid Waste Act Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221, 3256-57 (1984); Water Quality Act of 1987, Pub. L. No. 100-4, § 312, 101 Stat. 7, 42-45 (1987).

¹⁴⁸ See *EPA's Criminal Enforcement Program, Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 102d Cong. (1992); Howard Wolpe, *The Prosecution of Environmental Crimes at the Department of Energy's Rocky Flats Facility* (1993); Jonathan Turley, *Criminal Environmental Prosecution by the United States Department of Justice—Preliminary Report* (1992) (report prepared for

ronmental crimes program was naturally a focal point of the transition effort. Prior to the election, the Clinton campaign had itself embraced the notion that the Bush Administration may have undermined the criminal enforcement of pollution control laws to appease industry.¹⁴⁹

Upon closer examination, however, the claims of corruption and malfeasance mostly dissipated. What emerged in their stead was an enforcement program that was simultaneously absolutely essential and seriously flawed.¹⁵⁰ Ironically, a fundamental flaw was the way in which Congress had reflexively raised the criminal sanctions for environmental violations from misdemeanors to felonies, without considering the full implications of its doing so. One unsurprising result has been how the potentially sweeping scope of those sanctions has generated within the regulated community vocal concerns of unfairness.¹⁵¹ Less anticipated, but no less significant, has been how Congress's action prompted destructive misapprehensions within and between branches of government regarding the proper exercise of prosecutorial discretion in the administration of the federal environmental crimes program.¹⁵²

Why is the criminal sanction, including a felony sanction, so essential for environmental law? The need to deter environmental violations is likely the core reason.¹⁵³ Monetary sanctions can deter, but they can also be more readily passed on as a cost of doing business. They can be avoided, or at least mitigated, by declarations of bankruptcy followed by effective uses of bankruptcy laws designed to give debtors the possibility of a "fresh start."

Felony incarceration sanctions applied to individual corporate officers are not similarly susceptible to being passed on. They are personal to the defendant. Their impact on the individual's personal livelihood, including both social reputation and economic future, can be devastating. For that same reason, a meaningful threat of their imposition is far more likely than a civil monetary sanction to influence corporate attitudes about the necessity of compliance with environmental requirements.

The need for higher sanctions may also be especially acute in environmental law because the possibility of detecting a violation and securing a conviction remains relatively low. The sheer number and variety of activities regulated by federal and state pollution controls laws is immense. A violation, with devastating effects, can occur in a quite surreptitious man-

the Honorable Charles E. Schumer, Chair, Subcomm. on Crime and Criminal Justice, House Comm. on the Judiciary).

¹⁴⁹ Jim McGee, *Environmental Controversy Lingers Under Reno*, WASH. POST, Apr. 7, 1994, at A25.

¹⁵⁰ See generally Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L. J. 2407 (1995) (discussing three cases of environmental prosecution and the controversy surrounding the criminal environmental enforcement program).

¹⁵¹ See, e.g., Paul D. Kamenar, *The Truth: "There Are No Environmental Crimes,"* CALIF. LAWYER 89 (Aug. 1993); Richard B. Schmitt, *Plan for Tough Pollution Penalties Sparks Opposition from Business*, WALL ST. J., Mar. 14, 1994, at B4:5.

¹⁵² Lazarus, *supra* note 150, at 2485-07.

¹⁵³ See, e.g., Starr, *supra* note 146.

ner—the midnight dumping of toxic contaminants in a publicly-owned sewer system—with very little possibility of tracing the chemicals back to their original source. Few local law enforcement agencies are trained in these matters and neither federal nor state environmental agencies have historically employed the large number of investigators and inspectors that would be required to render the probability of detecting environmental violations very high. A harsh criminal sanction is, therefore, in many respects one of the more effective and accessible ways to influence behavior of the regulated community. It counters, in effect, the negative impact on compliance caused by the low probability of detection.

A felony sanction can also be justified based on the kind and degree of harm that may result from environmental violations, as well as the culpability of the accompanying *mens rea*. A violation of an environmental requirement can cause the kind of serious physical injury to persons and property that has long supported imposition of felony punishment. An individual causing such harm may, moreover, possess the state of mind regarding the wrongfulness of his conduct and its consequences that has historically justified the felony label. In many instances, the only distinction between an environmental crime and a more traditional crime is that the harm in the former has resulted from the contamination of environmental media.

So how is the environmental crimes program seriously flawed? Where is the fairness problem? The flaw is that too little effort has been made to consider the dividing line between civil and criminal sanctions and, within criminal sanctions, between misdemeanors and felonies. To conclude that environmental law requires a criminal dimension is not equivalent to establishing that *all* violations of environmental law do, or that they all warrant the felony sanction.

To be sure, such an equation would maximize deterrence. But deterrence alone is not a sufficient justification for the imposition of felony criminal sanctions. Other concerns need to be taken into account, including the relative culpability of the defendant's conduct, based, for instance, on his associated *mens rea* and the harm caused or threatened by his conduct.

Congress engaged in no such careful accounting in making environmental violations subject to felony sanctions. With limited exceptions,¹⁵⁴ Congress simply made "knowing" violations of environmental requirements punishable as felonies. There was no careful consideration of the nature of the requirements being criminalized and how their nature might bear on the defining of the criminal offense. And there was no careful

¹⁵⁴ The most notable exceptions are the various felony "endangerment" provisions contained in several environmental statutes. *See, e.g.*, Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 701, 104 Stat. 2399, 2675-77 (1990) (amending 42 U.S.C. § 113(c)(5) (1990)) (Clean Air Act knowing endangerment provision); Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 13, 94 Stat. 2334, 2339-42 (1980) (RCRA knowing endangerment provision); Water Quality Act of 1987, Pub. L. No. 100-4, § 309(c), 101 Stat. 7, 43-44 (1987) (Clean Water Act knowing endangerment provision).

consideration of the fundamental issue of precisely what "knowing" should mean in the context of environmental law.

Both present difficult issues of policy that have not lent themselves to easy resolution by either of the other two branches of government. There are some inherent tensions between environmental and criminal law that make their meshing difficult in the fashioning of environmental criminal law. Most simply put, environmental law possesses certain features that, while deserving of applause, render their wholesale criminalization problematic. Congress's mere requirement that the violations be "knowing" begs the difficult issues raised by these essential features of environmental laws.

So what are those features that make criminalization of environmental law an exercise worthy of such extraordinary care?¹⁵⁵ First, environmental laws are aspirational in character and exceedingly dynamic in nature. They do not simply reflect existing norms and behavior. They seek, quite often radically, to change behavior. They seek to force technological and social change, even at the risk that it may turn out that such change cannot be accomplished or may even turn out to be unwise. The law is designed to catalyze change through experimental prodding.

But for this same reason, environmental laws are constantly evolving, based on new information and shifting priorities and political coalitions. The mandates must appear uncompromising for them to be effective in promoting needed change. Yet, they must simultaneously be themselves subject to change in light of the very circumstances they produce.¹⁵⁶ Environmental justice concerns, for example, currently warrant changes in environmental protection requirements.¹⁵⁷

Felony sanctions, however, tend to be confined to violations of settled, not changing, norms. They are imposed for violations of standards that are readily achievable and not largely aspirational. Felony convictions are not experiments. They trigger, short of the death penalty, society's harshest sanctions.

The relatively obscure and indeterminate nature of environmental law is another feature that requires accounting in the fashioning of environmental criminal law. Environmental law is hard to understand. It is sometimes extraordinarily difficult to discover. And its essential jurisdictional terms frequently turn on definitions lacking any clear boundaries in actual application.

There are understandable, perhaps unavoidable, reasons why environmental requirements possess such features. They are not merely products of legislative, bureaucratic, or judicial incompetence. They reflect, in part, how our various lawmaking institutions, between and within competing sovereign federal, state, tribal, and local governmental authorities,

¹⁵⁵ These features are more elaborately described and discussed in Lazarus, *supra* note 150, at 2423-40.

¹⁵⁶ This flexibility, of course, destabilizes any settled private property expectations based on the prior law. See *supra* Part I.

¹⁵⁷ See *supra* Part II.

work with and against each other. But they also inevitably reflect the complexities of our natural ecosystems, industrial organizations, and manufacturing processes.

For example, there are sound reasons why the definition of "navigable waters" under the Clean Water Act is so elusive.¹⁵⁸ The purposes of the Act require accounting for the complexities of the hydrologic system. So long as a clear dividing line between land and water does not exist in nature, there is no reason to expect that laws designed to protect the aquatic ecosystem can be based on bright lines.

The complex, sometimes impenetrable meaning of "solid waste" in the Resource Conservation and Recovery Act of 1976 can be similarly explained. There are many obvious instances of "waste" just as there are many obvious instances of "navigable waters." But, given the variety of reuses of materials from industrial and manufacturing processes, it is not easy to distinguish between those reuses that reduce the "waste" problem and those that contribute to it. Here, too, the dividing line proves elusive.¹⁵⁹

The legitimacy of the reasons why environmental requirements tend to be obscure and indeterminate does not, however, make those features any less relevant to their criminalization. Legal rules subject to felony sanction are supposed to be readily knowable. Otherwise, it is not consistent with basic notions of fairness to assume everyone's knowledge of the law. Once discovered, the legal rules underlying felony offenses are also supposed to be clear, not indeterminate. An individual is not supposed to have to guess on which side of the law his conduct lies.

These tensions should give lawmakers pause in deciding (not whether but) how to criminalize environmental law. There are reasons why there is a damaging moral stigma associated with felony convictions. There are also reasons why violations of environmental laws should have moral stigma. But, unless lawmakers examine these inherent tensions between environmental and criminal law more closely, environmental criminal law may risk depriving both areas of law of their moral legitimacy.

Two possible solutions include the exercise of prosecutorial discretion and the amendment of the relevant statutory provisions. Although the former works well within certain bounds, the current gap between what is made subject to felony punishment and what likely should be is too broad to be left to prosecutors, either individually or collectively. Nothing in the training of individual prosecutors suggests that they should be making the substantial policy judgments necessary to exercise that discretion in a consistent and fair manner.

The problem is not, moreover, confined to those instances where a prosecutor actually seeks and obtains a felony conviction. Even when a prosecutor declines to bring a prosecution in a particular case, the tempta-

¹⁵⁸ See 33 C.F.R. pt. 328 (1996).

¹⁵⁹ See 40 C.F.R. § 261.2, 261.4 (1996); see also Stephen Johnson, *Recyclable Materials and Complicated, Conflicting and Costly RCRA's Definition of Solid Waste*, 21 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,357 (July 1991).

tion remains substantial to exercise the leverage such authority confers on him to extract otherwise unobtainable concessions from potential defendants.

History also testifies to the problems of relying on collective executive branch determinations for the fair exercise of expansive prosecutorial discretion in environmental law. There is a natural executive branch tendency not to cabin its discretionary authority in any accountable way. Guidelines are inevitably drafted in an open-ended, nonbinding fashion. Such guidelines at most also have bearing on *what the government believes* is true about who is prosecuted, but no legal relevance as to *what the government must convince a jury of*, beyond a reasonable doubt, to obtain a conviction. So long as the statute itself does not mandate the indicia of culpability that the government insists it uses in exercising its prosecutorial discretion, the government need not formally allege or prove such culpability at trial.

Environmental law is also one of the last places to expect such a delegation of authority between branches of government to work effectively. Witness the 1992 environmental crimes debacle itself.¹⁶⁰ That was no mere happenstance. The history of environmental law is replete with similar instances of accusations and counter-accusations between the executive and legislative branches that one or the other is undermining or even corrupting this nation's commitment to environmental protection.¹⁶¹

Legislative amendment is the better approach—and an approach that the environmental community should embrace rather than reflexively oppose. The cost should be small, because according to the government, only the worst cases are being prosecuted anyway.¹⁶² Hence, changing the law to reflect more accurately the culpability of those actually being prosecuted should not hinder any of those prosecutions.

In particular, Congress should more carefully define the mens rea required for a felony conviction in order to ensure moral culpability commensurate with the associated felony sanctions. This should *not* require a wholesale adoption of a requirement of specific intent—knowledge of the relevant legal requirement—though courts should, as always, be wary of allowing criminal sanctions for legal requirements lacking basic notions of fair notice.¹⁶³ But, as is generally required for felony conviction,¹⁶⁴ proof should be required of the defendant's knowledge of the relevant facts, i.e. those that make the conduct unlawful.

¹⁶⁰ See *supra* notes 148, 149 and accompanying text.

¹⁶¹ See Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 321-54 (Autumn 1991).

¹⁶² See Lois J. Schiffer & James F. Simon, *The Reality of Prosecuting Environmental Criminals: A Response to Professor Lazarus*, 83 GEO. L. J. 2531, 2532-33 (1995).

¹⁶³ Cf. *United States v. General Electric Co.*, 53 F.3d 1324 (D.C. Cir. 1995) (holding EPA did not provide fair notice of its interpretation of its regulations to a company EPA had fined for violations of the regulations and thus EPA could not fine the company for their violations).

¹⁶⁴ *United States v. Staples*, 511 U.S. 600 (1994).

For the violation of a National Pollutant Discharge Elimination System permit requirement,¹⁶⁵ proof would be required that the defendant knew that she was discharging if the underlying violation was discharging without a permit. But, if the violation were that the defendant was discharging more than the permit allowed, proof of the knowledge of the discharge, alone, would *not* be sufficient. Because the discharge was a crime only because it exceeded certain allowable amounts, proof would be necessary of the defendant's knowledge of those amounts.¹⁶⁶

For a conviction under Subchapter C of the Resource Conservation and Recovery Act,¹⁶⁷ proof that the defendant knew that the material she was disposing was more dangerous than distilled water would not be sufficient to establish her knowledge of the hazardous nature of the waste. Her knowledge of the relevant facts should require a greater awareness of the material's physical characteristics, consistent with those facts that make the material hazardous under applicable EPA regulations. Courts, however, have incorrectly upheld jury instructions that required proof only that the defendant knew that "it was not a harmless substance like uncontaminated water."¹⁶⁸ Congress should correct its mistake.

Some, but not all, environmental violations should be subject to felony sanctions. The felony sanctions should be reserved for one or two possible occasions. The first is when the mens rea accompanying the violations rises to the level of the criminal culpability traditionally necessary for felony incarceration. Although knowledge of specific legal requirements is generally not part of the required mens rea, awareness of the relevant facts should be. The second occasion is where the crime includes as an essential element to be proved at trial an especially heightened risk to human health and the environment that, because of its extreme severity, warrants a reduction in mens rea, including *no* need to prove the defendant's knowledge of all the facts relevant to each of the essential elements of the offense. Here, too, however, the question whether such circumstances were present would not be for the unilateral, unreviewable determination of a prosecutor. It would ultimately be for the jury to decide at trial. Our current environmental criminal provisions lack these essential safeguards.

IV. CONCLUSION

Environmental law's stubborn persistence has been at a cost. It has established a culture in the environmental community resistant to change and suspicious of reform. Any reform is equated with a gutting, undermining, and selling out of essential environmental protection safeguards. That dominant culture ignores environmentalism's own central tenet regarding the constant need for change and adaptation.

¹⁶⁵ 33 U.S.C. § 1342 (1994); 33 U.S.C. § 1319(c) (1994).

¹⁶⁶ Cf. *United States v. Ahmad*, 101 F.3d 386 (1996).

¹⁶⁷ 42 U.S.C. §§ 6921-6939e (1994).

¹⁶⁸ See *United States v. Laughlin*, 10 F.3d 961, 965 (2d Cir. 1993), *cert. denied*, 511 U.S. 1071 (1994); *United States v. Goldsmith*, 978 F.2d 643, 645-46 (11th Cir. 1992) (*per curiam*).

Environmentalism has 'greened' many areas of law during the past three decades. The information and values underlying modern environmentalism have not simply prompted the establishment of a series of discrete environmental protection laws at the federal, state, and local levels. Their impact has been far more transformative of this nation's laws. Hardly an area of law has been left untouched. Environmentalism cannot be safely confined to one area of the law any more than is it possible to entertain in law scientific fictions regarding the static and unchanging nature of natural resources that are in fact quite dynamic and evolutionary.

It is essential that environmentalists stop perceiving policy debates as always presenting starkly contrasting images of good versus evil. Such rhetorical imagery does a disservice to the issues and the choices we face.¹⁶⁹ Both, like nature itself, are far more complicated. No doubt it was once essential to ignore those complications in order to establish the clear organizing principles necessary in any political movement seeking dramatic reform. Environmental law is now, however, at a stage where the complications warrant recognition and redress. The threshold battles have been won. The risk that they will return is presented, ironically, by failing to recognize those complications and the very real fairness issues they raise—for environmental justice, private property, and environmental crime.¹⁷⁰

Doing so requires no diminution in that basic passion for environmental quality, that awe-struck respect for nature and the preservation of its wondrous beauty that originally inspired environmental law. It is incumbent upon those who believe in the laws passionately not to put on moral blinders and lose sight of the responsibility to take into account the basic issues of distributional fairness implicated by a radical rewriting of individual expectations in response to environmental protection concerns. One can justify doing so purely on strategic grounds. For absent such an accounting, environmental protection law risks losing the moral force it requires to maintain its persistent stubbornness in the face of countervailing pressures. Or, preferably, one can do so not pursuant to Machiavelian strategies, but simply because fairness matters.

¹⁶⁹ See UNCOMMON GROUND-RETHINKING THE HUMAN PLACE IN NATURE 22 (W. Cronon, ed., 1996) (contending that "self-criticism [is] crucial to the future of environmentalism").

¹⁷⁰ Cf. Peter M. Manus, *The Owl, the Indian, the Feminist, and the Brother: Environmentalism Encounters the Social Justice Movements*, 23 B.C. ENVTL. AFF. L. REV. 249, 256 (1996). "[T]he environmental cause can only stagnate if it maintains its current isolationary, command-and-control form. Achieving true permanence as a social cause requires environmentalists to identify and foster the types of human self-interested activities that are consistent with the goals of earth preservation." *Id.*

